LEGISLATIVE VETO AFTER CHADHA

HEARINGS

BEFORE THE

COMMITTEE ON RULES
HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON THE IMPACT OF THE SUPREME COURT DECISION IN THE CASE OF *IMMIGRATION AND NATURALIZATION SERVICE* v. *CHADHA* WHICH FOUND THE LEGISLATIVE VETO UNCONSTITUTIONAL

NOVEMBER 9, 10, 1983, FEBRUARY 23, 29, MARCH 1, 21, 22, AND MAY 10, 1984

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LEGISLATIVE VETO AFTER CHADHA

WEDNESDAY, NOVEMBER 9, 1983

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RULES,
Washington, D.C.

The committee met, pursuant to call, at 9:50 a.m., in room H-313, Hon. Claude Pepper (chairman) presiding.

Present: Representatives Pepper, Long, Moakley, Derrick, Beilenson, Frost, Wheat, and Lott.

The CHAIRMAN. The committee will come to order, please.

I would like to make a brief opening statement.

OPENING STATEMENT OF HON. CLAUDE PEPPER, CHAIRMAN OF THE COMMITTEE ON RULES

The CHAIRMAN. Today the Rules Committee begins a process of study and consideration of the implications of, and possible institutional responses to, the Supreme Court's landmark ruling in *Immigration and Naturalization Service* v. *Chadha*, which effectively declared all forms of the legislative veto unconstitutional.

It would be no great exaggeration to compare *Chadha's* historical importance with respect to congressional authority to that of Chief Justice Marshall's decision in *McCulloch* v. *Maryland* in 1819. But where McCulloch established the solid foundation for the plenary exercise of legislative power, *Chadha* has called into question Congress' ability to select the means by which to protect its constitutional prerogatives.

The far-reaching and potentially profound effects of the Court's ruling were immediately recognized both within and without the Congress. In July, in the extraordinary gesture of collective institutional concern, 17 standing committee chairmen requested that the Rules Committee take the lead in formulating the House response to *Chadha*. Their letter to me expressed unease over the ad hoc, uncoordinated actions that had already been taken or proposed, and stated their belief, "That precipitous action in this area could lead to more troubling consequences than those which were raised by the Supreme Court decision * * *".

I share those concerns deeply and am gratified that my colleagues have selected our committee as the vehicle for the development of such an institutional response. We eagerly accept the charge and the challenge with them.

My initial impression, however, is that our task will not be an easy one. First off, the term "legislative veto" has always been a misleading label. Although it implied a single monolithic instrument, in reality it covered a myriad of devices. Moreover, it was

applied in a variety of forms to a wide range of policy areas and had effects almost as varied as the forms devised. But if there was a common threat that linked many of them, it was that they represented the hard-won and often delicate accommodations that in recent years have become the basis for working relationships between Congress and the Executive in a number of sensitive areas of continuing policy and public concern.

The veto was a powerful means of facilitating some manner of decision and the delegation of authority. In other words, the legislative veto served as a pragmatic instrument that assisted our Government of separated powers to work effectively.

These efficacious accommodations were abruptly put asunder by *Chadha* and are now legally unavailable to temper or avoid serious conflict. The challenge for the Congress in the immediate future is to fill those voids expeditiously and in a manner that will facilitate the effective and cooperative function of the legislative and administrative decisionmaking processes.

This will not be an easy task. If precise functional replacements are desired, an essential prerequisite to any legislative action will be an understanding of what each particular veto provision was intended to accomplish and an assessment whether it in fact accomplished that purpose. Only then can the selection be made of a lawful response, or combination of responses, that will be appropriate to a particular set of circumstances.

The necessity for such an analytic framework has been made more evident by the widely disparate, and often seemingly inaccurate, scattershot approaches that have been taken or suggested in the few months since *Chadha* was announced. They have ranged from proposals that would require all rules of all agencies be passed into law by joint resolution before they could become effective, to those that would replace now unlawful one- and two-House vetoes with report and wait provisions.

The joint resolution mechanisms, whether positive or negative, generic or individualized, uniformly provide for expedited procedures for floor consideration. And, most surprisingly, at least 17 unlawful legislative vetoes, most of them of the committee veto variety, have been enacted into law since *Chadha*. In short, there as yet appears to be no systematic attempt to tailor a review mechanism to a particular situation or to rationalize and justify the application of a generic solution to a particular area of administrative decisionmaking. Nor has there been any evidence of any consideration of the impact those proposals may have on the operation of this institution.

We start our deliberations without any preconceptions as to a preferred solution in any area or with a preference for any device. We will seek advice and counsel from a variety of different perspectives and disciplines, from each branch of our Government, from the business world and academia, from Republicans and Democrats, and any other source that can assist us. In the end we hope we may distill from this collective wisdom a framework for action.

This opening set of hearings will focus generally on *Chadha's* future impact on the legislative process. Today we will hear from a number of our congressional colleagues. Tomorrow we have arranged for a distinguished panel of scholars. Future hearings will

concentrate on *Chadha's* effects and impact on the administrative, judicial, and budget processes.

I add only this.

In another meeting I suggested that I thought it would be wise if the staffs of the several standing committees would examine the legislative vetoes which have passed through their respective committees—look at them critically now in the light of the *Chadha* decision—first, was the legislative veto necessary to accomplish the purpose that the legislative committee had in mind in the promulgation of that legislation, and was that the only or the most desirable step to take in attempting to realize the aim that the committee had in the enactment of that legislation. My own view has changed.

We asked two committees to take back bills that had legislative vetoes in them, because we took the prima facie position that since the *Chadha* decision, all legislative vetoes were illegal.

I have just finished reading an article for the Harvard Law Journal by Professor Tribe severely criticizing the *Chadha* decision, and pointing out the many weaknesses in the reasoning that led to the conclusion in that decision, and especially emphasizing the sweeping character of the decision. It struck me in the beginning as oversimplistic.

I mentioned this matter to the former dean of the Harvard Law School, Dean Griswold, and he said, "I feel the same way about it; I feel it is oversimplistic in its answer to the problem of the legislative veto."

But I am of the opinion now that the best thing the Rules Committee can do is, carefully examine the legislation that comes to us from the respective substantive committees with legislative vetoes. In cases where we think there is a sound reason for the legislative veto because it is the best way of achieving what the legislative committee has in mind, that we go ahead and let it go out and eventually find its way up the ladder of judicial decision. I hope it will go to the Supreme Court itself. I think eventually the *Chadha* decision will be whittled down until we can find ways to do the things that we feel necessary in protection of the legislative prerogative, still under the eventual *Chadha* decision.

Those are just a few thoughts that came into my mind.

I had in mind Mr. Moakley would lead off with any comment he would like to make.

Mr. MOAKLEY. I would like to defer to Chairman John Dingell to be the leadoff witness, if you wouldn't mind, Mr. Chairman.

The CHAIRMAN. All right.

Mr. Dingell was one of those that signed a letter to us, asking our working together. We are honored to have you here, Mr. Dingell. We know how important this matter is to you and your important committee, and also the valuable contribution you have made and will make toward what our policy should be with respect to this decision.

We are pleased to have you here. We welcome your statement.

STATEMENT OF HON. JOHN D. DINGELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. DINGELL. Mr. Chairman, I thank you for the courtesy you do me in permitting me to appear today. I want to thank you and this distinguished committee for the leadership you are providing in addressing this problem—what it is the Congress should do with regard to the *Chadha* decision.

Mr. Chairman, I would point out that like every other constitutional decision, it is subject to a great deal of interpretation. And the number of interpretations is roughly equal to the number of interpreters.

Many feel that this is a matter of the utmost gravity and importance and some kind of a legislative calamity. Respectfully, I would differ with that.

The issue needs the careful attention of a responsible, wise committee with sufficient courage and security in terms of its intellectual processes to address this matter in the kind of calm and sensible approach that is needed to address the problems which really exist and the problems which are perceived, and regrettably the sense of hysteria that surrounds this particular thing.

It also needs a committee which has the ability to understand the political pressures which are motivating many of the actions which contributed to the *Chadha* decision, which flow from the *Chadha* decision, and which are related to matters involved in the question of legislative veto.

I would like to make further comments on this, Mr. Chairman, after I finish my prepared statement. But I do want to observe that your committee is probably the only committee which can deal with this unfortunate issue in a rational and unitary fashion, and to avoid the distressing and I believe embarrassing picture of the House continuously moiling and toiling on the question of legislative veto, and regrettably the question of legislative veto has got enmeshed into the question of regulatory reform. The two issues, let me assure you, Mr. Chairman, in the minds of anybody who will rationally study the question, are as far apart as the poles on the Earth. Neither is the same, and indeed the question of regulatory reform should be approached entirely separately. The tool of legislative veto should not be used as a substitute for regulatory reform if such is in fact needed.

There are several reasons that we find ourselves afflicted with the legislative veto. The first reason is that it is necessary to craft a legislative compromise which would be acceptable to the Congress. If you will recall, that was used when the legislation was passed to afford the President power to reorganize the Congress.

It was partly in that instance a compromise to permit that power to be afforded to the President. But it also was a compromise which was effected to permit the President to avoid the amendatory process that would be inflicted upon him if the Congress had to affirmatively approve the action which he took through the legislative process. And the President couldn't figure out how he was going to get a program to restructure the executive through the Congress without a large number of amendments both on procedure, on substance, and also on the basic structure. And all you have to do is to

look back to the history of what has transpired with regard to the different pieces of legislation which have set up Cabinet-level bodies.

That is the first reason.

There are some other reasons which I would like to address, as I go along, one of which is to use this as a device to put the Congress in business as some kind of court of appeals or some kind of a regulator of the regulators.

The consequences of this are extremely mischievous, as you can understand, for many reasons. The Congress winds up having to review every decision that is made downtown. And we will also find ourselves in the unpleasant position of having to go home and try to lie out of why we have done certain things of which we know nothing, why we have not done those things, or why we have not done them differently.

I would venture to say if you want to clog this place with an absolutely intolerable workload, put in place this kind of substitute that one of my good friends and colleagues offered on the floor in the past week or, as is set forth by the court, as a decisionmaking process for the Congress in the course of legislative veto. It would be a calamity in every particular, including a political calamity, for anybody unfortunate enough to sit in this place during the time that kind of thing is going on.

Mr. Chairman, the *Chadha* decision is not a decision of great moment. It is a simple enunciation of a basic constitutional principle that the court found absolutely impelling upon it. I don't think it is going to be changed by any number of cases submitted by this body or any other legislative body to that institution. They are simply going to adhere to that.

It was a conservative court, not a radical liberal court at all. Given that, I think they are going to persist in the course we have taken.

Mr. Chairman, this committee is one of the central committees in this body. It has a record of genuine expertise in the area of legislative oversight, in the area of legislation, in the area of the rules, and also a broad understanding of the Government's business, because you hear the testimony from chairmen of every committee and other Members of this body on every piece of legislation.

Your expertise is sufficiently broad to deal with it, and you are the only institution that can address the problem from a central view and from a central position. And having the other committees of this body either in their own workings or on the floor in legislation they are handling, faced with the continuing process of addressing the question of legislative veto can only result in further calamaties of the kind that we observe in the *Chadha* decision.

It was for this reason that 16 of your committee chairmen, Mr. Chairman, last July requested your committee to undertake the lead role in this matter. I want to commend you again and thank you for what you have done in this regard.

Before we begin to develop a response to the *Chadha* ruling, I feel it is imperative to identify exactly what we are responding to. There are many misconceptions about what the *Chadha* decision does and does not do to Congress as an institution. Some of these

misconceptions are innocent; some of them are perpetuated by those who seek to gain some advantage in playing to a perceived weakness.

Let me discuss first what I believe the *Chadha* decision does mean. Quite narrowly, it means that the one-House legislative veto contained in section 244(c)(2) of the Immigration and Nationality Act is unconstitutional. The broadest interpretation of this decision, confirmed by the Court in subsequent decisions involving the Federal Energy Regulatory Commission and the Federal Trade Commission, is that all legislative vetoes of one House, two Houses, or any intermediate variety, are unconstitutional. This is so whether the veto is of a rule, an adjudication or other Executive action, and whether the decision is that of the President, an executive branch agency, an independent regulatory agency, or any other governmental body or official.

We have lost the opportunity to avail ourselves of a legislative tool of limited value. This was a tool which gained such prevalence since its inception some 50 years ago that Congress became dependent upon it as an excuse for making hard decisions, for crafting legislative compromises, or sometimes just to satisfy the Executive.

In formulating a response to this loss, I believe we must examine the use, value, and effect of the now unavailable legislative veto tool. The greatest value of the legislative veto was not in its exercise, but as a means of breaking an impasse. The legislative veto was not beneficial in gaining legislative majorities and political compromises when none could otherwise be forged.

If you look at the legislation which created the reorganization powers, that is a clear example of that use, or the legislation which decontrolled crude oil, which did not permit the President to act in areas of removing controls, except on a one-House legislative veto. You will understand that the purposes of the legislative in those instances was either to satisfy the Executive as in the first case, or in the second case to make possible the crafting of a compromise and the delegation of authority which never otherwise would have been possible absent that event.

This was the value of the legislative veto during, as I mentioned, congressional consideration of matters such as natural gas policy, crude oil policy, alternative energy sources, automobile and other consumer safety areas.

The legislative veto came into being in order to obtain some Presidential agreement whereby the Executive would obtain the grant of some specific power which would not exist but for enactment of the law, and Congress would retain a limitation on that delegation; namely, that the Executive decision would be subject to congressional review and veto. That power remains here as it always has, but in a different form.

We have to act by the enactment of legislation. But we can also, Mr. Chairman, simply issue the legislative authorities to the Executive by enactment of legislation for a shorter period, or to sunset different statutory responsibilities and duties that are imposed upon the Executive. Or to engage in vigorous legislative oversight of the kind that our Committee on Energy and Commerce does on a regular day-to-day basis.

Increasingly, however, the legislative veto was put forward as an easy remedy when the Congress was unable to face hard choices or fashion workable compromises. The legislative veto was of value, therefore, as an aid to bring about compromise between the Congress and the Executive and within Congress itself.

The CHAIRMAN. Suppose we run down and vote and come right back.

[A brief recess was taken.]

The CHAIRMAN. The committee will come to order, please.

Mr. Dingell, we are pleased to have you continue your excellent statement.

Mr. DINGELL. Thank you, Mr. Chairman.

Mr. Chairman, as I had observed, the legislative veto was of some value as a tool of congressional oversight. Indeed, if the Executive or an independent regulatory agency proposed some action which was not in accordance with the congressional intent of the law being implemented, the legislative veto worked as an effective tool to void such action or to leverage a desired outcome.

I think we ought to be worried about the business of using the legislative veto as a mechanism to leverage the desired outcome, because, as I mentioned, there are many around here who have a variety of motives or reasons for desiring to see some kind of a legislative veto in place.

Mr. Chairman, since the first legislative veto provision was adopted in a 1932 Executive Reorganization Act, Congress has approved only 125 resolutions vetoing Presidential or agency actions. I think a study of those vetoes will be informative. Of these 125 vetoes, and that is in a period of 50 years, 66, or more than half, have been veto rejections of Presidential spending deferrals authorized by the Congressional Budget and Impoundment Control Act of 1974. Of the remaining 59 vetoes actually exercised, 24 were disapprovals of Presidential reorganization plans under statutory authority that no longer exists.

I would suspect in the hierarchy of things, these disapprovals and this use of the legislative veto was perhaps the most important in terms of real impact on the Nation and the real impact on the Government. In short, in the 50-year experience of legislative vetoes, Congress exercised that option in only 35 cases of agency regulation or other action.

One can only wonder in how many of those cases the particular action was vetoed because it was not in accordance with congressional intent or whether it was vetoed only because the subject of that action merely gained sufficient political leverage through lobbying to overturn the action in question. Congress has, therefore, lost a somewhat questionable oversight tool, and probably in the whole arsenal of congressional oversight ranks only as a kind of a questionable oversight tool.

I would observe, Mr. Chairman, that, given this, you should be concerned about those who confuse the legislative veto as some kind of a substitute for reform, and regulatory reform, which has become something of a code word or a word to conjure with in this town.

The legislative veto was of some value in airing timely and meaningful Presidential consultation and communication with the

Congress. This benefit was particularly apparent in the foreign affairs area. The use of the classical legislative veto model has now been lost as a method to force such consultations. But others, equally effective, remain unavailable; refusal to appropriate limitations on appropriation bills, limitations in authorization bills, authorization bills or appropriation bills in limited amount in terms of dollars or in short duration.

So we are not without mechanisms to deal with these questions. We are also not without authority to hail the administration before the appropriate congressional committees and compel them to testify. And we are not without the powers to compel the production of the true facts.

As you know, our committees have had a number of discussions with the Executive about production of books and papers. There has been a noticeable reluctance on the part of different administrations to produce these. Our committee has, where it has been sufficiently vigorous, always prevailed in these issues. And I would observe that other committees have the same talents, capacities to do so.

Obviously there is a need for budget, staff, and skill on the part of the committee, and a measure of determination and also the need for an essential solidity of view amongst the sundry members of the committees that this should be exercised. But that is easily available in the instances where the issue I think is sufficiently clear.

In any event, Mr. Chairman, the *Chadha* decision means that Congress has lost the ability to use, in what the courts have held an extralegal way, the legislative veto device. The device had some value as a method by which to forge some legislative consensus to require Presidential consultation and to exercise congressional oversight. Other mechanisms remain to the Congress to achieve these ends.

Let us now examine what the *Chadha* decision does not mean. Some would have us believe that Congress has been dealt a staggering blow by the Supreme Court; that the careful balance of power so carefully fashioned in the Constitution has irretrievably been tilted.

I do not believe that is so.

The decision does not mean, as one commentator said, "We're at a critical crossroads in the evolution of our government." Those who suggest the *Chadha* decision renders Congress weak and impotent to deal with or control the Executive and the independent regulatory commissions are simply wrong, and have not studied the other resources available to the Congress to deal with this.

One must then ask whether we must act in haste, either because we have these erroneous interpretations or whether this is going to be some sort of substitute for this wonderful world of regulatory reform about which we hear so much.

In fact, the *Chadha* decision negates not one of the authorities granted Congress in article I of the Constitution. We still have substantial authority through authorizing legislation, the appropriations process, controlling the terms of the statutory delegations, the power of the Senate over Presidential appointments and treaties, oversight investigations which, properly conducted, are devices of

immense value and power, the power to alter the standard of judicial review and to grant increased standing to those who may seek it, and ultimately, if laws are not enforced, the power to impeach officials in the executive branch.

These examples of limitational authority Congress may exercise over the Executive must be seen in the stark light of the ultimate truth so vividly put by the constitutional scholar Charles Black:

> My classes think I am trying to be funny when I say that by simple majorities Congress could, at the start of any fiscal biennium, reduce the President's staff to one secretary for answering social correpondence, and that by two-thirds majorities Congress could put the White House up at auction. But I am not trying to be funny; these things are literally true.

If anything, Congress lacks not an adequate arsenal of tools to achieve a desired result, but merely the will to exercise them.

It also in many instances lacks the consensus necessary for the Congress to achieve a legislative product.

One of the more obvious examples of misconstruction of the significance of the *Chadha* decision is contained in the Congressional Record of October 26, 1983. In an entry entitled "The Chadha Response Bill," the distinguished minority whip, Congressman Trent Lott, states:

> This bill has been specifically drafted in response to the Supreme Court's June 23 decision in *INS* against *Chadha*, holding the legislative veto unconstitutional.

Does the *Chadha* decision have anything to do with the procedural requirements for informal rulemaking contained in the Administrative Procedures Act? It, of course, does not.

Does the *Chadha* decision concern the review of regulations by the Office of Management and Budget? It, of course, does not.

I would urge this committee most strongly to avoid giving comfort to those who would, through overstatement and deception of the *Chadha* decision, seek to promote something they have long characterized as regulatory reform.

As I have stated, there is a vast difference between congressional oversight and regulatory reform. There is enormous difference between regulatory reform and what the *Chadha* decision says in terms of one-House veto. If regulatory reform is needed, let us address the question of regulatory reform. Let us have those who seek to reform the regulatory process come forward with a clear statement of what they want. Let them bring forward legislation which would accomplish this reform. And let us seek to no longer beat around the bush and to confuse the *Chadha* decision, the legislative veto, with regulatory reform.

Let us also see to it that in our undertakings that the Congress not be deceived into the assumption that regulatory reform is something that can be done by changes in the law which would evade other constitutional questions which are of equal importance.

Within a week of the *Chadha* decision, I wrote the able chairman of the Judiciary Committee's Adminstrative Law and Governmental Relations Subcommittee, expressing my view that the decision gave added weight to the arguments against regulatory reform legislation. Those legislative proposals would create within the Executive and the Court's new opportunities to control or influence

the regulatory process, some of them of constitutional doubtful character.

To the extent that the *Chadha* decision in some ways weakens congressional authority over regulation in comparison to the other branches, I hardly think Congress would wish to heap new powers upon the executive and the judiciary. This would clearly be the effect of Mr. Lott's bill H.R. 3939 and other similar proposals.

Once we have a firm understanding of what the *Chadha* decision does and does not do, we can proceed to fashion a response to it. If we need a response to it from the standpoint of congressional powers and responsibilities, we can fashion I think a proper and reasoned response to that need.

Admittedly, the Congress has lost the legislative veto as a device with whatever purposes it served. But certainly we have not lost the means to accomplish those purposes in other ways, ways which do not include ceding our constitutional prerogative to the Executive, or conferring upon the Executive powers which are probably unconstitutional or at least of doubtful good judgment.

Mr. Chairman, to the extent that the legislative veto was an effective tool in helping forge a political consensus, either in the Congress or elsewhere, it is no longer obtainable, and we will be forced to write laws probably with greater specificity, and with more narrow delegations of authority, far less discretion will be left for regulatory consideration and consequently the scope of judicial interpretation will probably have to be narrowed.

The most likely and desirable response to the *Chadha* decision then will be the recognition of the necessity that the Congress work harder to direct the Executive in the initial legislation and that it work harder, more carefully, and more directly to direct the Executive in carrying out the congressional intent and to see to it that through the mechanism of the different legislative oversight tools, that the intent of Congress is carried out by the Executive or by the regulatory bodies.

And that effort will have to be directed also at the independent agencies in Washington to see to it that that breed of regulatory structure in the Federal Government also responds to the intent of Congress.

Quite honestly, the result will be, I think, then, a Congress which will be strengthened in relation to the other branches, but it will be strengthened because we do what we can do under the Constitution, we do what we should do under the Constitution and we do it in a vigorous and proper and sensible way.

Mr. Chairman, the Congress may also wish to replace the mandated consultation and exchange of information achieved through some legislative veto provisions.

First of all, we have most of those powers without going "hat in hand" to the Executive. And we can, however, enhance them if that be needed.

Certainly there is nothing constitutionally wrong with provisions which have automatic delays in the effective date of otherwise final action to allow an opportunity for Congress to review the action, to see whether it wishes to seek some legislative overturning, modification or delaying of the action.

"Report and wait" provisions may be of enormous value in specific areas, but are just one of the tools, available to us. I would emphasize that the loss of the legislative veto means loss of an oversight tool of limited value and, in my view, a tool which we will never retrieve in our hands in the form it was when it was lost.

It is in this area that the greatest danger lies in attempting to fashion an exact replacement of the lost veto. The most frequently expressed replacement for the legislative veto as an oversight tool which will no doubt be the provision providing for affirmative approval of actions through enactment of a joint resolution.

I am gratified by the action of the House last Thursday evening in acknowledging during consideration of the Resource Conservation and Recovery Act that such an approval of rules device is not appropriate in every instance.

In all truth, I don't think it is appropriate in very many instances. And the reason is that if you want to see the Congress clogged, overloaded, incapable of action, because of a new effort to review a prodigious number of actions by the Executive and regulatory structure, that is a fine way to do it.

If the Congress has not already been brought to its knees by its own excesses or by the workload we face, then this will certainly be the tool which will prevent us from functioning effectively and which will assure that the institution is clogged to deal with any of the problems which concern us.

I will tell you, Mr. Chairman, that if this is the tool that we are to face, I will do my level best, as chairman of our committee, to simply place every one of these resolutions on the floor so that every one of my colleagues might have the opportunity to veto them.

I will specifically watch those who push this tool as a mechanism for regulatory reform. I am sure that if I put them—put this kind of measure on the floor on Monday and Fridays, they will be quite delighted.

Mr. Chairman, I think we have to observe that in certain instances this kind of tool which has the approval, I think, of the *Chadha* case will be valuable in extremely limited numbers and kinds of cases, possibly under war powers resolution, the danger of widespread use of this approach, Mr. Chairman, is, of course, that the congressional agenda, as I have observed, will be inundated by trivial matters and that these trivial matters would essentially be scheduled by outsiders to our process.

We would not only find ours clogged with trivia, but we would also find ourselves in the unfortunate position of turning the scheduling of the congressional business to persons outside of this institution.

Mr. Chairman, the Congress would be forced to drop from its business and to address these issues whenever an agency finished its work on a major rule, or when the President designated such a rule as major.

Next, we would proceed to become immersed in the fine detail of highly technical, mundane regulations. Of course, we would be walking into political thickets of the most appalling consequences at every turn of the road.

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Congress is no more capable, politically or technically, to deal with such issues than when the regulatory agencies were created. I would observe that the regulatory agencies were created because the Congress was keenly aware that it had neither the time nor the expertise to deal with the great issues of the day, and so we created the agencies to exercise those powers.

If any Member feels he has the time to grapple with this sort of minutiae of agency regulation, then he—and I suspect this House—would be much better served if he sought some kind of position as a GS–9 in the Office of Standards and Regulations at EPA, or perhaps in some similar body inside of the Office of Management and Budget.

I really don't think, Mr. Chairman, that the Congress wishes to create a structure whereby the decision of every independent regulatory agency has to be endorsed by some kind of congressional approval.

I don't think we want to see ours in the unique situation of then seeing this mandated congressional action being subject to overturn by Presidential veto, because, remember, after we had enacted a resolution of this sort, it would, by reason of the Constitution, be subject to a Presidential veto.

We would then, to see that it went into place, be compelled to reiterate our will, not by a simple majority, but by a two-thirds vote. This, in my view, is a constitutional travesty and an act of the most extraordinary unwisdom.

This, I would observe, is clearly foreseeable with the approval of rules joint resolution approach.

In light of *Chadha,* the Congress may wish to consider other oversight tools not previously contemplated or rarely used. It is conceivable that the ability of congressional oversight committee staffs to take sworn depositions of individuals or the ability to adequately enforce executive branch subpenas would have a more beneficial result in bringing about actions consistent with congressional intent than the so-called approval of rules approach.

Now, Mr. Chairman, I have not denigrated the need of the legislative committees to deal with questions relative to the enforcement of the laws or the change of the laws. Nor have I denigrated the need of the congressional committees to address, if Members who push this idea of regulatory reform so desire, to deal with questions like the Administrative Procedure Act, which is really the rule—the code of rules of fair play before the regulatory bodies.

And most of that statute, Mr. Chairman, and members of this committee, was put in place to give a uniform code of rules that would be identifiable to all, and would be generally the same before all regulatory agencies from the standpoint of procedure.

It was to assure that everybody was fairly treated. It had the very important purpose of implementing the constitutional requirements which had been laid in place by the courts for the generations prior to the time that the Congress enacted that legislation.

And as such, it was bought—rather, an acceptance of the Constitution, enunciation of constitutional rights by the Congress as they belonged to and affected all the persons before the regulatory bodies, but it also was something else.

It was a tool so that judicial review could be conducted in an orderly fashion over all of the abundance of regulatory actions that have to be taken by the Government of this country in the kind of society which we are.

I also would observe that if regulatory reform is sought, it should not be a regulatory device to change substantive rights afforded under the statutes that are enacted by this Congress on substantive matters.

And there is a lot of confusion inside the executive branch as to whether or not they can change substantive laws by changing procedural rules. Now, I will observe parenthetically to you, Mr. Chairman, that not infrequently there are good folk around here who try to do this.

And I am not talking about necessarily inside this body. I am talking about in Washington. I would observe to you also, Mr. Chairman, that this generally, when it becomes the subject of political awareness by the people or escapes into the press, brings down wrath upon those who would do this, that they don't very much enjoy and that usually results in a substantial change of their position.

Mr. Chairman, the Committee on Energy and Commerce will work with your committee and I and the staff, and I am sure my colleagues on that committee stand by, willing and able and ready to help you craft whatever reasonable and appropriate response to the *Chadha* decision you find necessary.

We share with you an agreement in Thomas Jefferson's advice about the adoption of political reforms. He made this statement: "The patch should be commensurate with the hole."

I am not sure that some of the patches that are being laid before us as a cure to the holes that people perceive are appropriate to the hole, either in size or whether, in fact, a hole really exists.

In closing, I think I would like to quote from my friend and perhaps one of the most knowledgeable of our colleagues on the issue of legislative veto, Mr. Moakley. In his appearance before the Committee on the Judiciary last July he stated,

> In fashioning institutional remedies to the current situation, I would hope that all branches of Government have registered a valuable lesson to be learned from *Chadha*. The process of Government is—and quite legitimately—a political one. The Nation is best served when that process is allowed to work, even with some tensions with flexibility and a fair regard by each branch for the legitimate role of the others.

I share Mr. Moakley's observation and I believe that it is important that we should all be guided by it.

Thank you, Mr. Chairman.

[Mr. Dingell's prepared statement follows:]

PREPARED STATEMENT OF HON. JOHN D. DINGELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

I appreciate the opportunity to discuss the status of this institution, the House of Representatives, in the wake of last June's Supreme Court decision in the case of *Immigration and Naturalization Service* v. *Chadha*. Prior to the *Chadha* decision, the Committee on Rules, and most especially its two subcommittees, created an excellent record of thoughtful and responsible consideration of the many issues surrounding the legislative veto mechanism. Because of this committee's record of expertise in this area, I joined 16 other committee chairmen last July in requesting

that your committee undertake the lead role in evaluating the ramifications of the *Chadha* decision and developing an institutional response to it.

Before we begin to develop a response to the *Chadha* ruling, I feel it is imperative to identify exactly what we are responding to. There are many misconceptions about what the *Chadha* decision does and does not do to Congress as an institution. Some of these misconceptions are innocent; some of them are perpetuated by those who seek to gain some advantage in playing to a perceived weakness.

Let me discuss first what I believe the *Chadha* decision does mean. Quite narrowly, it means that the one-House legislative veto contained in section 244(c)(2) of the Immigration and Nationality Act is unconstitutional. The broadest interpretation of this decision, confirmed by the Court in subsequent decisions involving the Federal Energy Regulatory Commission and the Federal Trade Commission, is that all legislative vetoes of one House, two Houses or any intermediate variety, are unconstitutional. This is so whether the veto is of a rule, an adjudication or other Executive action, and whether the decision is that of the President, an executive branch agency, an independent regulatory agency, or any other governmental body or official.

We have lost the opportunity to avail ourselves of a legislative tool of limited value. This was a tool which gained such prevalence since its inception some 50 years ago that Congress became dependent upon it as an excuse for making hard decisions. In formulating a response to this loss, I believe we must examine the use, value, and effect of the now unavailable legislative veto tool. The greatest value of the legislative veto was not in its exercise, but as a means of breaking an impasse. The legislative veto was most beneficial in gaining legislative majorities and political compromises when none could otherwise be forged. Such was the value of the legislative veto during congressional consideration of areas such as natural gas policy, alternative energy sources, and automobile and other consumer safety areas.

The legislative veto came into being in order to obtain some Presidential agreement whereby the Executive would obtain the grant of some specific power which would not exist but for enactment of the law and Congress would retain a limitation on that delegation, namely that the Executive decision would be subject to congressional review and veto. Increasingly, however, the legislative veto was put forward as the easy remedy when Congress was unable to face hard choices or fashion workable compromises. The legislative veto was of value, therefore, as an aid to being about compromise between the Congress and the Executive, and within Congress itself.

The legislative veto was also of value as a tool of congressional oversight. Indeed, if the Executive or an independent regulatory agency proposed some action which was not in accordance with the congressional intent of the law being implemented, the legislative veto worked as an effective tool to void such action or to leverage a desired outcome. Since the first legislative veto provision was adopted in a 1932 Executive Reorganization Act, Congress has approved only 125 resolutions vetoing Presidential or agency actions. Of these 66 or more half have been veto rejections of Presidential spending deferrals authorized by the Congressional Budget and Impoundment Control Act of 1974. Of the remaining 59 vetoes actually exercised, 24 were disapprovals of Presidential reorganization plans under statutory authority that no longer exists. In short, in the 50-year experience of legislative vetoes, Congress exercised that option in only 35 cases of agency regulation or other action. One can only wonder in how many of those cases the particular action was vetoed because it was not in accordance with congressional intent or whether it was vetoed only because the subject of that action merely gained sufficient political leverage through lobbying to overturn the action in question. Congress has, therefore, lost a somewhat questionable oversight tool.

The legislative veto was of some value in requiring timely and meaningful Presidential consultation and communication with the Congress. This benefit was particularly apparent in the foreign affairs area. The use of the classical legislative veto model has now been lost as a method to force such consultations. But others, equally effective, remain available.

In sum, the *Chadha* decision means that Congress has lost the ability to use, in an extralegal way, the legislative veto device. That device had some value as a method by which to forge some legislative consensus, to require Presidential consultation and to exercise congressional oversight.

Let us now examine what the *Chadha* decision does not mean. Some would have us believe that Congress has been dealt a staggering blow by the Supreme Court; that the careful balance of power so carefully fashioned in the Constitution has irretrieveably been tilted. The decision does not mean, as one commentator said, "We're at a critical crossroads in the evolution of our Government." Those who suggest the

Chadha decision renders Congress weak and impotent to deal with or control the Executive and the independent regulatory commissions are simply wrong.

In fact, the *Chadha* decision negates not one of the authorities granted Congress in Article One of the Constitution. We still have substantial authority through authorizing legislation, the appropriations process, controlling the terms of the statutory delegations, the power of the Senate over Presidential appointments and treaties, oversight investigations, the power to alter the standard of judicial review and to grant increased standing to those who may seek it, and ultimately, if laws are not enforced, the power to impeach officials in the executive branch. These examples of limitational authority Congress may exercise over the Executive must be seen in the stark light of the ultimate truth so vividly put by the constitutional scholar Charles Black: "My classes think I am trying to be funny when I say that by simple majorities, Congress could, at the start of any fiscal biennium, reduce the President's staff to one secretary for answering social correspondence, and that by two-third's majorities, Congress could put the White House up for auction. But I am not trying to be funny; these things are literally true."

If anything, Congress lacks not an adequate arsenal of tools to achieve a desired result, but merely the will to exercise them.

One of the more obvious examples of misconstruction of the significance of the *Chadha* decision is contained in the Congressional Record of October 26, 1983. In an entry entitled, "The Chadha Response Bill", the distinguished Minority Whip, Congressman Trent Lott states, "This bill has been specifically drafted in response to the Supreme Court's June 23 decision in INS against Chadha, holding the legislative veto unconstitutional." Does the *Chadha* decision have anything to do with the procedural requirements for informal rulemaking contained in the Administrative Procedures Act? It, of course, does not. Does the *Chadha* decision have something to do with the standards for judicial review of agency rulemakings? It, of course, does not. Does the *Chadha* decision concern the review of regulations by the Office of Management and Budget? It, of course, does not. I would urge this committee most strongly to avoid giving comfort to those who would, through overstatement and deception of the *Chadha* decision, seek to promote something they have long characterized as regulatory reform.

Within a week of the *Chadha* decision, I wrote the able chairman of the Judiciary Committee's Administrative Law and Governmental Relations Subcommittee, expressing my view that the decision gave added weight to the arguments against "regulatory reform" legislation. Those legislative proposals would create within the Executive agency and the courts new opportunities to control or influence the regulatory process. To the extent that the *Chadha* decision in some ways weakens congressional authority over regulation in comparison to the other branches, I hardly think Congress would wish to heap new powers upon the executive and the judiciary. This would clearly be the effect of Mr. Lott's bill H.R. 3939 and other similar proposals.

Once we have a firm understanding of what the *Chadha* decision does and does not do, we can proceed to fashion a response to it. Admittedly, we have lost the legislative veto as a device with whatever purposes it served. But certainly we have not lost the means to accomplish those purposes in other ways; ways which do not include ceding our Constitutional prerogative to the Executive. To the extent that the legislative veto was an effective tool in helping forge consensus otherwise not obtainable, we will be forced to write laws with greater specificity, and more narrow delegations of authority. Far less discretion will be left for regulatory consideration and, consequently, the scope of judicial interpretation will be narrowed. The most likely and desirable response to the *Chadha* decision then will be the recognition of the necessity that we work harder to direct the executive and the independent agencies in implementing our laws. The result will be a strengthened Congress in relation to the other branches.

Congress may also wish to replace the mandated consultation and exchange of information achieved through some legislative veto provisions. Certainly nothing is constitutionally wrong with provisions which have automatic delays in the effective date of otherwise final action to allow an opportunity for Congress to review the action to see whether it wishes to seek legislation overturning, modifying or delaying it. Such report and wait provisions may be of value in specific areas.

I would emphasize that the loss of the legislative veto means the loss of an oversight tool of limited value. It is in the area that the greatest danger lies in attempting to fashion an exact replacement for the lost veto. The most frequently expressed replacement for the legislative veto as an oversight tool will no doubt be the provision providing for the affirmative approval of actions through enactment of a joint resolution. I am gratified by the action of the House last Thursday evening in ac-

knowledging during consideration of the Resource Conservation and Recovery Act reauthorization bill that such an approval of rules device is not appropriate in every instance. While such a device may be of value in extremely limited cases, possibly under the War Powers Resolution, the danger of widespread use of this approach is, of course, that the congressional agenda would be inundated with trivial matters scheduled by outsiders.

First, Congress would be forced to drop its business whenever an agency finished its work on a major rule, or the President designated a rule as major. Next, we would proceed to become immersed in the fine detail of highly technical mundane regulations. Congress is no more capable, politically or technically, to deal with such issues than when the regulatory agencies were created. If any Member feels he has the time to grapple with the minutia of an agency regulation then he, and this House, might be better served if he were to seek a position as a GS-9 in the Office of Standards and Regulations at EPA. I hardly think that Congress wishes to create a structure whereby a decision by an independent regulatory commission endorsed by both Houses of Congress could be overturned by Presidential veto. This option is clearly foreseeable with the approval of rules joint resolution approach.

In the light of *Chadha* we may wish to consider other oversight tools not previously contemplated. It is conceivable that the ability of congressional oversight committee staff to take sworn depositions of individuals or the ability to adequately enforce executive branch subpoenas would have a more beneficial result in bringing about actions consistent with congressional intent than the so-called approval of rules approach.

The Committee on Energy and Commerce will work with your committee and others to fashion a reasonable and appropriate response to the *Chadha* decision. We share with you agreement in Thomas Jefferson's advice when adopting political reforms: "The patch should be commensurate with the hole."

In closing, I would like to quote from my friend and perhaps the most knowledgeable of our colleagues on the issue of legislative veto, Mr. Moakley. In his appearance before the Committee on the Judiciary last July, he stated, "In fashioning institutional remedies to the current situation, I would hope that all branches of government have registered a valuable lesson to be learned from *Chadha*. The process of government is—and quite ligitimately—a political one. The Nation is best served when that process is allowed to work, even with some tensions with flexibility and a fair regard by each branch for the legitimate role by the others." I share Mr. Moakley's observation and believe it appropriate that you should be guided by it.

Thank you once again for the opportunity to appear and share with you my comments.

The CHAIRMAN. Thank you very much for your statement, Mr. Dingell. Just a word or two before my colleagues inquire.

When we view it in its strict aspect, the *Chadha* case is a case where a man's deportation would have been held up, but for the congressional veto, by one House. And the Court emphasized that this was a case where we had exercised legislative authority, because we were changing the status and adversely affecting the private rights of an individual.

Justice Powell suggested that it smacked of being an attainder action, because it was a finding of guilt by a legislative body.

The dissenting opinion of Mr. Justice White said that the court in that opinion struck down more acts of Congress than had been stricken down as unconstitutional in the history of the court and the history of the Congress, an extraordinary action on the part of the Supreme Court of the United States. The language was so sweeping that we don't even know whether the Court included the War Powers Act, whether they excepted that, or whether that is distinguishable or not.

Shortly after the *Chadha* decision, there was another case in which they just sweepingly applied the *Chadha* case without even going into the details of it at all, without even having separate arguments as to whether the *Chadha* case actually applied.

It is obvious, I think, they would not have granted that power to the Attorney General if the Congress had not felt it wanted to reserve to itself the power to try to direct that delegation of authority if it chose to do so.

It seems to me the basic fallacy of the *Chadha* decision is that the Supreme Court assumed that the Congress was incapable of doing anything except legislating in the formal way that requires bicameralism.

There was no limit put upon the right of Congress to have oversight jurisdiction. There was hardly very much reference to oversight.

They assumed that the only thing Congress could do was to act legislatively, and when it acted legislatively, it meant bicameraly and by presentation to the President.

So the reason I suggested a while ago, since I believe—while even if the actual decision itself might stand, limited to that individual deportation, the only way we can ever test it and make them keep on refining that decision, is to present case after case to them—off hand, it is about the only way I see we can keep testing it to make them come down to a narrow interpretation.

Mr. DINGELL. Mr. Chairman, could I respond?

The CHAIRMAN. Yes.

Mr. DINGELL. Mr. Chairman, I have great respect for you, and I aways find myself very regretful when I differ with you. But I would observe here that I don't think that you are advocating essentially a series of confrontations with the Supreme Court, or even some game of chicken which would take place between this body and our sister body over at the other end of the building.

The CHAIRMAN. I don't call it that, Mr. Dingell. I certainly don't speak of our effort in doing that in any disparaging way or think in any sense of the way it is an impropriety on our part.

I say as far as I am concerned I don't think the *Chadha* decision is sound. I don't think it would eventually last. But I know the only way it can be cut down is for future actions of the Supreme Court to consider the different situations that are now sweepingly interdicted by the *Chadha* decision.

The only way I know ever to whittle it down to what I think is a proper scope, is for cases to be presented entirely different from the *Chadha* case.

For example, what would happen with rules that are issued by either an executive agency or by an independent agency of the Government, that is not taking individual rights away from a person like the one-House veto took away the right of *Chadha* to stay in this country.

So I just think that Congress has a right to say that I think that we would like to present to you, Mr. Supreme Court, with all respect, different situations which appear to be interdicted by your decision, but which we don't really think in the final analysis should be interdicted by your decision.

I don't know how else we could ever cause the body to reconsider.

Mr. DINGELL. Mr. Chairman, a Supreme Court opinion is essentially smorgasbord. There is a little bit there for everybody. Every-

body can pick out that in a decision which they agree with and that which they don't agree with.

And then it is a long time since I took constitutional law, Mr. Chairman, but I spent more of my life in this place, the House of Representatives, than I have doing anything else.

And I have a long association with this institution, going back to the day when you and my dad served together, back when I was 5 years old and first walked through the door of the House Chamber.

So I approach most questions of this kind with a very, very strong institutional bias. And I find the *Chadha* decision offensive.

I think that——

The CHAIRMAN. You find it what?

Mr. DINGELL. I find it offensive, because I think it is going to make the workings of the Government much harder, much slower, much more difficult. It is going to compel the Congress to write legislation that is much more specific. And that is going to create vastly more controversy, and impose greater slowdowns.

You can read *Chadha* and find in there the question of protection of individual rights. You can read *Chadha* and you can come down to a judgment as to what they were saying about the powers of this body.

I think if you bottom your action on the question of the judgment of individual rights, you are not interpreting *Chadha* properly, because if you look at any regulatory agency decision, that regulatory agency is interpreting rights and duties of different persons.

I doubt if you could find any action of any regulatory agency under the jurisdiction of our committee that doesn't deal with the rights of some particular person, and with the duties of others.

So I think that *Chadha*, if you choose that as the bounds of the *Chadha* decision, you are going to find that somebody is going to be before the Court any time you have this kind of question.

Now, the Supreme Court doesn't have the workload they have, and I really don't think they work very hard over there.

The CHAIRMAN. Excuse me. Let me put it this way.

I didn't mean to jump ahead to the conclusion. What we are talking about now is probably what we will come to at the end of our hearings, or the end of our consultation.

I just jumped ahead to contemplate the future. Would you, for example, under the present situation, advocate that the Congress pass no more bills with any kind of a veto power in them?

Mr. DINGELL. Well, Mr. Chairman, I am like every other practical legislator. I like the idea of legislative veto when it does something I think is good, and I don't like it when it does something I think is bad.

I don't like it used just broad-case as a tool to put us in the business of serving as some kind of a court of judicial review. I don't like it used as some kind of a tool to leverage some particular decision by the Executive, either before or after we make the enactment.

Mr. Chairman, I just want to tell you this. The Supreme Court is going to be coming down with per curiam decisions. They have come down with two sins that time.

I would be willing to bet you a new hat every time we use the kind of legislative veto that we used in *Chadha*, the Supreme Court

will simply have a law clerk who will say, appeal sustained per curiam, or else they will simply refuse to review the case.

But you are going to find if we get out of using the legislative veto and the mechanism you describe, we are going to do a lot of work, and accomplish very little, and get tipped over regularly by the Supreme Court.

I differ with you with great respect, Mr. Chairman. I want you to understand that.

The CHAIRMAN. If we don't ever have any test of the exact meaning and scope of the decision, how would we ever hope to get any modification of it?

Mr. DINGELL. Mr. Chairman, you can moil and toil on this question of reenacting—enacting some basis for a confrontation over a *Chadha*-type decision or you can start using other tools we have got. And we have plenty of them. My advice is let's use the tools we have.

If we come to a situation where we feel we have to have a confrontation with the Supreme Court over *Chadha,* or have to do something leading us to a confrontation, that we approach that on a wise and careful case by case selection considering the benefits to be achieved against the work that is going to have to be done to accomplish them, and the fair degree of assurance, and I would say in this instance almost a certainty, that the Supreme Court is going to kick over what we do.

The CHAIRMAN. Thank you. Mr. Long?

Mr. LONG. Thank you, Mr. Chairman.

John, I am most impressed by your statement. I think it reflects a knowledge of this institution and the workings of this institution that very few people have. I think it reflects a well-thought-out analysis of a very complex problem.

I generally agree with you in every instance, except for the last statement that you made. I have always thought what we were doing is slowly turning this institution, by the abuse of the legislative veto, into not even a city council, but a bunch of aldermen in a small town, with the types of decisions we have had to make.

Mr. DINGELL. I concur with that comment precisely.

Mr. LONG. We cannot, with the major policy problems we have, afford to spend our time doing that. The institution has great difficulties working effectively today. The budget act is a classic example of it.

We cannot handle budget decisions within the time periods that we have. If you impose these additional decisions upon this institution, the institution is going to wilt.

We will find ourselves, because of personal and parochial interests, dealing with every individual matters and will miss the big picture.

Mr. DINGELL. I agree.

Mr. LONG. I am inclined to agree with you that we will not get anywhere by arguing another form of the veto that was overturned in *Chadha.* I think we have got to look at the decision and search for different types of instruments that are available to us to accomplish this end without burdening ourselves unnecessarily.

Mr. DINGELL. I agree.

Mr. LONG. I am also one that really does not believe that the decision was an Earth-shaking decision.

Mr. DINGELL. I agree.

Mr. LONG. I think your comment regarding the relationship between legislative oversight and the *Chadha* decision is right. I don't think it really affected that at all.

I don't even think it touched on it. The chairman is worried about the fact that it did not say you can go ahead with legislative oversight.

I think that the court considered that, as I do, as two entirely separate things. There was no reason to comment upon that. They are not affecting our ability to have oversight on those things we have the right to oversight on.

Mr. DINGELL. You are correct.

Mr. LONG. I just hope that that is the way that we proceed.

As I say, I have listened to a lot of people around here, including the former chairman of this committee who was a student of this institution from whom I learned a great deal, and I have never heard as concise and clear an understanding expressed about the way the institution actually works, what makes it work, and what makes it not work.

You reflected that knowledge in your statement. I compliment you on it.

I hope some day I will have as much knowledge myself with respect to this institution.

Mr. DINGELL. You are very gracious. We have been friends a long time.

I don't have any worry about your knowledge equaling mine. We served together in the old days of the Commerce Committee. Those memories of our service together there are some of the best I have.

I have no worries about your skill here as a legislator or your ability to understand. They both are of the highest.

Mr. LONG. Thank you very kindly. I have no further questions.

The CHAIRMAN. Mr. Moakley?

Mr. MOAKLEY. Mr. Lott is here.

The CHAIRMAN. I beg your pardon. Mr. Lott?

Mr. LOTT. John, aren't you concerned that if we allow this issue to languish, and not act on it in some way, maybe not even in a broad stroke way, but if we don't do something, we are going to be faced with another series of these legislative veto approaches, many of them differing in their approach, being added to this bill and the next bill and get right back, the same situation we were in, only this time it would be constitutional in the way it sounds, perhaps?

Mr. DINGELL. You are a very perceptive scholar of this place. I think you have set forth something that we are going to face. It doesn't particularly concern me. We are going to face that issue. I think we ought to face it sensibly, not in panic.

I, quite honestly, think that a lot of the legislative vetoes offered are offered simply because the proposal is weak, as in the case of the small generator section of the RCRA extensions, or because there is a strong undertow of feeling in this place that the agency is a bad agency or that the agency is out of hand, as in the case of the FTC, or because somebody wants to use it as a curb on the

agency, or to do it as a tool in lieu of what is very difficult. It is enormously difficult to pass good legislative reform legislation.

I think the one reason this committee is so uniquely situated to deal with this question is that it is a body of senior Members who are quite safe usually in their districts, who are respected both in their districts and in the Congress, and who can provide the leadership that is necessary.

Somebody is going to have to do this. I have accepted legislative veto proposals where they were a part of a political compromise. And I think one of the reasons there is great outrage around here is that really they are almost impossible now to include as a political compromise as we did in the crude oil decontrol, because everybody knows as the *Chadha* decision imposes them on us, they are not going to work. So they won't be salable as that part of the thing.

I think what is going to have to happen is that this committee is going to have to come forward with perhaps something in the way of legislation saying this is the form of legislative veto.

Mr. LOTT. In other words, you are saying some limited generic form rather than having a whole series of varied legislative veto.

Mr. DINGELL. I think probably limited—well, it may be you are going to have to deal with it in a generic sense. It may be that you are going to have to deal with it—just say this is the kind of legislative veto we think meets the *Chadha* decision and this is the only thing that this committee is going to support, and we are going to make it hard for you to get a rule that goes to some different form.

But, again, I reiterate I am not convinced the *Chadha* decision is an earthshaking decision. I am not convinced they set out anything that is going to be changed by actions of this body. I don't view it as a calamity from the standpoint of a Member of the House. We still have an abundance of tools if we wish to use them to address the question of legislative oversight. If we really want to deal with the question of regulatory reform, we can do it by addressing the substantive laws which are found offensive by many of the people in this country.

I have been before this committee to complain about substantive laws and suggested changes that were denounced as being excessively favorable to industry—the Clean Air Act; and I have done that in other instances, too.

Mr. LOTT. Your committee was here this week on a bill that in effect involves the ratemaking process, which is a somewhat unusual initiative for us to take.

Mr. DINGELL. Our committee will be on the floor this week with a suspension dealing with the powers of the FCC to make rules with regard to persons who are under the jurisdiction of that committee.

But I don't have any objection to addressing this question either by amending the substantive statute or by amending the Administrative Procedures Act. Those are perfectly proper. They are immensely difficult things to do. But that is what the Congress is here for. We are not a city council to decide zoning cases; nor are we a district court or a justice court to deal with appeals from minor regulatory actions by regulatory agencies.

I think we have to understand what our function here is as we address this overall question of legislative oversight, the *Chadha* decision and regulatory reform.

Mr. LOTT. Thank you.

Mr. MOAKLEY. John, I want to commend you for an outstanding statement. I know the depth you have gone into it. It is very reassuring for me to have one who is such a fierce defender of the institution to feel the way you do about *Chadha*, because I feel exactly the way you do about it. But you have got the reputation of being much more of a fierceful defender of this institution than I am.

I just think your statement was outstanding. I would hope that that would be available for most Members to look at when they are talking about the legislative veto. I agree with you; I think we have got to go to other alternatives. I think if we write any legislation and put in any kind of a veto that the Supreme Court has struck down in the *Chadha* decision, again I agree some clerk is just going to stamp it, they will not even look at it, and they will think some of us have gone crazy in view of what they said, repeating the mistakes they warned us against.

The question that Mr. Lott asked about a generic legislative veto, I feel the reason the Supreme Court finally acted on this after sidestepping it so many years was because of the amount of people who are interested in the generic legislative veto when it came over from the Senate, and then they saw the names on the Levitas bill and other bills showing they had a majority, and I think the Supreme Court felt they had to step in before the House of Representatives shot itself in the foot, in determining that a generic legislative veto was constitutional.

I think, otherwise, if we were just going along case by case and making an accord for the executive and the legislative branch to work out some agreement where we put the President on the fast track as long as we had some kind of nullification process, that they would still have winked at it and probably looked the other way. In fact, they did in one prior case. I think because it was a generic legislative veto they felt this was the time we had to step in and just put those people on the right track.

I agree. I think our chairman has his own ideas on this. But I think it is not a death blow to the Congress. In fact, I think we are still in the supreme position. After all, we write the budget. We have to put a lot of things in it that the President has got to take. I think if it is an accord that can be accepted by him and accepted by the legislature, it will still work out all right.

I am sure many things will never be tested because as long as we don't overstep our boundaries, and he doesn't overstep his, I think we can live with each other.

Mr. DINGELL. I think that is a very perceptive statement. I am in accord with it. I thank you for your kind comments.

You are absolutely correct. The Supreme Court has a great reluctance to find statutes unconstitutional. They also have a great reluctance to step into the legislative business. Obviously, they are, in spite of their protestations, a very political institution. They recognize the politics that go on in this town. And to one degree or another, depending on the case, they are affected by those politics

and the judgment is in some degree affected by politics as to whether they go into it or what conclusion they will come to.

It is pretty clear they saw that the legislative veto was approaching the level of being largely intolerable from the standpoint of the Executive. Every President that I can recall, that I have worked with, since Eisenhower, has denounced the legislative veto. Every Attorney General has at different times been up here or over to the courts to say that the legislative veto was an unconstitutional mechanism.

This should not come as a vast surprise to us. The thing that probably triggered the Supreme Court was the point mentioned by Mr. Pepper, who is a very perceptive gentleman. That was the fact that the court found here this legislative veto was adversely affecting the right of a person resident inside the United States. He is not a citizen. But he has certain rights. They found this was affecting his rights, and that was intolerable from the constitutional standpoint.

They went into the issue. I think they kicked over for good, and all the question of the power of this Congress to enact legislative vetoes in the form before them.

Mr. MOAKLEY. I know your final statement said you would hold yourself available to work with the Rules Committee as we fashion what we feel to be some kind of an answer to the legislative veto. I thank you for that.

Mr. Beilenson.

Mr. BEILENSON. Thank you, Mr. Chairman.

I really don't have any questions. I think the gentleman's testimony was excellent. I agree with it, as I do with the current chairman's comments, and the comments made by our good colleague, Mr. Long. Anything that makes us think through more carefully and more clearly what we intend to do when we are in the process of legislating is a helpful and good thing.

I think that is what this decision forces us to do. I am all for it. I agree with the gentleman's testimony and thank him for it.

Mr. MOAKLEY. Thank you.

Congressman Frost?

Mr. FROST. I think everything has been covered pretty well. One observation I would make.

I did read the *Chadha* decision right after it came out. I have been following this whole issue for some time. I was surprised at how simplistic the approach in the *Chadha* decision was. And I do somewhat share Chairman Pepper's observation that that may not remain law in that form forever, and that some subsequent court may make some adjustments in that.

I realize you do not agree with the chairman on that. But I was struck by the decision. I really didn't think it was a particularly well-reasoned decision.

Mr. DINGELL. I think that is a defect that that decision shares with most of the work of the Supreme Court. Again, I think it was an unwise decision from the standpoint it is going to make it awfully hard for us to pass legislation and forge out the compromises that are necessary. It was simplistic. But you are going to face the same kind of simplistic decisions in the future on that particular case.

Maybe you can craft something that will meet the test that they set out in the *Chadha* decision. Maybe you cannot. Maybe you are going to want to try to forge something that will meet the approval of the court on the *Chadha* decision. Maybe you are going to want to use the other tools we have. We should not shy away from using our tools.

I would just observe our committee has a reputation for legislative oversight. Sam Rayburn gave us the job of watching the Executive and dealing with legislative oversight over the quasi-judicial independent agencies which are creatures of the Congress and largely under the jurisdiction of our committees. Because people were tinkering around with them, coming up with bad decisions, ex parte communications of all sorts on these agencies.

I think every committee, by reason of the *Chadha* decision, if the Congress wants to do what it says, is going to have to have an adequate staff and probably a significantly larger staff than now to address these kinds of questions, to do the oversight, do the things that we tried to do through the simplistic approach of the legislative veto, through the in-House responsibilities and powers we have within our committee structure.

Mr. FROST. I have no further questions.

Mr. MOAKLEY. Congressman Wheat?

Mr. WHEAT. No questions.

Mr. MOAKLEY. John, thank you very much, once again, for an outstanding statement. I really commend you on it. I think this should be required reading for every Member of the House of Representatives.

Mr. DINGELL. Thank you, Mr. Chairman. We are prepared to work with this committee. I thank you for your courtesy to me.

I have been very, very lacking in diligence. I should have introduced Mr. Patrick McLain, a member of our staff who did most of the work on the statement and who works with me and with our committee to deal with these questions. He, along with our staff and I, will be glad to cooperate with you.

Mr. MOAKLEY. Both of you gentlemen will be hearing from us as we progress in our hearings. Thank you very much.

Our next witness is Mr. Florio.

STATEMENT OF HON. JAMES J. FLORIO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. FLORIO. Thank you very much.

I think the issue thing we are dealing with today is of supreme importance in determining what the relationships will be between the various branches of Government in the future. The Congress has various methods for monitoring, guiding and restraining Executive action.

The legislative veto, even in its constitutional form, if that can be worked out, is really not a desirable method of exercising the degree of oversight that its proponents advocate. First, it forces us so deeply into the details of administration that we lose our ability—we, as the Congress—to effectively deal with the formulation of fundamental social policy positions, which is the purpose of the legislative process.

Second, the legislative veto, particularly in recent proposals, which require congressional approval of rules, is just fundamentally unfair. The approval veto is unfair for two reasons. First, it vitiates the due process protections afforded by the administrative agencies. It does this by radically politicizing technical judgments, ensuring that every decision will be appealed to the political process. Uncertainty prevails, and nothing is ever really settled. Agencies and parties may invest years in running the increasingly procedurally complex gamut of rulemaking, but not know the final outcome because inevitably that process will be appealed into the political process; therefore, no degree of stability can ever be ensured. Administrators will be making their decisions with an eye to the ultimate political forum; that is, the Congress.

The second reason the approval veto system is unfair is related to the first. Throughout our whole system of economic regulation, it would drastically tilt the balance of influence away from consumers, environmentalists, and the generally less well-organized interests of the broad public toward the organized, the wealthy and the more powerful. The result is not because the political process is inevitably tilted toward such interests. I believe that in a fair fight there are enough checks and balances in our system so as to allow the public interest to prevail.

The flaw, rather, is unique to the legislative veto. It forces policymaking into a straightjacket which focuses on narrow and technical points. Often this mobilizes well-organized interests restrained by the regulation. The benefits of regulation are often spread broadly across a wider public, but a public that is less well organized. The result is an unfair and undemocratic fight between the organized and the unorganized.

Let me give you a specific example in the case of the Federal Trade Commission. Currently, some Members of Congress advocate a proposal that no FTC rules should take effect without being enacted into law, like ordinary legislation. This is a bad idea. If adopted, it would overburden Congress, strike a devastating blow at consumer protection, and afford special interests a field day.

The Magnuson-Moss FTC Improvements Act was one of the great consumer victories of the 1970's. The current proposal would effectively repeal that law. The FTC's authority under that act to issue consumer protection rules would be erased by reducing it to the authority only to propose rules for congressional consideration.

I don't think we really have to be concerned about an overly vigorous FTC. Maybe we can figure out some way of getting the FTC to do what it is supposed to do. If that is the concern of some, there are better ways than the approval veto proposal, which is currently being discussed. Even the disapproval mechanism, which I am not a great apostle for, is infinitely preferable to the approval process. The disapproval mechanism would at least put the burden where it belongs—on those who wish to overturn the outcome of a fair and reasonably independent administrative process.

The fact is that the independent administrative agencies are not really that independent. Even without the old legislative veto, they are subject to many congressional constraints. But these agencies were given a measure of independence for a reason, and the reason was that the rules that came out of these agencies were designed to

be based on expertise and should be protected from the unfairness that results from undue political influence.

One need only compare the recent sad story at EPA to recognize the wisdom of restraining agencies, maintaining agencies with some degree of independence, and freeing them from the political forces at work.

Opponents of agency rulemaking righteously resort to rhetoric, criticizing decisionmaking by unelected bureaucrats. But a democratic system is the one most responsive to the public interest. The way to achieve responsiveness is not necessarily to put every technical decision into the political cockpit. It is the well-financed special interests who like the highly politicized approach the best. They can afford to be here in the Capitol day after day, fine-tuning the law to suit themselves while the public is necessarily elsewhere attending to other matters.

The kind of oversight we should have of the FTC is one that is responsive to the longrun interests of the public—not one that flinches at every political tremor. The current approval review proposal would radically politicize FTC rulemaking, provide an opportunity for endless delay and effectively eviscerate the rulemaking process.

I think the public will recognize if this Congress goes forward with some sort of approval mechanism, they will recognize what the Congress is doing is giving up its appropriate role and in a sense throwing the rulemaking process into the campaign arena on the regular basis. That is not desirable.

So I would hope that as this committee goes forward with its overall approach to deal with this problem, they would ultimately come out with a view that puts into question the desirability of the legislative veto at all. But if, in fact, there is a feeling that there is a need for some legislative veto mechanism, that it not be the approval process. The approval process, as I said, gives up the rulemaking process, just guts the whole body of administrative law that has developed over the last 50 or 60 years, and that is not in our interests.

I would just conclude by saying the FTC authorization is before the committee. I know that there are proposals for the approval process mechanism to be incorporated and made in order. I would hope that those who take that position would be willing to sign on to an alternative position of the disapproval process, which as I understand it is supported by the Chairman of the FTC—again, no one who is inclined to be overly vigorous.

It is supported by the administration, I think, to the degree we have gotten any statement out of the administration, and is supported by the National Association of Manufacturers. That is, they support the idea of having the disapproval mechanism.

I would hope that this committee could see fit to provide us with a rule for the FTC bill. It should be a modified closed rule. I think that is important. And it should make in order the idea that a disapproval mechanism might be offered as an amendment. And that is the extent of the latitude of the rule that I would suggest.

[Mr. Florio's prepared statement follows:]

PREPARED STATEMENT OF HON. JAMES J. FLORIO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

I appreciate this opportunity to express to this committee my views on the legislative veto.

On the Energy and Commerce Committee we confront this important issue in the context of economic regulations. That is what I will address today, leaving for another day the rather different considerations involved in other areas, such as foreign policy.

We in Congress have various methods for monitoring, guiding and restraining Executive action. The legislative veto, even in its constitutional forms, is not a method that is desirable. Here is why. First, it forces us so deeply into the details of administration we lose our ability to deal effectively with fundamental legislative issues. In the name of reclaiming congressional authority, we have relinquished it. This is a point that many critics of the veto have made, and it requires little further elaboration.

Second, the Legislative veto—particularly in recent proposals to require congressional approval of rules—is fundamentally unfair. This is a point that has not frequently been made and therefore one I wish to stress today.

The proposal that rules be approved by Congress before they can take effect—what I will call "approval veto"—is unfair for two reasons.

First, It vitiates the due process protections afforded by administrative agencies. It does this by radically politicizing technical judgements, ensuring that every decision will be appealed to the political process. Uncertainty prevails. Nothing is ever settled. Agencies and parties may invest years in running the increasingly procedurally rigorous gauntlet of rulemaking, but they know that the final outcome will be determined by different criteria—political criteria. These criteria will seep into and eventually swamp the administrative process, because adminstrators will make all their decisions with an eye only to the ultimate political determinants of the outcome.

The second reason the approval veto is unfair is related to the first. Throughout our whole system of economic regulation it would drastically tilt the balance of influence away from consumers, environmentalists and the generally less well organized interests of the broader public toward the organized, the wealthy, and the powerful.

This result is not because the political process is inevitably tilted toward such interests. I happen to believe that in a fair fight there are still enough checks and balances in our legislative system that the public interest can prevail.

The flaw, rather, is unique to the legislative veto. It forces policymaking into a straight jacket which focuses on narrow and technical points. Often this mobilizes well-organized interests restrained by the regulation. The benefits of regulations are often spread broadly across a wider public, but a public that is less well organized. The result is an unfair and undemocratic fight between the organized and the unorganized. Let me give you as a specific example the case of the Federal Trade Commission.

Currently, some Members of Congress advocate a proposal that no FTC rules should take effect without being enacted into law like ordinary legislation. This is a bad idea. If adopted, it would overburden Congress, strike a devastating blow at consumer protection, and afford special interests a field day.

The Magnuson-Moss FTC Improvements Act was one of the great consumer victories of the 1970's. The current proposal would effectively repeal that law. The FTC's authority under that act to issue consumer protection rules would be erased by reducing it to the authority only to propose rules for congressional consideration.

What are the grounds for undertaking this radical surgery? In recent months the FTC has approved rules to protect consumers from shoddy practices in the funeral, used car, and credit practices industries. It has exercised its discretion in other cases to abandon rules that were proposed by the staff. This is not a record of abuse calling for the proposed amputation of the public interest.

If some Members believe there is a need to restrain FTC rulemaking, there are better ways than the approval veto proposal. Even a disapproval veto mechanism is unnecessary. But at least it would put the burden where it belongs—on those who wish to overturn the outcome of a fair and reasonably independent administrative process.

The fact is that the independent administrative agencies are not really independent. Even without the old legislative veto they are subject to many congressional constraints. But these agencies were given a measure of independence for a reason. The idea was that important regulatory decisions should be made on the basis of

expertise and should be protected from the unfairness that results from undue political influence. One need only compare the recent sad story at the Environmental Protection Agency to recognize the wisdom of maintaining agencies with some independence.

Opponents of agency rulemaking righteously resort to rhetoric, criticizing decisionmaking by unelected bureaucrats. But a democratic system is the one most responsive to the public interst. The way to achieve responsiveness is not necessarily to put every technical decision into the political cockpit. It is the well-financed special interests who like the highly politicized approach the best. They can afford to be here in the Capitol day after day, fine tuning the law to suit themselves while the public is necessarily elsewhere attending to other matters.

The kind of oversight we should have of the FTC is one that is responsive to the long run interests of the public, not one that flinches at every political tremor. The current approval review proposal would radically politicize FTC rulemaking, provide an opportunity for endless delay, and effectively eviscerate the rulemaking process.

The public will recognize this proposal for what it is—a disguised assault on consumers and on settled principles of administrative law. I trust that the Congress will ultimately reject this proposal.

This is an example that I believe applied to many other agencies. I commend this committee for addressing this issue, the ramifications of which for the entire Government can hardly be exaggerated.

I hope the committee will develop a consensus that will avoid the unfair and undemocratic features of the veto mechanism in its most objectionable forms.

Mr. MOAKLEY. Thank you very much.

Any questions?

Mr. BEILENSON. I have no questions. I agree with the gentleman's testimony.

Mr. FROST. No questions.

Mr. WHEAT. No questions.

Mr. MOAKLEY. At this juncture, Senator Levin is tied up in the Senate. He would like to have his testimony entered in the record.

Without objection, it will be done.

[Senator Levin's statement, as though read, follows:]

STATEMENT OF HON. CARL LEVIN, A U.S. SENATOR FROM THE STATE OF MICHIGAN

Mr. LEVIN. Mr. Chairman, members of the Rules Committee, it's a pleasure to be able to testify before your panel as it begins its inquiry into the condition of the legislative veto post-*Chadha*. I've been involved in this issue for 5 years, now, and while to some, this issue may prove to be an excellent sleep enhancer, I remain fascinated by the question of balancing the power between the executive and legislative branches in these last decades of tremendous growth in Federal programs.

When the *Chadha* decision was rendered, I said the decision would create chaos and conflict, since it, in effect, struck down or called into question some 60 legislative veto provisions. To some extent I think I have been proven wrong. Even though the first reports described the *Chadha* decision as significantly benefiting the executive branch, I think the President and his advisers saw quickly that any such gain was only short term, and that in the long run, without accommodation, the delegated authority which only Congress has the power to give, could quickly be withdrawn from the President's control. As a result, I think both the Congress and the President are proceeding cautiously as we pick up and reassemble the pieces from this statute-shattering opinion.

As you know, we have legislative vetoes in a wide variety of policy areas. In the area of foreign policy we have the War Powers Act, the Nuclear Nonproliferation Act, and the act governing the sales of weapons to foreign countries. In the area of government management we have the Reorganization Act and the Budget Act which contain legislative vetoes. And, of course, in the area of domestic programs we have legislative vetoes over agency rulemakings. It appears that we are approaching these diverse issues on a case-by-case basis, without an overall prescription for remedying the entire problem. I think that is probably the correct way to go about it. However, I do think there is a singular beneficial and appropriate way to pursue a legislative veto in the area of agency rulemaking and that is what I would like to discuss with you today.

It lies in a proposal authored by Senator David Boren and myself in 1979 as part of the Federal Trade Commission (FTC) reauthorization. In a vote of 87 to 10 the Senate went on record in support of the Levin-Boren amendment, which created a joint-resolution legislative veto for rules issued by the FTC.

Simply stated, a proposed rule could not take effect for 30 days. During that time, if the committee of either House having jurisdiction over the FTC voted to report a joint resolution of disapproval, the rule would be delayed an additional 60 days, during which time both Houses of Congress could act to veto the rule by enacting the joint resolution into law. If the President vetoed the joint resolution, two-thirds of Congress could override that veto. Such a legislative veto mechanism already was in place with regard to regulations issued by the Department of Housing and Urban Development. The Senate-passed legislative veto on the FTC was modified in conference that year, in the face of a one-House veto approved by the House. The conferees decided to require disapproval by both Houses of Congress by concurrent resolution, thereby excluding the President.

Senator Boren and I introduced a bill, S. 1680, to apply the joint resolution approach described above to all executive branch and independent rulemaking agencies. The heart of the Levin-Boren joint resolution proposal is that it delays Executive action before it takes effect, and also provides for expedited consideration of the disapproval resolution to guarantee that a resolution could be adopted or rejected within the established timeframe. Moreover, it meets the test for constitutionality established by the Supreme Court in the recent *Chadha* case, since it requires action by both Houses and the President, in that order.

An additional advantage of the joint resolution approach is that it represents a shared power approach and continues to allow for a subtle mechanism to balance the power of the two branches. It avoids a possible extreme result—that Congress, in reaction to the Supreme Court's decision, will take back much of its previously delegated authority or so restrict it that there is little or no real discretion on the part of the agencies.

Some may argue that in the last analysis, use of a joint resolution means merely that it would take two-thirds of Congress to strike a proposal or regulation issued by an agency. While that may be technically correct, history has shown that the legislative veto over agency rulemaking is most effective in the delay period—

when negotiation and compromise between Congress and the Executive can occur. Rarely does dispute over a rule extend to a final disapproval. In fact, over the last 5 years, Congress has disapproved agency rules in fewer than 10 instances. And, as to the rules of independent agencies and even some executive agencies, it is possible that the President will actually side with Congress in its objection to the rule.

In 1979, the Governmental Affairs Committee, of which I am a member, held a hearing on the experience of the HUD joint-resolution legislative-veto mechanism. What we found was that it was working first as a deterrent, making the agency think more carefully about congressional intent; and that, second, the opportunity for delay by vote of that jurisdictional committee made accommodation and communication possible.

By adopting the joint-resolution legislative veto, Congress can continue the useful delegation to the executive branch of authority for very complex programs while retaining an important say over the implementation of statutes and authorized powers.

But, most importantly—and this is why so many of us supported legislative veto in the first place—it establishes accountability, through the elected Members of Congress, over the actions of the unaccountable, unelected bureaucrats who otherwise would have the final say—but for lengthy and costly litigation—over the programs that directly and significantly affect the lives of all our citizens.

Mr. BEILENSON [presiding]. We have the pleasure of hearing from our good friend and colleague, Mr. Moakley, at this time.

STATEMENT OF HON. JOHN JOSEPH MOAKLEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. MOAKLEY. Thank you very much, Mr. Chairman.

Mr. Chairman, members of the committee, I appreciate the opportunity to participate in this hearing, and I commend you for affording the Congress with this forum, to weigh the impact of the three recent Supreme Court decisions which nullify the legislative veto, especially in recent years, the veto has been viewed by Congress, and by outside interests, as an important tool in managing the Federal bureaucracy, and especially in keeping the regulatory process accountable. But I think it is important that Congress respond cautiously to the present challenge. In weighing the impact of the decision, and formulating general institutional responses to *Chadha,* these full committee hearings have a vital role to play.

In carrying out its responsibility under the rules for individual legislative vetoes and regulatory reform measures, the Subcommittee on Rules of the House looks forward to coordinating its efforts closely with these hearings, and, Mr. Chairman, with your strong personal interest in the matter.

Mr. Chairman, I have a lengthy prepared statement. It has been made available to the committee, and I propose to deal with it only in summary fashion in this presentation. With the leave of the committee, however, I will submit the full statement for the record.

Mr. Chairman, the sweeping Supreme Court decision in the matter of *Immigration and Naturalization Services* v. *Chadha* ap-

peared on first reading to invalidate all forms of the legislative veto and the summary decisions in the subsequent rulings on the vetoes applicable to the Federal Energy Regulatory Commission and the Federal Trade Commission, certainly tend to confirm the broadest reading of *Chadha*.

But the ruling deals with a matter so focused at the inner subtleties of relations between the executive and legislative branches, that it is hardly surprising that much public, official and media discussion has substantially distorted both the significance and the effect of the decision. In some respects, the *Chadha* decision means a good deal more than has been recognized yet, and in others, may mean a good deal less.

Although my position has been characterized in opposition to the legislative veto, I think it is very important to understand that no one is really an opponent of the veto. Members of Congress have simply had honest differences on how and where it should be applied.

Every President since Herbert Hoover has argued that the veto is unconstitutional, yet each of them has proposed a veto at one point or another.

The question for Members has been the application of the veto in specific contexts, and I suspect that nearly every Member has voted both for and against the concept. So the Supreme Court decision should delight no one.

Certainly, the decision is a significant one and will force some very fundamental changes in the manner in which our Government operates. But assertions that the decision strikes a devastating blow to the Congress, as regards its power relative to the President, misgauges the long-range effects of the way Congress will handle this new balance in future legislation, but it also misjudges even the immediate consequences of what the decision really means with respect to the statutes touched by it.

The legislative veto has been in use for over 50 years and both Congress and the President have found it convenient. Typically, the way the device has come into being is that Congress and the President reach an agreement, that the executive will be granted a specific power, which would not exist except for the enactment of the law, and Congress ties a limitation to that delegation — that the Executive discussion will be subject to congressional nullification.

In this context, the veto works best when it is enacted as part of a negotiated agreement between the branches to improve management flexibility or response to emergency situations.

Historically, the courts have been very reluctant to intervene in these kinds of political agreements between the other branches. Indeed, as recently as 1978, the Supreme Court allowed to stand a lower court ruling which affirmed a law which had allowed the President to adjust Federal pay scales annually, subject to a legislative veto.

Increasingly, however, there has been alarm about the proliferation in the uses to which the legislative veto has been put. The veto is on weakest ground when foisted by Congress for its own convenience or inability to face hard choices. And such uses have become disturbingly more common in recent years than the cautious power

sharing agreements between the branches which gave birth to the legislative veto.

And suddenly, in the past few years, congressional exuberance with the device has led to the birth of proposals for a generic legislative veto—a proposed law which would give Congress the power to review and nullify each regulation issued by the entire Government.

The issue reached a head last year when the Senate passed the proposal 69 to 25. A similar House proposal, which was not acted on, was cosponsored by a substantial majority of the House.

The results of such a proposal could have been disturbing and the potential for genuine paralysis in entire, important segments of the regulatory process was the great risk posed by a broad, generic veto.

Certainly, the business community and other interests have legitimate grievances against poorly considered Federal regulations. They have equal grievances against poorly considered laws. And to expect a Congress that can barely pass a few hundred laws in a year to seriously review 7,000 regulations, is the answer to neither problem.

Unlike the hundreds of specifically linked agreements enacted since 1932, a generic veto is nothing more or less than an unconstitutional effort to turn the entire process of national government on its head, transferring to each branch the functions for which it has the least expertise and legitimacy.

It was becoming increasingly clear that the use of the legislative veto was a runaway train and there was increasing doubt of any ability to restrain the device to its traditional and accepted uses. It was in response to this trend, I believe, that the Supreme Court has now been forced to intervene in a matter it had successfully sought to avoid deciding for a generation, in this regard, the decision should not be viewed as a disaster, or as a victory, for anyone.

Congress, admittedly, has lost a tool which has, in its better applications, proved useful and efficient. But by restraining Congress from immersing itself in every item of regulation and adjudication, the Court has saved Congress from drowning, in detail it lacks the institutional capacity to manage, and freed it to act within the scope of its legitimate role for shaping national policy.

Clearly, the *Chadha* decision will force vast institutional adjustments to be made by Congress to prepare itself to work effectively under this new arrangement, but I sincerely believe the long-term effects could be salutory for Congress, the President and the Nation.

In the long run, the Congress will be strengthened in relation to the President, the bureaucracy, and the courts. It will be forced to write laws with greater specificity. Far less substance will be left for regulatory or judicial interpretation and powers of a legislative character will be delegated with narrower limitation both as to scope and duration.

In fashioning institutional remedies to the current situation, I would hope that all branches of Government have registered a valuable lesson to be learned from *Chadha*. The process of government is—and quite legitimately—a political one. And the Nation is best served when that process is allowed to work, even with some

tensions, with flexibility and a fair regard by each branch for the legitimate role of the others.

Throughout their history, for example, the Appropriations Committees have handled routine adjustments during a fiscal year through a process known as reprogramings. The system is clearly not sanctioned by the *Chadha* decision, but that doesn't matter because the system is beyond the reach of the courts as long as both branches operate in good faith.

Slightly simplified, the process is that, if the administration wants to transfer money from one purpose to a related one within the same appropriation, a letter is sent to the relevant subcommittees of the House and Senate Appropriation Committees. The committees vote on the matter and the administration abides by the decision. The committees are aware that the administration is under no effective obligation to comply with arbitrary instructions and the administration is aware that appropriations run for only a year, and are usually revised to reflect any difficulties the committees have noted during the prior appropriation.

But there is no Federal law on the subject for any court to review. It is simply an accommodation based on restraint, and a decent respect by each branch for the responsibilities and privileges of the other.

Where understood practices and comities between the branches are stretched beyond their understood term, the branch damaged must be expected to respond with all the powers within its reach. The survival of our constitutional system requires that self-defense.

Presidential impoundment powers had actually proven useful tools for fiscal flexibility which served the purposes of both branches for a generation under a variety of Democratic and Republican Presidents and Democratic and Republican congressional chambers, but President Nixon dramatically abused the system indeed. It is not unreasonable to characterize his actions as an attempt to use impoundment to give the Presidency something the Constitution had deliberately denied it—an item veto of appropriations. In 1974, Congress responded to the constitutional threat by extinguishing impoundment powers and replacing it with the comparatively cumbersome congressional budget process.

The development of the War Powers Resolution is a case of obviously similar retrenchment of an informal system stretched too far.

The legislative veto likewise proved a useful and effective tool to both branches to provide comparable administrative and regulatory flexibility but the zealousness with which Congress attempted to toss it onto a variety of laws began to shift the constitutional balance in such a manner that the Supreme Court was forced to rule more sweepingly than it might have wanted on an issue I suspect it would have preferred not to address at all. Indeed, the record is rather clear that as recently as 1978, the Supreme Court ducked a case that presented an opportunity to rule on the identical issues posed by *Chadha*.

I am not distraught over the current situation for reasons I think I have outlined clearly, but as we survey the results of the *Chadha* decision, it is rather clear that the Court's attempts to sidestep the issue in previous years was wise and that the interests of neither

the President nor Congress have been advanced by this definitive constitutional resolution of the issues.

The immediate task involves all three branches and will be facilitated by the greatest possible caution and restraint by each.

No single committee of Congress can undertake these next steps. They involve the entire institution and I am aware of no committee which does not have some law within its jurisdiction touched by *Chadha*. It is not necessary that all these laws be repealed or modified by Congress, nor that most of them become subject to judicial rulings. In some cases, resolution will be forced on Congress.

Other vetoes will never be tested. The courts cannot rule hypothetically and issues must actually exist to be tested. We could hardly dispatch an ambassador-at-large to obtain the consent of some nation to an invasion because our Government needs to bring a test case of the War Powers Resolution.

In many cases, a decision will be made deliberately to avoid any clarification. It is possible that Congress and the President will simply decide, for example, to observe all the procedures of title X of the Congressional Budget and Impoundment Control Act as a political accommodation. As I have stated, I expect that the congressional review of deferrals under title X would be struck down under the *Chadha* decision. But the nonseverability of Presidential deferral authority is sufficiently clear, that neither branch has any incentive to test the law so long as both branches operate with some comity and avoid any effort to use the deferral section to deal entitlements, I am inclined to doubt that their accommodation can ever come within reach of the courts.

Similar determinations to seek no judicial resolution and to simply abide by the terms of statutes of doubtful constitutionality may turn out to be an appropriate response in many other cases. Various project authorization powers exercised by the Public Works Committees of each House and similar fiscal controls exercised by other committees have worked efficiently over the years and there is little reason to abandon them.

But even in cases in which it is determined to leave a matter undecided, it is important that even that decision be reached as the result of careful committee review.

I hope that each committee of the Congress will promptly begin a review of all of the laws within its jurisdiction touched by the court decision to clarify these issues. In addition, I would strongly urge committees to review pending legislation very carefully. The *Chadha* decision is unequivocal and puts Congress on clear public notice of how the Federal judiciary will rule in these matters. An argument of nonseverability will be very difficult to sustain in the case of any delegation which involves a suspect review mechanisms enacted subsequently to the Supreme Court ruling.

In addition to these individual statutory and legislative reviews, I believe that these Rules Committee hearings to study some of the broader institutional issues posed by the *Chadha* decision can make a significant contribution to enabling Congress to properly address the challenge of oversight in a better manner.

Personally, I think Congress should reserve judgment on these institutional responses pending a substantial process of information gathering along the lines of our committee hearings and the ones

being conducted by the House Judiciary Committee in considering the more narrow issue of regulatory reform. However, it might be appropriate to comment on some of the propositions that are likely to be discussed.

By focusing so strongly on the presentation clause in *Chadha*, the court appeared to be pointing the way toward joint resolutions submitted to the President in the same manner as bills as a constitutional alternative to the traditional legislative veto.

Selecting between the use of approval or disapproval resolutions, however, raises difficult questions of political balance.

Joint resolutions of disapproval, if they pertain to actions which the President is likely to seek to uphold shift the balance of power dramatically by delegating powers of a legislative character and then leaving the Congress able to influence those legislative actions only by majorities sufficient to override a Presidential veto.

Joint resolutions of approval, on the other hand, retain significant policy powers in the Congress but could lead Congress toward further and dangerous involvement in the smallest details of national government.

In most cases, I would caution against such an approach. As traditionally drafted, legislative veto laws have served not only as a limitation on agency exercises but also as rules of Congress to limit congressional review of those exercises. My greatest criticism of the veto is that it has locked Congress into yes or no responses to delicate and complicated issues. The rebuttal to my position, obviously, has been that the matter is placed before Congress in a form that it can only approve or disapprove by concurrent resolution to improve it, we would have to act by statute. Now that the courts have made clear that we only can act by statute, anyway, all arguments for the rules of the House that customarily attach to vetoes disappear.

To pass a law authorizing the Executive to issue a rule or make any other proposal and to say Congress can pass a joint resolution enacting the recommendation is a self-evident restatement of the Constitution. So what is the point of bothering to write such laws? If they follow the traditional form of previous legislative vetoes, the answer would be to impose a form of closed rule on congressional action on the recommendation.

The House would be unlikely to adopt a closed rule on a bill yet written by one of its committees and it ought to be even more hesitant to write into law a closed rule to allow entities outside of Congress to propose classes of law over which Congress surrenders its traditional powers to consider and perfect.

In the short run, however, both joint resolutions of approval and of disapproval will be population and the choice between them will pose difficult questions for the Congress.

The modern administrative state has required substantial delegation of legislative powers to the Executive. And the legislative veto has been an entirely understandable response to the imbalance that it has caused. In the absence of the legislative veto, Congress is going to have to examine those delegations it has already made and those it proposes to make with considerably more caution.

One of the matters I would expect the Committee on Rules to review is the possibility that the rules of the House might impose

requirements on committees, in handling bills authorizing delegations of a legislative character, to report in some detail to the House on the need for doing so and the committee's intent in how those authorities will be used.

The area of response to *Chadha* which lies within the jurisdiction of the Committee on the Judiciary is the matter of regulatory reform, and the always controversial proposition which accompanies it—the Bumper amendment. I would urge Congress to act with considerable caution on such responses.

Most regulatory reform proposal are designed to increase the powers of the President or the courts over the regulatory process. In the wake of the *Chadha* decision, which clearly weakens congressional authority over regulation in comparison to the other branches, I think Congress should be reluctant to heap new regulatory powers on these other branches.

I do not dispute the need for regulatory reform, but I think Congress needs to make some important institutional responses to *Chadha* before it will be appropriate to proceed with regulatory reform proposals, especially those which increase Presidential and OMB control over rulemaking without appropriate congressional authorities to balance those review powers.

The proposal, known as the Bumpers amendment, to allow the courts of the United States to independently review regulations, seems to present little merit at this point. The *Chadha* decision, and a number of rulings in the regulatory area, make it clear that the courts already have rather more power over regulatory affairs than is probably appropriate.

I would strongly urge Congress, in weighing the Bumpers amendment, to realize that the most compelling separation of powers danger that faces this country does not concern the unelected bureaucrats. We have done fairly well in dealing with the Federal bureaucracy and have adequate legislative powers in reserve to redress any grievance which may arise there. But we are today confronted with a Federal judiciary which has shown little reluctance to move forcefully in areas heretofore assumed to be of a legislative character. And Congress would be ill advised to expand those powers over regulation pending some very serious thought about the current balance of powers between the branches.

In the last two Congresses, the Committee on Rules and the Committee on the Judiciary have dealt with the issue of regulatory reform from very different perspectives of what the real problems are, much less their solutions. I am hopeful that the *Chadha* decision has created a climate in which the linked issues of regulatory reform and congressional reform can be addressed in a more coordinated fashion.

It continues to be my contention that the root source of most complaints about the regulatory process lies in the statutes which govern the agencies and the manner in which Congress writes those laws. And any regulatory reform proposal that does not address the need for major structural changes in congressional oversight and lawmaking is doomed to failure.

The genius of our constitutional system is that the Presidency, the Congress, and the courts will always exist and have to work together. In the resolution of any confrontation, even one as sweep-

ing as *Chadha*, the question is whether the three, in reaching accommodations that replace the veto, have learned the lessons of recent history and can apply them with comity and with commonsense.

Mr. Chairman, thank you very much for listening to my statement. I hope this will be the beginning of many, many meetings in which we in the Congress will take a closer look at exactly what the *Chadha* decision does do and does not do to our legislative process.

Mr. BEILENSON. Thank you very much, Mr. Moakley, for what I for one thought was a very wise and thoughtful statement that will be useful for all of us to read carefully and ponder.

Are there any questions from Mr. Frost or Mr. Lott at this time?

Mr. LOTT. I realize we need to go vote. I wonder if my colleagues would be coming back after this vote so I could go ahead and present my statement, which would take about 10 minutes.

I just have one question.

I am worried, really, that—I know the Judiciary Committee has no intention to take action. And I worry the Rules Committee does not intend to at some point take some action here. Maybe we will make a deliberate decision we do not want to do anything. But when you say the first of many, many hearings into it——

Mr. MOAKLEY. I am only echoing the chairman of the committee, who intends to really go into this *Chadha* decision. I may disagree with him on the way he is going. But I am sure it will open up many hearings.

Mr. LOTT. I think we should think about it carefully. We may disagree with the extent or limit we might eventually act on. But I would like for us to be committed to taking some action. And action could include an affirmative decision we are not going to do anything. But not just drag it out on and on with hearings and no intention of acting.

Mr. MOAKLEY. I am sure the gentleman is aware of the letter written by 17 chairmen to the chairman of the Rules Committee requesting the Rules Committee step in and take action as a result of *Chadha*. I am sure that the Senator is doing just that. Even though my subcommittee has jurisdiction over legislative veto, we have come to an accord that my subcommittee will handle the bills before the committee pertaining to legislative veto, but on the bigger issue, the constitutionality of the legislative veto, the full committee will be the focus of those hearings.

Mr. LOTT. Thank you.

Mr. BEILENSON. I agree with what Mr. Lott says. We ought to follow through early in the year, when we do not have much other business to do, and try to reach some kind of conclusions about this—if we think nothing ought to be done, or some limited response should be made.

Mr. LOTT. It is interesting to me while John Dingell in his statement did not imply this, in answer to my questions he indicated maybe we should have some limited general guidelines as to what direction these legislative vetoes should take. I thought that was a positive statement.

Mr. MOAKLEY. I know Senator Pepper has been meeting unofficially with members of the Harvard faculty, spoke to some of the

ex-deans. I am sure he is expected to bring people down who have really dealt with the legislative veto.

Thank you very much.

[A brief recess was taken.]

Mr. MOAKLEY [presiding]. The Committee on Rules will now come to order.

We are indeed honored to have a former Member—Senator Grassley.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Thank you very much.

Mr. MOAKLEY. Thank you very much for coming over.

Senator GRASSLEY. I am in the middle of this issue because of my chairmanship of the Subcommittee on Judiciary with jurisdiction over administrative practice and procedure.

Thank you for the opportunity to testify. But most importantly, thank you for just spending a great deal of time on a very important issue. I disagree with the Supreme Court decision, but it is the law of the land and we have to move on from that point.

As Chief Justice Burger stated in handing down the *Chadha* decision, efficiency is a lesser value in a free society than liberty. But I believe all of us would agree that efficiency in government is desirable. The Founding Fathers, writing when the United States was small and life was much more simple, were concerned chiefly with excessive power in the Executive, but they were certainly aware of the need to divide and disperse power in order to protect liberty. As a result they gave us liberty by conflict; legislation requires the concurrence of a majority of both Houses of Congress, but the President is given a qualified power to nullify proposed legislation by veto.

The painfully literal reading of article I powers by the Court does not help to resolve the endless and inconclusive wrangling over major issues between the executive and legislative branches. The congressional veto was a compromise which allowed effective and accountable decisions that the public could understand, and operated to everyone's advantage.

Since we can no longer recall inadvertent regulatory actions by simple agreement of both Houses of Congress, we are now faced with the need to exercise more control in the original delegation of legislative power to agencies. The real challenge in American Government today is not the runaway exercise of power by the President; it is the irresponsible exercise of power by unelected bureaucrats in numberless agencies making rules that have the force of law, without the political or economic accountability that the Founding Fathers intended for our Government to have.

I believe that in the long run this is what regulatory reform is all about. Surely we need to have regulation in many areas, setting national standards for the protection of our workers, our environment, and the public in general. Many of us feel that a new view of the role of the courts is also in order, but most important is that the voice of the American people be heard in as direct a manner as

possible. As Senator Harrison Schmitt said during the floor debate on S. 1080,

> The public does not express itself through the courts, nor does it speak through the executive branch on the multiplicity of rulemaking issues and legislative issues that the Congress must oversee. It is the Congress that fills this role, and it is the Congress that must have the power to overturn proposed rules if we are to have permanent regulatory reform.

The language now in S. 1080 calls for congressional review of any agency's proposed regulations, with provisions for a concurrent resolution of disapproval for rules that Congress finds objectionable. This procedure the Supreme Court has found to be unconstitutional, but it does not alter or dilute the original rationale which brought the legislative veto into use in the first place. The issue is still, "Who shall write the laws of the land?"

The congressional veto concept is as vital to our governing process now as it was prior to *Chadha*. I will be offering an amendment to S. 1080 similar to the proposal introduced by Congressman Lott in H.R. 3939. The idea is to replace the unconstitutional concurrent resolution of disapproval with a joint resolution of approval for major rules, with a joint resolution of disapproval for all other rules. Both of these processes would be on a 90-day report-and-wait schedule, with expedited procedures for discharge from committees of jurisdiction and for floor consideration. This proposal has the support of a majority of the members of the Senate Committee on the Judiciary.

Some have expressed concern that such a requirement would create an impossible workload for Congress and its staff, but if limited to major rules—as defined in S. 1080—the intensive review should cover no more than 40 or 50 proposals a year. Most of the several thousand other rules would go into effect with only a cursory review by the Congress. If we do not have such a system, we will be faced with writing much more detailed legislation initially, to provide more specific standards and policy directives to the agencies in the original delegation. This would be a substantial burden, too, one which we have not been willing to undertake in the past, and which would not make adequate use of the agency's expertise in its own field.

If 535 Members of Congress and our thousands of staff people cannot take time to examine substantive obligations being placed on the citizens of this country, some with severe economic and even criminal sanctions, then something is terribly wrong. Is it fair to ask a small businessman to comply with a regulation which we claim we do not even have time to read?

It may not be appropriate to have one generic solution to all the current statutes which provide for legislative veto, but it does seem reasonable that all agency rules should be subjected to the same congressional review procedures. We are not affecting the War Powers Act, the budget process, or foreign arms sales by this amendment; those are being dealt with on a case-by-case basis. The policies behind those vetoes are unique. By separating out major rules for congressional scrutiny we will be retaining effective control over regulatory actions, and fulfilling our constitutional role of legislation by a majority of the elected Representatives of the people. The American public deserves no less.

Mr. MOAKLEY. Senator, thank you very much for coming over here this morning to testify. Questions?

Mr. BEILENSON. I have a question. I think Mr. Lott will speak to this.

I was going to ask about how these major rules are defined.

Mr. LOTT. The economic impact is $100 million a year.

Mr. BEILENSON. And this would bring about 40 or 50 rules before us this year.

Senator GRASSLEY. I have recently checked for verification of that, and reviews that have been made by scholars in the area indicate that number has been pretty consistent throughout much testimony before the Congress and much scholarly writing on the subject.

Mr. LOTT. OMB, I understand, says that in 1982 it was 52, which probably is a little higher than it would be ordinarily.

Mr. BEILENSON. Maybe you have some testimony to this effect. It would be interesting for us to see, maybe even from the past couple of years, what would have been before us had that law been in effect: whether, for instance, the FTC rules which have been before us would also have been under your proposal, so we get some feel for exactly what kind of issues we would have to consider.

Mr. MOAKLEY. You say we would only vote on 40 rule changes that affect over $100 million?

Senator GRASSLEY. That would be the joint resolution of approval. The rules would be submitted to us. They could not go into effect unless we passed a resolution for their approval, which then would be subject to the President.

All other rules would go into effect unless there was a joint resolution of disapproval, also subject to the President's signature.

Mr. MOAKLEY. Why wouldn't it go the disapproval method on all rules?

Senator GRASSLEY. In major rules, some of those are tremendously expensive in cost to the public at large, to the general economy, to the business people involved, and also some of them have criminal sanctions involved.

They are so important, and have so much of an impact, and some of them deserve much more attention than we might give to more minor pieces of legislation in the Congress. They are so important they ought not to go into effect without the same procedures legislation would follow.

Mr. MOAKLEY. Is the dollar figure the only difference between a minor and a major rule?

Senator GRASSLEY. Not entirely.

Mr. MOAKLEY. What happens if, say, in an environmental pollution thing, where you are talking about human life, how do you differentiate there, or is it still a dollar value?

Senator GRASSLEY. We are getting the information on that point. I cannot answer your question at this moment, but I will submit that in writing for the record.

[The information referred to follows:]

DECEMBER 15, 1983.

Hon. CLAUDE PEPPER,
Committee on Rules, House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: During my recent testimony before your committee on November 9, 1983, concerning the legislative veto, Mr. Beilenson raised a question about the number of "major rules" which would need to be considered under the new review proposals. I promised to provide some verification for my contention that the resolution of approval would be required for about forty to fifty rules each year.

The President's Executive Order 12291 contains a definition of "major rule" which is substantially the same as in S. 1080 (a regulation likely to result in an annual effect on the economy of $100 million or more, or result in a substantial increase in costs or prices for consumers, or significant adverse effects on competition, employment, investment, productivity, etc.). Under this Executive Order, the Office of Management and Budget reviews all proposed and final regulations prior to publication in the Federal Register, a total of 2,633 during 1982. Of these, 56 were classified as major rules at the time of publication. Not all of these were completed, of course, during that calendar year, and some would be exempted from congressional review under the terms of the proposed amendment to S. 1080. A total of 51 final major rules were promulgated.

These numbers come from the 1982 OMB report on activities conducted under Executive Order 12291, supervised by the Presidential Task Force on Regulatory Relief. It is not clear from this report how many of these rules were promulgated by independent agencies. They are technically exempt from the Executive order, but were asked to comply voluntarily with its basic principles.

No figures for 1983 are available, but the Office of Information and Regulatory Affairs estimates the rate to be approximately the same as last year.

Therefore, the use of fifty regulations a year for congressional review purposes seems to be a reasonable assumption. I hope this clarifies a point on which there seemed to be some doubt, for the record.

On another point, Mr. Moakley asked how we would use this distinction for a major rule that involved human life, such as an environmental pollution regulation. The GAO report identified some of the problems of quantifying costs and benefits for purposes of the regulatory impact analysis required of major rules by E.O. 12291. In fact, many of the regulatory analyses reviewed in that study were done under President Carter's Executive Order 12044, which did not explicitly require estimation of benefits.

However, in testimony before our Subcommittee on Administrative Practice and Procedure, the GAO praised the approach taken in S. 1080 which requires that agencies describe the nature and extent of nonquantifiable benefits and costs of a proposed rule, as well as the reasonable alternatives, rather than evaluating "primarily on a mathematical or numerical basis". This "promotes the appropriate use of information and thereby the quality of analyses" upon which regulatory decisions are based, according to GAO. It is the regulatory analysis that distinguishes major rules from ordinary rules, and will furnish the basis for Congressional review of informal rulemaking under S. 1080.

Sincerely,

CHARLES E. GRASSLEY,
Chairman, Subcommittee on
Administrative Practice and Procedure.

Mr. MOAKLEY. Mr. Lott, any questions?

Mr. LOTT. We would like to welcome you back home, Senator. I am pleased that you haven't been totally distracted by your new assignment on the other side. And I want to personally thank you for the job you have done on this legislation, the work you have done, and for the vote that you had in the Senate in the last Congress, which was unanimous.

In that connection, when do you expect action may be taken in the Senate in this Congress?

Senator GRASSLEY. Well, the bill is on the calendar, the regulatory reform bill. And it will be that instrument that I would hope to amend with some sort of a constitutional legislative veto. And we

feel, just within the last month, that we are able to clear some hurdles that are necessary for it to be considered. If we don't get it considered before November 18, it will be high on the list for early next year.

Mr. Chairman, I can add one thing, besides what I said I would submit to you in writing. There is a provision in S. 1980 that would allow the President to himself designate up to 75 rules per year as major rules. So you can have Presidential designation of major impact regardless of cost.

Mr. MOAKLEY. Without any criteria, he could just designate them as major rules?

Senator GRASSLEY. No. There are criteria—criteria are set out on page 16 of S. 1080.

Mr. MOAKLEY. Mr. Beilenson.

Mr. BEILENSON. I am not sure how I feel about this whole subject. I do want to commend you on your work on the defense budget. I think some of the things you and your colleagues are doing over there make a lot of sense.

Mr. MOAKLEY. Is the Bumpers bill going anywhere?

Senator GRASSLEY. Yes. It is part of S. 1080. I don't think there is any controversy on that. We reintroduced S. 1080 as it passed the Senate last year and with the Bumpers amendment in it.

I don't think anything is in controversy about S. 1080 except for the type of veto we will incorporate in it.

Mr. MOAKLEY. All right. I wasn't sure Bumpers was in that.

Senator GRASSLEY. Yes, it is.

Mr. MOAKLEY. Thank you very much for coming over.

Senator GRASSLEY. I want to thank Congressman Lott for letting me go ahead. I appreciate that.

[The text of S. 1080 follows:]

98TH CONGRESS
1ST SESSION

S. 1080

To amend the Administrative Procedure Act to require Federal agencies to analyze the effects of rules to improve their effectiveness and to decrease their compliance costs, to provide for a periodic review of regulations, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 19 (legislative day, APRIL 18), 1983

Mr. GRASSLEY (for himself and Mr. HEFLIN) introduced the following bill; which was read the first time

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A BILL

To amend the Administrative Procedure Act to require Federal agencies to analyze the effects of rules to improve their effectiveness and to decrease their compliance costs, to provide for a periodic review of regulations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Regulatory Reform Act".

DEFINITION OF RULE

SEC. 2. Section 551(4) of title 5, United States Code, is amended by inserting before the semicolon at the end thereof a comma and the following: "except that the term 'rule' does

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not include agency statements involving a matter relating to public property or contracts or general statements of policy of the Tennessee Valley Authority except where an applicable statute requires notice and hearing pursuant to this chapter or the statement to be made on the record after opportunity for an agency hearing".

RULEMAKING

SEC. 3. Section 553 of title 5, United States Code, is amended to read as follows:

"§ 553. Rule making

"(a) This section applies to every rule making, according to the provisions thereof, except to the extent that there is involved—

"(1) a matter pertaining to a military or foreign affairs function of the United States;

"(2) a matter relating to the management and personnel practices of an agency;

"(3) an interpretive rule, general statement of policy, or rule of agency organization, procedure, or practice, unless such rule or statement has general applicability and substantially alters or creates rights or obligations of persons outside the agency; or

"(4) a rule relating to the acquisition, management, or disposal by an agency of real or personal property or of services that is promulgated in compli-

ance with criteria and procedures established by the Administrator for Federal Procurement Policy or the Administrator of General Services.

"(b)(1) General notice of proposed rule making shall be published in the Federal Register, unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. Each notice of proposed rule making shall include—

"(A) a statement of the time, place, and nature of public rule making proceedings;

"(B) a succinct explanation of the need for and specific objectives of the proposed rule;

"(C) an explanation of the specific statutory authority under which the rule is proposed;

"(D) the proposed provisions of the rule;

"(E) a statement that the agency seeks proposals from the public and from State and local governments for alternative methods to accomplish the objectives of the rule making that are more effective or less burdensome than the approach used in the proposed rule;

"(F) a description of any data, methodologies, reports, studies, scientific evaluations, or other similar information on which the agency plans to substantially rely in the rule making, including an identification of each author or source of such information and the pur-

poses for which the agency plans to rely on such information; and

"(G) a statement specifying where the file of the rule making proceeding maintained pursuant to subsection (f) of this section may be inspected and how copies of the items in the file may be obtained.

"(2) Except when notice or hearing is required by statute, a final rule may be adopted and may become effective without prior compliance with the provisions of this subsection and subsections (c) and (f) of this section if—

"(A) the agency for good cause finds that providing notice and public procedure thereon before the rule becomes effective is impracticable or contrary to an important public interest;

"(B) the agency publishes the rule in the Federal Register with such finding and a succinct explanation of the reasons therefor; and

"(C) the agency complies with the provisions of this subsection and subsections (c) and (f) of this section to the maximum extent feasible prior to the promulgation of the final rule and fully complies with such provisions as soon as reasonably practicable after the promulgation of the rule.

"(3) Except when notice or hearing is required by statute, this subsection and subsections (c) and (f) of this section

do not apply to a rule when the agency for good cause finds that notice and public procedure thereon are unnecessary due to the insignificant impact of the rule and publishes, at the time of publication of the final rule, such finding and a succinct explanation of the reason therefor.

"(4) Whenever the provisions of a final rule that an agency plans to adopt are so different from the provisions of the proposed rule that the original notice of proposed rule making did not fairly apprise the public of the issues ultimately to be resolved in the rule making or of the substance of the rule, the agency shall publish in the Federal Register a notice of the final rule the agency plans to adopt, together with the information relevant to such rule which is required by the applicable provisions of this section and which has not previously been published in the Federal Register. The agency shall allow a reasonable period for comment on such final rule.

"(c)(1) After providing the notice required by this section, the agency shall give interested persons at least sixty days to participate in the rule making through the submission of written data, views, or arguments.

"(2) In order to collect relevant information, and to identify and elicit full and representative public comment on the significant issues of a particular rule making, the agency

may use such other procedures as the agency determines are appropriate, including—

"(A) the publication of an advance notice of proposed rule making;

"(B) the provision of notice, in forms which are more direct than notice published in the Federal Register, to persons who would be substantially affected by the proposed rule, but who are unlikely to receive notice of the proposed rule making through the Federal Register;

"(C) the provision of opportunities for oral presentation of data, views, information, or rebuttal arguments at informal public hearings, which may be held in the District of Columbia and other locations;

"(D) the provision of summaries, explanatory materials, or other technical information in response to public inquiries concerning the issues involved in the rule making; and

"(E) the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in a rule making.

The decision of the agency to use or not to use such other procedures in a rule making pursuant to this paragraph shall not be subject to judicial review.

"(3)(A) The opportunity for participation in a rule making for a major rule (as defined in section 621(4) of this title) shall include the opportunity for oral presentation of data, views, and information at informal public hearings. Such public hearings—

"(i) may include an opportunity for oral rebuttal or argument where appropriate; and

"(ii) shall include an opportunity for direct and cross-examination of the principal agency employees or other persons who prepared for the agency data on which the agency substantially relied in formulating the rule, and of any other persons who present testimony, documents, or other information at such hearings, where other procedures, such as the convening of public meetings, conferences or panel discussions, or the presentation of staff arguments for comment and rebuttal, are determined to be inadequate for the resolution of significant issues of fact upon which the rule is based.

"(B) No court shall hold unlawful or set aside an agency rule because of a failure by the agency to use a particular procedure pursuant to subparagraph (A) of this paragraph unless—

"(i) an objection to the failure to use such procedure was presented to the agency in a timely fashion

or there are extraordinary circumstances that excuse the failure to present a timely objection; and

"(ii) the court finds that such failure substantially precluded a fair consideration and informed resolution of a central issue of the rule making taken as a whole.

"(4) To ensure an orderly and expeditious proceeding, the agency may establish reasonable procedures to regulate the course of informal public hearings under paragraphs (2) and (3) of this subsection, including the designation of representatives to make oral presentations or engage in direct or cross-examination on behalf of several parties with a common interest in a rule making. Transcripts shall be made of all such public hearings.

"(5) An agency shall publish any final rule it adopts in the Federal Register, together with a concise statement of the basis and purpose of the rule and a statement of when the rule may become effective. The statement of basis and purpose shall include—

"(A) an explanation of the need for, objectives of, and statutory authority for the rule;

"(B) a discussion of any significant issues raised by the comments on the proposed rule, including a description of the reasonable alternatives to the rule proposed by the agency and by interested persons, and the reasons why each such alternative was rejected; and

"(C) an explanation of how the factual conclusions upon which the rule is based are substantially supported in the rule making file maintained pursuant to subsection (f) of this section.

"(6) When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

"(d)(1) An agency shall publish the final rule adopted in the Federal Register at least thirty days before the effective date of the rule. An agency may make a rule effective in less than thirty days after publishing the final rule in the Federal Register in the case of a rule that grants or recognizes an exemption or relieves a restriction, or in the case of a rule for which the agency for good cause finds that such a delay in the effective date would be contrary to an important public interest and publishes such finding and an explanation of the reasons therefor, with the final rule.

"(2) In promulgating a final rule, the agency may not substantially rely on any factual or methodological material that was not placed in the rule making file maintained pursuant to subsection (f) of this section in time to afford an adequate opportunity for public comment thereon during the period for public participation in the rule making. Notwithstanding the preceding sentence, an agency may rely on such material—

"(A) if, in the case of material developed by or for the agency, such material was placed in the rule making file promptly upon its completion and, if such material is of central relevance to the rule making, was made available in time for interested persons to have an adequate opportunity to comment thereon;

"(B) if, in the case of material submitted by a person outside the agency, such material was placed in the rule making file promptly upon its receipt by the agency and, if such material is of central relevance to the rule making, the agency provided not less than fifteen days for interested persons to comment thereon in addition to the period for comment provided under paragraph (1) of subsection (c);

"(C) if such material is material of which the agency properly can take official notice; or

"(D) if such material is material referred to in subsection (f)(3) of this section and the agency has complied with the requirements of that subsection.

"(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule, for an interpretation regarding the meaning of a rule, and for a variance or exemption from the terms of a rule if the agency may grant such variance or exemption. The agency shall act on such petitions with reasonable prompt-

ness. The response of the agency to each such petition shall be in writing accompanied by a statement of reasons.

"(f)(1) The agency shall maintain a file for each rule making proceeding conducted pursuant to this section and shall maintain a current index to such file. The file and the material excluded from the file pursuant to paragraph (2) of this subsection shall constitute the rule making record for purposes of judicial review. Except as provided in paragraph (2) of this subsection, the file shall be made available to the public beginning on the date on which the agency makes an initial publication concerning the rule. The file shall include—

"(A)(i) the notice of proposed rule making and any supplement to or modification or revision of such notice; and

"(ii) any advance notice of proposed rule making;

"(B) copies of all written comments received on the proposed rule;

"(C) a transcript of any public hearing conducted in the rule making;

"(D) copies, or an identification of the place at which copies may be obtained, of all material described by the agency pursuant to subsection (b)(1)(F) of this section and of other factual and methodological material not described by the agency pursuant to such sub-

section that pertains directly to the rule making and that the agency considered in connection with the rule making, or that was prepared by or for the agency in connection with the rule making;

"(E) any statement, description, analysis, or any other material that the agency is required to make public in connection with the rule making, including any preliminary or final regulatory analysis issued by the agency pursuant to chapter 6 of this title;

"(F) copies of all written material pertaining to the rule, including any drafts of the proposed and the final rule, submitted by the agency to the President or his designee directed by the President to review proposed or final rules for their regulatory impact; and

"(G) a written explanation of the specific reasons for any significant changes made by the agency in the drafts of the proposed or final rule which respond to any comment received by the agency on the draft proposed rule, the proposed rule, the draft final rule, or the final rule, made by the President or his designee directed by the President to review proposed or final rules for their regulatory impact.

"(2) The agency shall place the materials described in clauses (A) through (H) of the last sentence of paragraph (1)

in the file required by such paragraph as soon as practicable after such materials become available to the agency.

"(3) The file required by paragraph (1) of this subsection need not include any material that need not be made available to the public under section 552 of this title if the agency includes in such file a statement that notes the existence of such material and the basis upon which the material is exempt from public disclosure under such section. The agency may not substantially rely on any such material in formulating a rule unless it makes the substance of such material available for adequate comment by interested persons. The agency may use summaries, aggregations of data, or other appropriate mechanisms so as to protect the confidentiality of such material to the maximum extent possible.

"(4) No court shall hold unlawful or set aside an agency rule because of a violation of paragraph (1) of this subsection unless the court finds that such violation has precluded fair public consideration of a material issue of the rule making taken as a whole. Judicial review of compliance or noncompliance with paragraph (1) of this subsection shall be limited to review of action or inaction on the part of an agency.

"(g) For a period of one year after the effective date of a final rule issued pursuant to this section, such rule shall not substantially change the requirements of any contract, cooperative agreement, or grant existing on such effective date

between a Federal agency and a State or local government. The preceding sentence does not apply to any case in which the agency for good cause finds that a delay in the effect of the rule would be contrary to an important public interest and publishes such finding and an explanation of the reasons therefor, with the final rule.

"(h) Nothing in this section authorizes the use of appropriated funds available to any agency to pay the attorney's fees or other expenses of persons participating or intervening in agency proceedings.".

REGULATORY ACTIVITIES: ANALYSIS; PRIORITIES AND REVIEW; REPORT

SEC. 4. (a) Chapter 6 of title 5, United States Code, is amended by adding at the end thereof the following:

"SUBCHAPTER II—ANALYSIS OF AGENCY PROPOSALS

"§ 621. Definitions

"For purposes of this subchapter and subchapters III and IV of this chapter:

"(1) The term 'agency' has the same meaning as in section 551(1) of this title.

"(2) The term 'person' has the same meaning as in section 551(2) of this title.

"(3) The term 'rule' has the same meaning as in section 551(4) of this title, except that such term does not include—

"(A) a rule of particular applicability that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers or acquisitions, or accounting practices or disclosures bearing on any of the foregoing;

"(B) a rule relating to monetary policy proposed or promulgated by the Board of Governors of the Federal Reserve System; or

"(C) a rule issued by the Federal Election Commission or a rule issued by the Federal Communications Commission pursuant to sections 312(a)(7) and 315 of the Communications Act of 1934.

"(4) The term 'major rule' means—

"(A) a rule or a group of closely related rules that the agency, the President, or the officer selected under section 624 of this title reasonably determines is likely to have an annual effect on the economy of $100,000,000 or more in reasonably quantifiable direct and indirect costs; and

"(B) a rule or a group of closely related rules that is otherwise designated a major rule by the agency proposing the rule, or is so designated by the President, or by the officer selected under section 624 of this title, on the ground that the rule is likely to result in—

"(i) a substantial increase in costs or prices for wage earners, consumers, individual industries, nonprofit organizations, Federal, State, or local government agencies, or geographic regions; or

"(ii) significant adverse effects on competition, employment, investment, productivity, innovation, the environment, public health or safety, or the ability of enterprises whose principal places of business are in the United States to compete in domestic or export markets.

For purposes of subparagraph (A) of this paragraph, the term 'rule' does not mean—

"(I) a rule that involves the internal revenue laws of the United States;

"(II) a rule that authorizes the introduction into commerce or recognizes the marketable status of a product, pursuant to sections 408,

"409(c), and 706 of the Federal Food, Drug, and Cosmetic Act;

"(III) a rule exempt from notice and public procedure pursuant to section 553(a) of this title; or

"(IV) a rule relating to the viability, stability, asset powers, or categories of accounts of, or permissible interest rate ceilings applicable to, depository institutions the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Share Insurance Fund of the National Credit Union Administration Board.

"(5) The term 'benefit' means the reasonably identifiable significant benefits and beneficial effects, including social and economic benefits and effects, that are expected to result directly or indirectly from implementation of a rule or an alternative to a rule.

"(6) The term 'cost' means the reasonably identifiable significant costs and adverse effects, including social and economic costs and effects, that are expected to result directly or indirectly from implementation of a rule or an alternative to a rule

"§ 622. Regulatory analysis

"(a) Prior to publishing notice of proposed rule making for any rule, each agency shall determine whether the rule is or is not a major rule within the meaning of section 621(4)(A) of this title and, if it is not, whether it should be designated a major rule under section 621(4)(B) of this title. For the purpose of any such determination or designation, a group of closely related rules shall be considered as one rule. Every notice of proposed rule making shall include a succinct statement and explanation of the agency's determination of whether or not the rule is a major rule within the meaning of section 621(4)(A) of this title and, if applicable, of its designation as a major rule under section 621(4)(B) of this title.

"(b) The President or the officer selected by the President under section 624 of this title may determine that a rule is a major rule within the meaning of section 621(4)(A) of this title or may designate a rule as a major rule under section 621(4)(B) of this title not later than thirty days after the publication of the notice of proposed rule making for that rule. Such determination or designation shall be published in the Federal Register, together with a succinct statement of the basis for the determination or designation. The President or the officer selected by the President under section 624 of this title may designate not more than seventy-five rules as major rules under section 621(4)(B) of this title in any fiscal year.

"(c)(1) When the agency publishes a notice of proposed rule making for a major rule, the agency shall issue and place in the rule making file maintained under section 553(f) of this title a preliminary regulatory analysis and shall include in such notice of proposed rule making a summary of the analysis. When the President or the officer selected by the President under section 624 of this title has published a determination or designation that a rule is a major rule after the publication of the notice of proposed rule making for that rule, the agency shall promptly issue and place in the rule making file maintained under section 553(f) of this title a preliminary regulatory analysis for the rule and shall publish in the Federal Register a summary of such analysis. Following the issuance of a preliminary regulatory analysis under the preceding sentence, the agency shall give interested persons an opportunity to comment thereon pursuant to section 553 of this title in the same manner as if the preliminary regulatory analysis had been issued with the notice of proposed rule making.

"(2) Each preliminary regulatory analysis shall contain—

"(A) a succinct description of the benefits of the proposed rule, including any beneficial effects that cannot be quantified, and an explanation of how the agency anticipates each benefit will be achieved by the

proposed rule, including a description of the persons, classes of persons, or particular levels of Government likely to receive such benefits;

"(B) a succinct description of the costs of the proposed rule, including any costs that cannot be quantified, and an explanation of how the agency anticipates each such cost will result from the proposed rule, including a description of the persons, classes of persons, or particular levels of Government likely to incur such costs;

"(C) a succinct description of reasonable alternatives for achieving the identified benefits of the proposed rule, including alternatives that—

"(i) require no Government action;

"(ii) will accommodate differences between geographic regions; and

"(iii) employ performance or other standards which permit the greatest flexibility in achieving the identified benefits of the proposed rule;

"(D) a statement—

"(i) identifying any source of funds available from the Federal Government to pay State and local governments the costs incurred by such governments as a result of the proposed rule; or

"(ii) specifying that the agency does not know of any such source;

"(E) in any case in which the proposed rule is based on scientific evaluations or information, a description of action undertaken by the agency to verify the quality, reliability, and relevance of such scientific evaluations or scientific information; and

"(F) where it is not expressly or by necessary implication inconsistent with the provisions of the enabling statute pursuant to which the agency is proposing the rule, an explanation of how the identified benefits of the proposed rule are likely to justify the identified costs of the proposed rule, and an explanation of how the proposed rule is likely to substantially achieve the rule making objectives in a more cost-effective manner than the alternatives to the proposed rule.

"(d)(1) When the agency publishes a final major rule, the agency shall also issue and place in the rule making file maintained under section 553(f) of this title a final regulatory analysis, and shall include a summary of the analysis in the statement of basis and purpose required by section 553(c)(6) of this title. Notwithstanding the preceding sentence, in any case in which an agency, under section 553(b)(2) of this title, is not required to comply with subsections (b) through (f) of section 553 of this title prior to the adoption of a final rule,

an agency is not required to comply with the preceding sentence prior to the adoption of the final rule but shall comply with such sentence when complying with section 553(b)(2)(C) of this title.

"(2) Each final regulatory analysis shall contain—

"(A) a description and comparison of the benefits and costs of the rule and of the reasonable alternatives to the rule described in the rule making; and

"(B) where it is not expressly or by necessary implication inconsistent with the provisions of the enabling statute pursuant to which the agency is acting, a reasonable determination, based upon the rule making file considered as a whole, that the benefits of the rule justify the costs of the rule, and that the rule will substantially achieve the rule making objectives in a more cost-effective manner than the alternatives described in the rule making.

"(e)(1) An agency shall describe the nature and extent of the nonquantifiable benefits and costs of a proposed and a final rule pursuant to this section in as precise and succinct a manner as possible. The description of the benefits and costs of a proposed and a final rule required under this section shall include a quantification or numerical estimate of the quantifiable benefits and costs. Such quantification or numerical estimate shall be made in the most appropriate unit of measure-

ment and shall specify the ranges of predictions and explain the margins of error involved in the quantification methods and in the estimates used.

"(2) In evaluating and comparing costs and benefits, the agency shall not rely on cost or benefit information submitted by any person that is not accompanied by data, analysis, or other supporting materials that would enable the agency and other persons interested in the rule making to assess the accuracy and reliability of such information. The agency evaluations of the relationships of the benefits of a proposed and final rule to its costs required by this section shall be clearly articulated in accordance with the provisions of this section. An agency is not required to make such evaluation primarily on a mathematical or numerical basis.

"(f) The preparation of the preliminary or final regulatory analysis required by this section shall only be performed by an officer or employee of the agency. The provisions of the preceding sentence do not preclude a person outside the agency from gathering data or information to be used by the agency in preparing any such regulatory analysis or from providing an explanation sufficient to permit the agency to analyze such data or information. If any such data or information is gathered or explained by a person outside the agency, the agency shall specifically identify in the preliminary or final regulatory analysis the data or information gath-

ered or explained and the person who gathered or explained it, and shall describe the arrangement by which the information was procured by the agency, including the total amount of funds expended for such procurement.

"(g) The requirements of this section do not alter the criteria for rule making otherwise applicable under other statutes.

"§ 623. Judicial review

"(a) Compliance or noncompliance by an agency with the provisions of this subchapter shall not be subject to judicial review except according to the provisions of this section.

"(b) Any determination by the President or by the officer selected under section 624 of this title that a rule is a major rule within the meaning of section 621(4)(A) of this title, and any designation by the President or the officer selected under section 624 of this title that a rule is a major rule under section 621(4)(B) of this title, or any failure to make such a designation, shall not be subject to judicial review in any manner.

"(c) The determination of an agency of whether a rule is or is not a major rule within the meaning of section 621(4)(A) of this title shall be set aside by a reviewing court only upon a clear and convincing showing that the determination is erroneous in light of the information available to the agency at the time it made the determination. Any designation by an

agency that a rule is a major rule under section 621(4)(B) of this title, or any failure to make such a designation, shall not be subject to judicial review in any manner.

"(d) Any regulatory analysis prepared under section 622 of this title shall not be subject to judicial consideration separate or apart from review of the rule to which it relates. When an action for judicial review of a rule is instituted, any regulatory analysis for such rule shall constitute part of the whole rule making record of agency action for the purpose of judicial review of the rule and shall, to the extent relevant, be considered by a court in determining the legality of the rule.

"§ 624. Executive oversight

"(a) The President shall have the authority to establish procedures for agency compliance with this subchapter and subchapter III of this chapter. The President shall have the authority to monitor, review, and ensure agency implementation of such procedures. The President shall report annually to the Congress on agency compliance or noncompliance with the requirements of this chapter.

"(b) Any procedures established pursuant to the authority granted under subsection (a) of this section shall be adopted after the public has been afforded an opportunity to comment thereon, and shall be consistent with the prompt completion of rule making proceedings. If such procedures in-

clude review of preliminary or final regulatory analyses to ensure that they comply with the procedures established pursuant to subsection (a), the time for any such review of a preliminary regulatory analysis shall not exceed thirty days following the receipt of that analysis by the President or by an officer to whom the authority granted under subsection (a) of this section has been delegated pursuant to subsection (c) of this section, and the time for such review of a final regulatory analysis shall not exceed thirty days following the receipt of that analysis by the President or such officer. The times for each such review may be extended for good cause by the President or such officer for an additional thirty days. Notice of any such extension, together with a succinct statement of the reasons therefor, shall be inserted in the rule making file.

"(c) The President may delegate the authority granted by subsection (a) of this section, in whole or in part, to the Vice President or to an officer within the Executive Office of the President whose appointment has been subject to the advice and consent of the Senate. Any such notice with respect to a delegation to the Vice President shall contain a statement by the Vice President that the Vice President will make every reasonable effort to respond to congressional inquiries concerning the exercise of the authority delegated under this subsection. Notice of any such delegation, or any

revocation or modification thereof, shall be published in the Federal Register.

"(d) The authority granted under subsection (a) of this section shall not apply to rules issued by the Nuclear Regulatory Commission.

"(e) Any exercise of the authority granted under this section, or any failure to exercise such authority, by the President or by an officer to whom such authority has been delegated under subsection (c) of this section, shall not be subject to judicial review in any manner under this Act.

"SUBCHAPTER III—REGULATORY PRIORITIES AND REVIEW

"§ 631. Review of agency rules

"(a)(1)(A) Not later than nine months after the effective date of this section, each agency shall prepare and publish in the Federal Register a proposed schedule for the review, in accordance with this section, of—

"(i) each rule of the agency which is in effect on such effective date and which, if adopted on such effective date, would be a major rule under section 621(4)(A) of this title, and

"(ii) each rule of the agency in effect on such effective date (in addition to the rules described in clause (i)) which the agency has selected for review.

"(B) Each proposed schedule required by subparagraph (A) shall include—

"(i) a brief explanation of the reasons the agency considers each rule on the schedule to be such a major rule under section 621(a)(4)(A) of this title or of the reasons why the agency selected the rule for review;

"(ii) a date set by the agency, in accordance with the provisions of subsection (b)(1) of this section, for the completion of the review of each such rule; and

"(iii) a statement that the agency requests comments from the public on the proposed schedule.

"(C) The agency shall set a date to initiate review of each rule on the schedule in a manner which will ensure the simultaneous review of related items and which will achieve a reasonable distribution of reviews over the period of time covered by the schedule.

"(2) At least ninety days before publishing in the Federal Register the proposed schedule required under paragraph (1), each agency shall make the proposed schedule available to the President, or to the Vice President or other officer to whom oversight authority has been delegated under section 624(b) of this title. The President or that officer may select for review in accordance with this section any additional rule that the President or such officer determines to be a major rule under section 621(4)(A) of this title.

"(3) Not later than one year after the effective date of this section, each agency shall publish in the Federal Register a final schedule for the review of the rules referred to in paragraphs (1) and (2) of this subsection. Each agency shall publish with the final schedule the response of the agency to comments received concerning the proposed schedule.

"(b)(1) Except where explicitly provided otherwise by statute, the agency shall, pursuant to subsections (c) through (e) of this section, review—

"(A) each rule on the schedule promulgated pursuant to subsection (a) of this section;

"(B) each major rule under section 621(4) of this title promulgated, amended, or otherwise renewed by an agency after the date of the enactment of this section; and

"(C) each rule promulgated after the date of enactment of this section which the President or the officer designated by the President pursuant to subsection (a)(2) of this section determines to be a major rule under section 621(4)(A) of this title.

Except where an extension has been granted pursuant to subsection (f) of this section, the review of a rule required by this section shall be completed within ten years after the effective date of this section or within ten years after the date

on which the rule is promulgated, amended, or renewed, whichever is later.

"(2) A rule required to be reviewed under the preceding subsection on grounds that it is a major rule need not be reviewed if the agency determines that such rule, if adopted at the time of the planned review, would not be a major rule under the definition previously applied to it. When the agency makes such a determination, it shall publish a notice and explanation of the determination in the Federal Register.

"(c) An agency shall publish in the Federal Register a notice of its proposed action under this section with respect to a rule being reviewed. The notice shall include—

"(1) an identification of the specific statutory authority under which the rule was promulgated and a statement specifying the agency's determination of whether the rule continues to fulfill the intent of Congress in enacting that authority;

"(2) an assessment of the benefits and costs of the rule during the period in which it has been in effect;

"(3) an explanation of the proposed agency action with respect to the rule; and

"(4) a statement that the agency seeks proposals from the public for modifications or alternatives to the rule which may accomplish the objectives of the rule in a more effective or less burdensome manner.

"(d) If an agency proposes to repeal or amend a rule under review pursuant to this section, the agency shall, after issuing the notice required by subsection (c) of this section, comply with the provisions of this chapter and chapter 5 of this title or other applicable law. The requirements of such provisions and related requirements of law shall apply to the same extent and in the same manner as in the case of a proposed agency action to repeal or amend a rule which is not taken pursuant to the review required by this section.

"(e) If an agency proposes to renew without amendment a rule under review pursuant to this section, the agency shall—

"(1) give interested persons not less than sixty days after the publication of the notice required by subsection (c) of this section to comment on the proposed renewal; and

"(2) publish in the Federal Register notice of the renewal of such rule and an explanation of the continued need for the rule, and, if the renewed rule is a major rule under section 621(4) of this title, include with such notice an explanation of the reasonable determination of the agency that the rule complies with the provisions of section 622(d)(2)(B) of this title.

"(f)(1) Any agency, which for good cause finds compliance with this section with respect to a particular rule to be

impracticable during the period provided in subsection (b) of this section, may request the President, or the officer designated by the President pursuant to subsection (a)(2) of this section, to establish a period longer than ten years for the completion of the review of such rule. The President or that officer may extend the period for review of a rule to a total period of not more than fifteen years. Such extension shall be published in the Federal Register with an explanation of the reasons therefor.

"(2) An agency may, with the concurrence of the President or the officer designated by the President pursuant to subsection (a)(2) of this section, or shall, at the direction of the President or that officer, alter the timing of review of rules under any schedule required by this section for the review of rules if an explanation of such alteration is published in the Federal Register at the time such alteration is made.

"(g) In any case in which an agency has not completed the review of a rule within the period prescribed by subsection (b) or (f) of this section, the agency shall immediately publish in the Federal Register a notice proposing to amend, repeal, or renew the rule under subsection (c) of this section, and shall complete proceedings pursuant to subsection (d) or (e) of this section within one hundred and eighty days after

the date on which the review was required to be completed under subsection (b) or (f) of this section.

"(h)(1) Agency compliance or noncompliance with the provisions of subsection (a) of this section shall not be subject to judicial review in any manner.

"(2) Agency compliance or noncompliance with the provisions of subsections (b), (c), (e), (f), and (g) of this section shall be subject to judicial review only pursuant to section 706(a)(1) of this title.

"(i) Nothing in this section shall relieve any agency from its obligation to respond to a petition to issue, amend, or repeal a rule, for an interpretation regarding the meaning of a rule, or for a variance or exemption from the terms of a rule, submitted pursuant to section 553(e) of this title.

"§ 632. Regulatory agenda and calendar

"(a) Each agency shall publish in the Federal Register in April and October of each year an agenda of the rules that the agency expects to propose, promulgate, renew, or repeal in the succeeding twelve months. For each such rule, the agenda shall contain, at a minimum, and in addition to any other information required by law—

"(1) a general description of the rule, including a citation to the authority under which the action with respect to the rule is to be taken, or a specific explana-

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tion of the congressional intent to which the objectives of the rule respond;

"(2) a statement of whether or not the rule is or is expected to be a major rule;

"(3) an approximate schedule of the significant dates on which the agency will take action relating to the rule, including the dates for any notice of proposed rule making, hearing, and final action on the rule;

"(4) the name, address, and telephone number of an agency official responsible for answering questions from the public concerning the rule;

"(5) a statement specifying whether each rule listed on the previous agenda has been published as a proposed rule, has been published as a final rule, has become effective, has been repealed, or is pending in some other status; and

"(6) a cumulative summary of the status of the rules listed on the previous agenda in accordance with clause (5) of this subsection.

"(b) The President or an officer in the Executive Office of the President whose appointment has been subject to the advice and consent of the Senate shall publish in the Federal Register in May and November of each year a Calendar of Federal Regulations listing each of the major rules identified in the regulatory agendas published by agencies in the pre-

ceding month. Each rule listed in the calendar shall be accompanied by a summary of the information relating to the rule that appeared in the most recent regulatory agenda in which the rule was identified.

"(c) An agency may propose or promulgate a major rule that was not listed in the regulatory agenda required by subsection (a) of this section only if the agency publishes with the rule an explanation of the omission of the rule from such agenda and otherwise complies with this section with respect to that rule.

"(d) Any compliance or noncompliance by the agency with the provisions of this section shall not be subject to judicial review.

"§ 633. Establishment of deadlines

"(a)(1) Whenever any agency publishes a notice of proposed rule making pursuant to section 553 of this title, the agency shall include in such notice an announcement of the date by which it intends to complete final agency action on the rule.

"(2) If any agency announcement under this section indicates that the proceeding relating to such rule will require more than one year to complete, the agency shall also indicate in the announcement the date by which the agency intends to complete each major portion of that proceeding. In carrying out the requirements of this subsection, the agency

shall select dates for completing agency action which will assure the most expeditious consideration of the rule which is possible, consistent with the interests of fairness and other agency priorities.

"(3) The requirements of this subsection shall not apply to any rule on which the agency intends to complete action within one hundred and twenty days after providing notice of the proposed action.

"(b) If an agency fails to complete action in a proceeding, or a major portion of the proceeding, by the date announced pursuant to subsection (a) of this section, or, in the case of a proceeding described in paragraph (3) of such subsection, if an agency fails to complete action within one hundred and twenty days after providing notice of such proposed action, and the expected delay in completing action will exceed thirty days, the agency shall promptly announce the new date by which the agency intends to complete action in such proceeding and new dates by which the agency intends to complete action on each major portion of the proceeding.

"(c) Compliance or noncompliance by an agency with the provisions of this section shall not be subject to judicial review except in accordance with subsection (d).

"(d) In determining whether to compel agency action unreasonably delayed pursuant to section 706(a)(1) of this title, the reviewing court shall consider, in addition to any

other relevant factors, the extent to which the agency has failed to comply with this section.

"SUBCHAPTER IV—REPORT TO THE CONGRESS

"§ 641. Annual report

"Not later than January 31 of each year, the President shall report to the Congress on the regulatory activities of the Government. The report shall include—

"(1) a description of the regulatory functions and activities of the Government, and the relationship of such functions and activities to national needs; and

"(2) an estimate, for the national economy and for each of the major sectors of the national economy, of the costs and benefits resulting from—

"(A) all major rules promulgated during the preceding fiscal year;

"(B) all major rules included on the regulatory agenda published under section 632 of this title during April and October of the year preceding the year in which the report is made; and

"(C) all major rules scheduled for review under section 631 of this title to the extent possible.".

(b) Such chapter is further amended—

(1) by inserting after the chapter analysis the following new subchapter heading:

"SUBCHAPTER I—REGULATORY FLEXIBILITY";

and

(2) by striking out "this chapter" each place it appears in subchapter I and inserting in lieu thereof in each such place "this subchapter".

(c) The chapter analysis of such chapter is amended—

(1) by inserting after the chapter heading the following new subchapter heading:

"SUBCHAPTER I—REGULATORY FLEXIBILITY";

and

(2) by adding at the end thereof the following:

"SUBCHAPTER II—ANALYSIS OF AGENCY PROPOSALS

"Sec.
"621. Definitions.
"622. Regulatory analysis.
"623. Judicial review.
"624. Executive oversight.

"SUBCHAPTER III—REGULATORY PRIORITIES AND REVIEW

"631. Review of agency rules.
"632. Regulatory agenda and calendar.
"633. Establishment of deadlines.

"SUBCHAPTER IV—REPORT TO THE CONGRESS

"641. Annual report.".

JUDICIAL REVIEW

SEC. 5. Section 706 of title 5, United States Code, is amended to read as follows:

"§ 706. Scope of review

"(a) To the extent necessary to decision and when presented, the reviewing court shall independently decide all relevant questions of law, interpret constitutional and statutory

provisions, and determine the meaning or applicability of the terms of agency action. The reviewing court shall—

"(1) compel agency action unlawfully withheld or unreasonably delayed; and

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

"(D) without observance of procedure required by law;

"(E) unsupported by substantial evidence in a proceeding subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

"(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

"(b) In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

"(c) In making determinations concerning statutory jurisdiction or authority under subsection (a)(2)(C) of this section, the court shall require that action by the agency is within the scope of the agency jurisdiction or authority on the basis of the language of the statute or, in the event of ambiguity, other evidence of ascertainable legislative intent. In making determinations on other questions of law, the court shall not accord any presumption in favor of or against agency action, but in reaching its independent judgment concerning an agency's interpretation of a statutory provision, the court shall give the agency interpretation such weight as it warrants, taking into account the discretionary authority provided to the agency by law.

"(d) In making a finding under subsection (a)(2)(A) of this section, the court shall determine whether the factual basis of a rule adopted in a proceeding subject to section 553 of this title is without substantial support in the rule making file.".

VENUE

SEC. 6. (a) Section 2112 of title 28, United States Code, is amended—

(1) by striking out the last three sentences of subsection (a);

(2) by redesignating subsections (b) and (c) as subsections (c) and (d), respectively; and

(3) by inserting after subsection (a) the following new subsection:

"(b)(1) If proceedings have been instituted in two or more courts of appeals with respect to the same agency action and the first such proceeding was instituted more than five days before the second, the record shall be filed in that court in which the proceeding was first instituted. If the first such proceeding was not instituted more than five days before the institution of a later proceeding with respect to the same agency action, and the agency, board, commission, or officer concerned has received written notice from the parties instituting each of these proceedings, the agency, board, commission, or officer concerned shall promptly advise in writing the Administrative Office of the United States Courts, with respect to the first proceeding and all proceedings initiated within five days of the first proceeding, that such multiple proceedings have been instituted and shall identify each court for which it has notice that such proceedings are pending. Pursuant to a system of random selection devised for this purpose, the Administrative Office thereupon shall select the court in which the record shall be filed from among those identified by the agency. Upon notification of such selection, the agency, board, commission, or officer concerned shall promptly file the record in such court. For the purpose of review of agency action which has previously been remanded

to the agency, board, commission, or officer concerned, the record shall be filed in the court of appeals which remanded such order.

"(2) Where proceedings have been instituted in two or more courts of appeals with respect to the same agency action and the record has been filed in one of such courts pursuant to paragraph (1), the other courts in which such proceedings are pending shall promptly transfer such proceedings to the court of appeals in which the record has been filed. Pending selection of a court pursuant to subsection (1), any court in which a proceeding has been instituted may postpone the effective date of the agency action until fifteen days after the Administrative Office has selected the court in which the record shall be filed. Such postponement by the court may thereafter be modified, revoked, or extended by the court in which the record is to be filed.

"(3) Any court in which a proceeding with respect to any agency action is pending, including any court selected pursuant to paragraph (1), may transfer such proceeding to any other court of appeals for the convenience of the parties or otherwise in the interest of justice.".

(b) Section 604(a) of title 28, United States Code, is amended—

(1) by redesignating paragraphs (17) and (18) as paragraphs (18) and (19), respectively, and

(2) by inserting after paragraph (16) the following new paragraph:

"(17) Pursuant to section 2112 of this title, where proceedings with respect to action of any agency, board, commission, or officer have been instituted in two or more courts of appeals, administer a system of random selection to determine the appropriate court in which the record is to be filed.".

ADVISORY COMMITTEE

SEC. 7. Clause (iii) of section 3(2)(C) of the Federal Advisory Committee Act is amended to read as follows: "(iii) any committee which is composed wholly of full-time officers or employees of the Federal Government, or elected officials of State or local governments acting in their official capacities or their representatives or representatives of their national organizations.".

RESOLUTION OF AGENCY JURISDICTIONAL CONFLICT

SEC. 8. (a) Section 2201 of title 28, United States Code, is amended by inserting "(a)" before "In" and by adding at the end thereof the following new subsections:

"(b)(1) Except as provided in paragraph (3), upon the filing of an appropriate pleading by a regulatory agency or a public utility, the district courts shall have original jurisdiction of any civil action or proceeding to resolve a controversy between two or more regulatory agencies, with respect to

jurisdiction to regulate any of the rates, services, or records relating thereto, of a public utility unless all of such agencies are agencies of the same State.

"(2) If any party shall apply to the court before whom the pleading is filed for leave to adduce additional evidence relevant to a finding of jurisdiction, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such additional evidence in proceedings before one or more of the regulatory agency parties to the action brought hereunder, the court may order such additional evidence to be taken before any of such regulatory agencies and to be adduced upon the hearing in such manner and upon such terms and conditions as the court deems proper.

"(3) If the courts of appeals have exclusive original jurisdiction to review agency action of a regulatory agency, then an action or proceeding under this subsection with respect to a controversy to which such regulatory agency is a party shall be brought in such court of appeals rather than in the district court.

"(c) The court may declare the rights and other legal relations of the parties to an action or proceeding brought under subsection (b) to the extent necessary to resolve the controversy with respect to jurisdiction and may take any action necessary to maintain the status quo pending such dec-

laration, or pending appeal of such declaration, including staying any civil action or proceeding that might be affected by such declaration. Such action or declaration shall not be withheld—

"(1) on the ground that a controversy with respect to matters other than jurisdiction to regulate may exist between or among the parties,

"(2) due to failure to pursue or exhaust any administrative remedies, or

"(3) due to inconsistent provisions of other statutes providing for judicial review of such agency action, including the regulatory statutes under which the controversy has arisen.

Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

"(d) For purposes of this subsection—

"(1) the term 'State' includes the District of Columbia and any territory or possession of the United States;

"(2) the term 'public utility' is any entity which offers its services to the public or any segment thereof, and whose rates are subject to regulation on a cost of service or rate of return basis by one or more regulatory agencies;

"(3) the term 'regulatory agency' includes any agency having or exercising any regulatory function with respect to any public utility; and

"(4) the term 'agency' means the United States, a State or political subdivision of a State, or any agency or instrumentality of the United States or any such State subdivision or agency.".

(b)(1) Chapter 151 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 2203. Process and procedure

"In any civil action or proceeding under section 2201(b) of this title, (1) the United States or any agency of the United States may join or be joined as a party, (2) any State or State subdivision or agency thereof may join or, with its consent where necessary, be joined as a party, and a district court may issue its process for such purposes without regard to territorial limitations.".

(2) The table of sections for chapter 151 of title 28, United States Code, is amended by adding at the end thereof the following new item:

"2203. Process and procedure.".

(c)(1) Chapter 87 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 1409. Public utility jurisdictional controversies

"Any civil action or proceeding for a declaratory judgment under section 2201(b) of this title may be brought in any judicial district in which the public utility resides or has its principal office, or in the United States District Court for the District of Columbia, except that whenever one or more States or subdivisions thereof or the agencies of a State or a subdivision thereof are parties, the civil action or proceeding must be brought in a judicial district within one of such States.".

(2) The table of sections for chapter 87 of title 28, United States Code, is amended by adding at the end thereof the following new item:

"1409. Public utility jurisdictional controversies.".

PROHIBITION AGAINST INTERVENOR FUNDING

SEC. 9. (a) Subchapter II of chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following new section:

"§ 560. Prohibition against intervenor funding

"Except as provided in section 504 of this title, section 2412 of title 28, section 319 of the Federal Power Act, section 18(h) of the Federal Trade Commission Act, section 7(c) of the Consumer Product Safety Act, section 22 of the Act entitled 'An Act to provide certain basic authority for the Department of State', approved August 1, 1956, and paragraphs (4) and (5) of section 6(c) of the Toxic Substances

Control Act, and except as otherwise expressly authorized by statute, no appropriated funds available to any agency may be used to pay the expenses of persons participating or intervening in agency proceedings.".

(b) The table of sections for such chapter is amended by adding at the end thereof the following:

"560. Prohibition against intervenor funding.".

USE OF STATE AND LOCAL REQUIREMENTS

SEC. 10. (a) Subchapter II of chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following new section:

"§ 561. Use of duplicative State or local requirements

"(a) Except as otherwise provided by law, the head of each Federal agency is authorized, in the administration of a Federal statute with respect to any State or locality, to adopt as a Federal rule a regulation of that State or local government or use as a Federal recordkeeping or reporting requirement or implementation procedure a recordkeeping or reporting requirement or implementation procedure of that State or locality if the head of the agency determines—

"(1) that such State or local government regulation, implementation procedure, recordkeeping requirement, or reporting requirement duplicates a Federal regulation, procedure, recordkeeping requirement, or reporting requirement; and

"(2) that such State or local government regulation, implementation procedure, recordkeeping requirement, or reporting requirement is substantively equivalent to or more stringent than the Federal regulation, procedure, recordkeeping requirement, or reporting requirement.

"(b) When the head of an agency determines to use a State or local recordkeeping or reporting requirement, or implementation procedure, as a Federal recordkeeping or reporting requirement or implementation procedure in that State or locality, the head of the agency shall prepare, at a minimum, a written statement of the reasons for any determination made under subsection (a), and shall make such statement available to the public.

"(c) This section does not limit the authority or responsibility of the head of any agency to enforce Federal law.".

(b) Section 551(5) of title 5, United States Code, is amended by inserting a comma and "or the adoption of a rule pursuant to section 561 of this title" before the semicolon.

(c) The table of sections for chapter 5 of such title is amended by inserting after the item relating to section 560 the following new item:

"561. Use of duplicative State or local requirements.".

PRESIDENTIAL AUTHORITY

SEC. 11. Nothing in this Act (1) limits the exercise by the President of the authority and responsibility that the

President otherwise possesses under the Constitution and other laws of the United States with respect to regulatory policies, procedures, and programs of departments, agencies, and offices, or (2) alters in any manner rulemaking authority vested by law in an agency to initiate or complete a rule making proceeding, or to issue, modify, or rescind a rule.

CONFORMING AMENDMENTS

SEC. 12. (a) Section 33(c) of the Federal Energy Administration Act of 1974 (15 U.S.C. 789(c)) is amended by striking out "(without regard to subsection (a)(2) thereof)" and inserting in lieu thereof "(without regard to clauses (2) and (4) of subsection (a) of such section)".

(b)(1) Section 3(e)(1) of the Federal Hazardous Substances Labeling Act (15 U.S.C. 1262(e)(1)) is amended by striking out "(other than clause (B) of the last sentence of subsection (b) of such section)" and inserting in lieu thereof "(other than paragraphs (2)(A) and (3) of subsection (b) of such section)".

(2) Section 3(e)(3)(C) of such Act (15 U.S.C. 1262(e)(3)(C)) is amended by inserting "(a)" after "section 706".

(c)(1) Section 5(a) of the Poison Prevention Packaging Act of 1970 (15 U.S.C. 1474(a)) is amended by striking out "(other than paragraph (3)(B) of the last sentence of subsection (b) of such section)" and inserting in lieu thereof "(other

than paragraphs (2)(A) and (3) of subsection (b) of such section)".

(2) Section 5(b)(3) of such Act (15 U.S.C. 1474(b)(3)) is amended by inserting "(a)" after "section 706".

(d) Section 19(c)(1)(B)(iii)(II) of the Toxic Substances Control Act (15 U.S.C. 2618(c)(1)(B)(iii)(II)) is amended by striking out "section 553(c)" and inserting in lieu thereof "section 553(c)(6)".

(e) Section 4218(b) of title 18, United States Code, is amended—

(1) by striking out "section 553(b)(3)(A)" and inserting in lieu thereof "section 553(a)(3)"; and

(2) by striking out "statements" and inserting in lieu thereof "statement".

(f) Section 409 of the General Education Provisions Act (20 U.S.C. 1221e–4) is amended by striking out "exception provided under section 553(b)" and inserting in lieu thereof "exceptions provided under subsection (a)(3) and paragraphs (2)(A) and (3) of subsection (b) of section 553".

(g)(1) Section 508 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 358) is amended—

(A) by striking out "section 4 of the Administrative Procedure Act (5 U.S.C. 1003)" in subsection (c) and inserting in lieu thereof "section 553"; and

(B) by striking out "section 4 of the Administrative Procedure Act (5 U.S.C. 1003)" in subsection (e) and inserting in lieu thereof "section 553".

(2) Section 514(e)(4) of such Act (21 U.S.C. 360d(e)(4)) is amended by striking out "subsection (b)(A)" and inserting in lieu thereof "subsection (a)(3)".

(h) Section 426(a) of the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. 936(a)) is amended by striking out "subsection (a) thereof" and inserting in lieu thereof "subsection (a) (1), (2), and (4) of such section".

(i) Section 5(a) of the Deepwater Port Act of 1974 (33 U.S.C. 1504(a)) is amended by striking out "without regard to subsection (a) thereof" and inserting in lieu thereof "without regard to clauses (1), (2), and (4) of subsection (a) of such section".

(j) Section 10(a) of the Act of June 30, 1936 (49 Stat. 2036, as amended; 41 U.S.C. 43a(a)) is amended by striking out "section 4 of the Administrative Procedure Act, such Act" and inserting in lieu thereof "section 553 of title 5, United States Code, the provisions of chapters 5, 6, and 7 of such title".

(k) Section 2(a)(2) of the Act of June 25, 1936 (52 Stat. 1196; 41 U.S.C. 47(a)(2)) is amended by striking out "subsections (b), (c), (d), and (e) of section 553 of title 5, United States Code," and inserting in lieu thereof "section 553 of

title 5, United States Code (without regard to clauses (1), (2), and (4) of subsection (a) of such section)".

(l) Section 170A(c) of the Atomic Energy Act of 1954 (42 U.S.C. 2210a(c)) is amended by striking out "(without regard to subsection (a)(2) thereof)" and inserting in lieu thereof "(without regard to clauses (2) and (4) of subsection (a) of such section)".

(m) Section 6(c)(2) of the Noise Control Act of 1972 (42 U.S.C. 4905(c)(2)) is amended by striking out "the first sentence of".

(n) Section 501(b)(3) of the Department of Energy Organization Act (42 U.S.C. 7191(b)(3)) is amended by striking out "subsection (a)(2) of such section with respect to public property, loans, grants, or contracts" and inserting in lieu thereof "subsection (a)(4) of such section".

(o) Section 307(d) of the Clean Air Act (42 U.S.C. 7607(d)) is amended by striking out "subparagraphs (A) or (B) of subsection 553(b)" in paragraph (1)(N) and inserting in lieu thereof "subsection (a)(3) and paragraphs (2)(A) and (3) of subsection (b) of section 553".

(p) Section 102(a) of the Ocean Thermal Energy Conversion Act of 1980 (42 U.S.C. 9112(a)) is amended by striking out "without regard to subsection (a) thereof" and inserting in lieu thereof "without regard to clauses (1), (2), and (4) of subsection (a) of such section".

(q) Section 310 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1740) is amended by striking out "section 553(a)(2)" and inserting in lieu thereof "clauses (2) and (4) of section 553(a)".

CONGRESSIONAL REVIEW

SEC. 13. (a) Title 5, United States Code, is amended by inserting immediately after chapter 7 the following new chapter:

"CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULE MAKING

"Sec.
"801. Definitions.
"802. Congressional review of agency rules.
"803. Procedures for consideration of resolutions of disapproval.

"§ 801. Definitions

"For purposes of this chapter—

"(1) the term 'agency' has the same meaning as in section 551(1) of this title;

"(2) the term 'rule' means any rule which is subject to section 553 of this title;

"(3) the term 'resolution of disapproval' means a concurrent resolution of the Congress, the matter after the resolving clause of which is as follows: 'That the Congress disapproves the recommended final rule issued by dealing with the matter of , which rule was transmitted to the Congress on .', the first blank being

filled with the name of the agency issuing the rule, the second blank being filled with the title of the rule and such further description as may be necessary to identify it, and the third blank being filled with the date of transmittal of the rule to the Congress; and

"(4) the term 'appropriate committee' means the committee of the House of Representatives and the committee of the Senate which has primary legislative jurisdiction over the statute pursuant to which an agency issues a rule.

"§ 802. Congressional review of agency rules

"(a)(1) The provisions of this section do not apply to—

"(A) any rule for which an agency makes a finding under section 553(b)(3) of this title;

"(B) any rule of particular applicability that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing; and

"(C) any rule if—

"(i) the agency made a finding with respect to such rule under section 553(b)(2) of this title; or

"(ii) the head of the agency determines that the rule is being issued in response to an emergency situation or other exceptional circumstances requiring immediate agency action in the public interest; and

"(iii) on the date on which the agency issues the rule, the head of the agency submits to the chairman and ranking minority member of the appropriate committees a written notice specifying the reasons for the determination of the agency under clause (i) or (ii) of this subparagraph.

"(2) Notwithstanding any other provision of law, unless earlier withdrawn by the agency or earlier set aside by judicial action, a rule to which paragraph (1)(C) of this subsection applies shall terminate one hundred and twenty days after the date on which it is issued.

"(b)(1) Notwithstanding any other provision of law, any final rule subject to this section shall be considered a recommendation of the agency to the Congress and shall have no force and effect as a rule unless such rule has become effective in accordance with this section.

"(2)(A) Notwithstanding any other provision of law, no recommended final rule of an agency may become effective until the expiration of a period of forty-five days of continuous session of Congress after the date on which the rule is

received by the Congress under paragraph (4) of this subsection. If before the expiration of such forty-five-day period, either appropriate committee orders reported or is discharged from consideration of a resolution of disapproval with respect to such rule, such rule may not become effective if within thirty days of continuous session of Congress after the date on which such committee orders reported or is discharged from further consideration of such resolution, one House of Congress agrees to such resolution of disapproval of the rule and within thirty additional days of continuous session of Congress after the date of transmittal of the resolution of disapproval to the other House, such other House agrees to such resolution of disapproval.

"(B) Whenever an appropriate committee reports a resolution of disapproval pursuant to this paragraph, the resolution shall be accompanied by a committee report specifying the reasons for the committee's action.

"(C) Notwithstanding subparagraph (A) of this paragraph, a recommended final rule may become effective at any time after the day on which either House of Congress defeats a resolution of disapproval, and, in the case of the Senate, a motion to reconsider such resolution is disposed of.

"(3)(A) Except as provided in subparagraph (B) of this paragraph, if Congress adjourns sine die at the end of a Congress prior to the expiration of the periods specified in para-

graph (2)(A) of this subsection with respect to a recommended final rule, the rule shall not become effective during that Congress. The agency which issued such recommended final rule may transmit such rule at any time after the first day of the following Congress in accordance with paragraph (4) of this subsection, and the periods specified in paragraph (2)(A) of this subsection with respect to any such rule shall begin on the date such rule is transmitted to the Congress.

"(B) If—

"(i) Congress adjourns sine die at the end of a Congress prior to the expiration of the periods specified in paragraph (2)(A) of this subsection with respect to a recommended final rule;

"(ii) an agency transmits such recommended final rule to the Congress at least forty-five days of continuous session of Congress prior to the day on which Congress adjourns sine die at the end of a Congress; and

"(iii) either House of Congress does not adopt a resolution of disapproval with respect to such recommended final rule prior to the day on which Congress adjourns sine die at the end of a Congress,

such rule may become effective at any time after the day on which Congress adjourns sine die at the end of a Congress.

"(4)(A) On the day on which a recommended final rule is transmitted for publication to the Federal Register, an

agency shall transmit to the Secretary of the Senate and the Clerk of the House of Representatives a copy of the complete text of such recommended final rule and a copy of any other materials transmitted to the Federal Register with such rule.

"(B)(i) If either House of Congress is not in session on the day on which a recommended final rule is transmitted for publication to the Federal Register, the periods specified in paragraph (2)(A) of this subsection with respect to such rule shall begin on the first day thereafter when both Houses of Congress are in session.

"(ii) The Secretary of the Senate and the Clerk of the House of Representatives are authorized to receive recommended final rules and materials transmitted under this paragraph on days when the Senate or the House of Representatives, as the case may be, is not in session.

"(C) On the day on which the Secretary of the Senate and the Clerk of the House of Representatives receive a recommended final rule and the materials transmitted with such rule, the Secretary and the Clerk shall transmit a copy of such rule and such materials to the appropriate committees.

"(c)(1) If a recommended final rule of an agency is disapproved under this section, the agency may issue a recommended final rule which relates to the same acts or practices as the disapproved rule. Such recommended final rule—

"(A) shall be based upon—

"(i) the rule making record of the recommended final rule disapproved by the Congress; or

"(ii) such rule making record and the record established in supplemental rule making proceedings conducted by the agency in accordance with section 553 of this title, in any case in which the agency determines that it is necessary to supplement the existing rule making record; and

"(B) may reflect such changes as the agency considers necessary or appropriate including such changes as may be appropriate in light of congressional debate and consideration of the resolution of disapproval with respect to the rule.

"(2) An agency, after issuing a recommended final rule under this subsection, shall transmit such rule to the Secretary of the Senate and the Clerk of the House of Representatives in accordance with subsection (b) of this section, and such rule shall only become effective in accordance with such subsection.

"(d) Congressional inaction on or rejection of a resolution of disapproval with respect to a recommended final rule shall not be deemed an expression of approval of such rule.

"§ 803. Procedures for consideration of resolutions of disapproval

"(a) The provisions of this section, paragraphs (3) and (4) of section 801, and paragraphs (2)(B) and (4)(C) of section 802(b) are enacted by Congress—

"(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions of disapproval; and they supersede other rules only to the extent that they are inconsistent therewith; and

"(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

"(b) Except as provided in subsection (e) of this section, resolutions of disapproval shall, upon introduction or receipt from the other House of Congress, be immediately referred by the presiding officer of the Senate or the House of Representatives to the appropriate committee of the Senate or the House of Representatives, as the case may be.

"(c)(1)(A) Except as provided in subparagraph (B) of this paragraph, if the committee to which a resolution of dis-

approval has been referred does not report such resolution within thirty days of continuous session of Congress after the date of transmittal to the Congress of the recommended final rule to which such resolution relates, it shall be in order to move to discharge the committee from further consideration of such resolution.

"(B) If the committee to which a resolution of disapproval transmitted from the other House has been referred does not report such resolution within twenty days after the date of transmittal of such resolution from the other House, it shall be in order to move to discharge such committee from further consideration of such resolution.

"(2) Any motion to discharge under paragraph (1) of this subsection must be supported in writing by one-fifth of the Members, duly chosen and sworn, of the House of Congress involved, and is highly privileged in the House and privileged in the Senate (except that it may not be made after a resolution of disapproval has been reported with respect to the same rule); and debate thereon shall be limited to not more than one hour, the time to be divided in the House of Representatives equally between those favoring and those opposing the motion to discharge and to be divided in the Senate equally between, and controlled, by the majority leader and the minority leader or their designees. An amendment to the motion is not in order.

"(d)(1) Except as provided in paragraphs (2) and (3) of this subsection, consideration of a resolution of disapproval shall be in accord with the rules of the Senate and of the House of Representatives, respectively.

"(2) When a committee has reported or has been discharged from further consideration of a resolution of disapproval, or when the companion resolution from the other House has been placed on the calendar of the first House, it shall be in order, notwithstanding the provisions of rule XXII of the Standing Rules of the Senate or any other rule of the Senate or the House of Representatives, at any time thereafter (even though a previous motion to the same effect has been disagreed to) to move to proceed to the immediate consideration of either such resolution. The motion is highly privileged in the House and privileged in the Senate and is not debatable. An amendment to the motion is not in order.

"(3) Debate on a resolution of disapproval shall be limited to not more than two hours (except that when one House has debated its resolution of disapproval, the companion resolution shall not be debatable), which shall be divided in the House of Representatives equally between those favoring and those opposing the resolution and which shall be divided in the Senate equally between, and controlled, by the majority leader and the minority leader or their designees. A motion further to limit debate is not in order. An amendment to, or

motion to recommit the resolution is not in order. A motion to reconsider shall be in order only on the day on which occurs the vote on adoption of the resolution of disapproval, and shall not be debatable. Any other motions shall be decided without debate.

"(e) If a resolution of disapproval has been ordered reported or discharged from the committee of the House to which it was referred, and that House receives a resolution of disapproval with respect to the same rule from the other House, the resolution of disapproval of the other House shall be placed on the appropriate calendar of the first House. If prior to the disposition of a resolution of disapproval of one House, that House receives the companion resolution of disapproval from the other House, the vote in the first House shall occur on the resolution of disapproval of the other House.

"(f) The provisions of this chapter supersede any other provision of law requiring action by both Houses of Congress for congressional review or disapproval of agency rules to the extent such other provisions are inconsistent with this chapter. The provisions of this chapter do not supersede any other provisions of law requiring action by only one House of Congress for congressional review or disapproval of agency rules.

"(g) For the purposes of this chapter—

"(1) continuity of session is broken only by an adjournment sine die at the end of a Congress; and

"(2) the days on which either House is not in session because of an adjournment or recess of more than fifteen days are excluded in the computation of days of continuous session.".

(b) The table of chapters for part I of title 5, United States Code, is amended by inserting immediately after the item relating to chapter 7 the following:

"8. Congressional Review of Agency Rule Making ..... 801".

SEVERABILITY

SEC. 14. If the provisions of any part of this Act or the amendments made by this Act, or the application thereof, to any person or circumstances is held invalid, the provisions of the other parts of this Act or the amendments made by this Act and their application to other persons or circumstances shall not be affected.

OPEN MEETINGS

SEC. 15. Section 552b(a)(1) of title 5, United States Code, is amended by inserting before the semicolon a comma and "and also means the Chrysler Corporation Loan Guarantee Board".

EFFECTIVE DATES

SEC. 16. (a)(1) The provisions of sections 2, 3, 5, and 12 of this Act and the amendments made by such sections, and the provisions of subchapter II of chapter 6 of title 5,

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United States Code (as added by section 4 of this Act), shall take effect on January 1, 1985, and shall not apply to any proceeding for which a notice of proposed rule making was issued before such effective date or to any other agency action initiated before such effective date.

(2) The provisions of section 621(4)(IV) of title 5, United States Code (as added by section 4 of this Act) shall not be in effect after June 30, 1985, unless the President certifies that the extension or reinstitution of such provisions is necessary to allow the Federal agencies authorized to issue rules identified in that section to take expeditious and appropriate action to preserve the viability, safety, or soundness of federally insured depository institutions. Any certification by the President under this subsection may only be made for a single one-year period beginning after June 30, 1985.

(b) The provisions of subchapter III of chapter 6 of title 5, United States Code (as added by section 4 of this Act) shall take effect six months after the date of enactment of this Act.

(c) The provisions of section 6 of this Act shall take effect three months after the date of enactment of this Act and shall apply, according to the provisions thereof, to review proceedings instituted after such date.

(d) The provisions of subchapter IV of chapter 6 of title 5, United States Code (as added by section 4 of this Act), and

the provisions of sections 7, 9, 10, 11, and 15 of this Act and the amendments made by such sections shall take effect on the date of enactment of this Act.

(e) The amendments made by section 8 of this Act shall take effect on the date of enactment of this Act, and shall not apply to any civil action commenced prior to such date.

(f) The provisions of section 13 of this Act and the amendments made by such section shall take effect on the first day of the Ninety-ninth Congress.

Mr. MOAKLEY. The Chair now is very pleased to hear from one of the oustanding members of this committee, Hon. Trent Lott.

STATEMENT OF HON. TRENT LOTT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSISSIPPI

Mr. LOTT. Thank you very much, Mr. Chairman. I ask unanimous consent that my full statement be made part of the hearing record, and I will give you a summary.

Mr. MOAKLEY. Without objection, Mr. Lott's statement will appear full in the record.

Mr. LOTT. Before I get started on my abbreviated remarks, I do want to refer to the questions you were asking there on the major rules. First, it imposes the economic costs which are likely to result in an annual impact on the economy of a 100 million or more, plus a second approach, otherwise as designated a major rule by the agency proposing the rule or by the President, not later than 30 days after publication, for these reasons. Because the rule would have significant adverse effects on the environment, health or safety, competition, employment, investments, productivity, innovation or the ability of enterprises and so forth, or because the rule would cause substantial increase in costs or prices for wage earners, consumers, nonprofit organizations, et cetera.

Mr. MOAKLEY. I thought he said the only thing would make it a major rule is this. I knew last year they were talking about the environmental.

Mr. LOTT. That is on page 5, H.R. 3939. [See text of H.R. 3939 on p. 121.]

Mr. Chairman, first, I would like to thank you for this opportunity to testify. As I have already said—as the plans of the full committee to have these hearings and hopefully the subcommittee to really get into it and look at all the different proposals that are being offered and hopefully take some action even if it is an affirmative stand to take no action—but I am glad we are doing this.

I think we need to clearly, as a result of *Chadha,* but also even if we hadn't had *Chadha.* I think we are developing a real problem on our hands with all these various legislative veto proposals and the need for some look at regulatory reform.

As my colleagues are aware, there are currently about 20 legislative veto provisions now on the books which apply to regulations. Moreover, there is considerable support in both Houses for a generic congressional check on all regulations.

The current chairman of this committee and I were among the 253 House cosponsors in the last Congress of H.R. 1776, the Levitas bill, which provided a one and one-half House veto for all regulations subject to informal rulemaking. And the Senate last year adopted a two-House veto as part of the regulatory reform bill it passed by a vote of 94 to 0.

The reason this strong sentiment persists for a congressional review mechanism of some sort isn't difficult to discern. Members are acutely aware of the tremendous costs and burdens imposed by regulations. They cost the economy in excess of $100 billion annually.

As I said last week in my remarks on the amendment by Mr. Levitas, what bothers me is they are not rulemaking or developing regulations. They are making law at many of these agencies.

We cannot just ignore that. I think this administration is wrong by some of the opposition to legislative veto. Every administration does it. Republican or Democrat.

The truth is they say, "Hey, we would like for it to be applicable to the next administration, but we don't want it applicable to ours."

The same is true, I think, of labor. They say, "Maybe if we have the next administration we wouldn't want it, but we would like to have it now."

It is all shortsighted. It is not partisan in my opinion. I think it is an issue that Congress should address and we should have some control over.

Now, I admit up front, before I get into the details of the proposal I have before you, it is a very sweeping, very broad, ideal approach in my opinion.

I get into a lot of areas that you might not be looking at if you take a very narrow view. But as long as I was going to draft legislation and urge that it be considered, I thought I ought to touch all these things, including sunset, including the congressional review and the Bumpers approach.

I have them all in here, and ideally that is what I would like to have. But I realize maybe that won't, in the final analysis, be what we will be able to go with.

But I would like for us to have some general guidelines.

Let me get to the provisions of the bill.

Title I of the bill deals with internal agency rulemaking improvements. It is basically the regulatory reform compromise for H.R. 746 developed in the last Congress by the Speaker, the White House, and others.

I think it is a good political base to build on, as well as a sound legislative document. In essence, it calls on agencies to perform regulatory analyses on major regulations and their alternatives.

Unlike the compromise, it requires agencies to choose the most cost-effective alternative unless another is mandated by law. The compromise would simply have allowed agencies to choose another alternative and explain why they had not chosen the most cost-effective approach.

The other departure from the compromise in H.R. 3939 is the sunset requirement for all new and existing major regulations. Under both approaches agencies are required to review all major rules at least once every 10 years.

But under the compromise, an agency could simply extend a major rule in its existing form after the review, without resubmitting it to new rulemaking or to the Congress for possible disapproval.

It is a perpetuation of existing rules without any congressional involvement.

Under H.R. 3939, the major rule would expire on its sunset date unless the agency specifically acts to renew it in the same or modified form by new rulemaking and submission to the Congress for approval.

It was our feeling that the compromise provisions provided too much incentive for agencies to renew a rule in its existing form. Like the compromise, H.R. 3939 would permit the President to add regulations to the list of major regulations both for analyses and sunset review purposes, and to adjust the sunset review timetable of an agency.

This latter provision should allow for more coordination between related rules from different agencies—something sorely lacking at present.

We have got contradictory rules on the books, and no real coordination. Even the President, who is supposed to preside over these agencies in most instances, really don't have a good way for coordinating or eliminating duplicative rules and regulations which just confound business and industry and labor and small and large business.

Mr. MOAKLEY. What is the purpose of allowing the President to name 50 or 70 rules as rules to be major rules? Why is that?

Mr. LOTT. One of the major reasons is to deal with the overlapping and conflicting rules, so that you won't base it just on a dollar amount or these other areas.

Mr. MOAKLEY. Will he be able to do that both in executive and independent regulatory agencies?

Mr. LOTT. Yes; as I understand it.

Title II of H.R. 3939 is the congressional review portion. Whereas the compromise provided only for congressional disapproval of major regulations through the enactment of joint resolutions, H.R. 3939 requires the approval of such regulations by the enactment of joint resolutions, and permits the disapproval of nonmajor rules subject to informal rulemaking by the enactment of joint resolutions.

In both instances, the President's signature would be required, and the bill thus meets the *Chadha* test. The constitutionality of this has been confirmed by the American Law Division of the Library of Congress.

Committees would be required to consider and report approval resolutions for major rules within 45 days or would be discharged. This is an expedited provision.

I think we have this process. We have a general rule. We went on to set up an expedited process—committees are not going to act or they will not allow us to really look at these things, just by sitting around endlessly instead of having a time limit.

This procedure is taken directly from the Executive Reorganization Act, both in its existing form and as reported by the Government Operations Committee in this Congress. Consideration of nonmajor rules resolutions could be forced in committees by the signature of one-fourth of the membership of either House on a motion for consideration within 30 days after the regulation is submitted.

House rules would be amended to establish a Regulatory Review Calendar to which these resolutions of approval and disapproval would be referred. It would be called on the first and third Mondays and second and fourth Tuesdays of each month.

This has been established in direct response to leadership concerns about controlling floor scheduling and will avoid the confusion and chaos otherwise associated to such privileged matters. A

House majority could still block consideration of resolution by defeating the motion to proceed to its consideration.

I appreciate that there is some opposition on this committee to any kind of expedited procedures, but I think we cannot just ignore the need for trying to force some action in a reasonable time if we are going to have any time as a kind of a general guideline in this area.

The discharge threat, I think, is necessary because in some instances you just have too much of a cozy relationship between the committees and the agencies and the various groups out there that might be affected.

So the requirement that the committees report when required must be enforceable, and that is why we have the automatic discharge provision here.

Expedited procedures are also necessary given the short review period which, in turn, is essential to permitting a rule to take effect in a reasonable time. The resolutions will not be subject to an amendment, by the way.

I think that is the only way to approach it. Otherwise you get into an interminable process of these resolutions being subject to amendment.

We have gone through that before.

Finally, title III of the bill amends House rules in three respects. One is the creation of the regulatory review calendar which I have already described.

The second is to permit limitation amendments for certain regulations to be offered during the normal amendment stage of appropriations bills rather than being in order only if the motion to rise and report is defeated, as is now the case.

Under H.R. 3939, such limitation amendments could be offered upfront to prevent the use of funds for regulations for which resolutions of disapproval have either not been considered by the House or have passed the House but not been enacted during the 90-day congressional review period.

The purpose for this proposed change is to allow for the appropriations process to be used as a last resort if things are not satisfactorily addressed by the authorizing committees or if the Senate or President should block the enactment of a disapproval resolution.

Finally, the bill amends House oversight rules to require formal committee adoption of oversight plans at the beginning of a Congress and an accounting for them in a committee's final oversight report at the end of the Congress.

We have talked about that in the past. I think there is a real need for that, to have some sort of plan for oversight at the beginning of the Congress, an accounting for them in the committee's final oversight report.

You have something upfront, here is your plan, you have to say this is what we have done in oversight, hopefully giving some results of that oversight activity.

I think these House rules changes help round out the comprehensive nature of this bill in coordinating a variety of alternatives to the legislative veto for the main purpose of restoring political accountability to the rulemaking process.

In conclusion, Mr. Chairman, I would strongly urge this committee to give serious consideration to a generic alternative to the legislative veto for Federal regulations as proposed by H.R. 3939. If this committee does not take this responsibility seriously, I fear we will once again witness the proliferation of a variety of veto alternatives on individual bills as they come to the floor.

We saw it just last week. And that is not the end of it. That is the beginning.

You saw the vote go one way and then on a separate vote in the whole House it went the other way. That is going to come again and again.

Anyone who bothers to review the appendix to the House Rules Manual containing all the confusing and conflicting variations on the traditional legislative veto cannot help but be struck by the lack of uniformity and predictability which this mish-mash of procedures inflicted on the orderly functioning of this institution.

We will not serve the House well by studying this problem to death or by waiting for the Judiciary Committee to move on some bill sometime next year. If ever a situation cried out for leadership by this committee, this is it.

I would like to sum up the bill by saying it would forbid Federal agencies from implementing regulations with an annual economic impact of more than $100 million. Agencies could just propose those major rules to Congress, and the rules would take effect only if Congress approved them and the approval were signed by the President. It provides a fast track mechanism and sets up a special regulatory review calendar.

I guess my main pitch is: Let's do something. I realize you have this question of overload. There is method in my madness.

One of my problems with Congress is I think we legislate too much. I think we are always out looking around for a way to prime the pump, a new problem to solve. We are into everything, churning out new bills. I think we should spend at least one-third of our total time legislatively in oversight and review of what we have done with programs and agencies and with regulations.

So while there are those that are saying we will overload our system, what I am hoping to do is to force the committees and the House to get away from just churning out new and perpetuating old systems and spend a little more time in our overview responsibilities than we have done now, and watching these regulations that are growing like Topsy.

One word can give an agency a license to just go off on a tangent. Again on the RCRA bill, the word "cumulative" in one amendment that was offered by Mr. Breaux would just have caused a field day for EPA to determine what that word was.

Now, you talk about stricter legislating. How strict can you get when one word is a license for an agency to do whatever they want?

I hope we will get into it, have a hearing, get into experts, a variety of experts. We are going to have to pass some sort of general guidelines or we are going to get socked with, as John Dingell said—for a variety of reasons, some of them political—a variety of legislative veto provisions.

Thank you.

[Mr. Lott's prepared statement follows:]

PREPARED STATEMENT OF HON. TRENT LOTT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSISSIPPI

Mr. Chairman, I appreciate this opportunity to testify today on the impact of the Supreme Court's decision in *Chadha* on the Congress. I especially want to commend you on recognizing the importance of this landmark decision as it affects this institution and for accepting the invitation of some 17 House committee chairmen for this committee to assess the impact of the decision and to coordinate our responses to it. This will be a monumental task but it is one which I think is both urgently and vitally necessary if we are to restore a proper balance between the two great branches of our government.

While these legislative veto provisions span a wide range of governmental activities—from war powers, arms exports, and trade, to impoundments, energy and executive reorganization—I want to confine my testimony today to the loss of the legislative veto as it applies to Federal regulations, and to suggest an alternative which I have developed in H.R. 3939, the Regulatory Oversight and Control Act of 1983.

The appendix to Justice White's dissent in *Chadha* contains an inventory of some 56 statutes having one or more currently operative legislative veto provisions, about one-third of which apply to various types of Federal regulations. The most notable of these are for the Federal Trade Commission, the Consumer Product Safety Commission, the Federal Election Commission, the Department of Education, and certain regulations of the Departments of Transportation and Agriculture and the Environmental Protection Agency.

Moreover, as my colleagues are well aware, there is strong sentiment in both Houses of Congress for a generic legislative veto for all regulations subject to informal rulemaking. In the last Congress there were 253 House cosponsors, including the chairman of this committee and myself, for Congressman Levitas' H.R. 1776 which included a 1½-House veto for regulations. And the Senate, in the last Congress, by a vote of 94–0, passed a regulatory reform bill, S. 1080, which included a two-House veto for regulations.

THE NEED FOR CONGRESSIONAL CONTROL

I don't think it is difficult to understand the persistence of such strong sentiment for some kind of congressional check on the regulatory bureaucracy. There is a growing awareness both within the Congress and beyond the beltway that Federal regulations impose a hidden tax on the economy in excess of $100 billion annually. Moreover, the OMB estimates that this cost could reach $500 billion a year by the end of this decade unless unnecessary regulations are eliminated.

As Members of Congress we have almost daily exposure to the practical problems, costs and burdens which regulations impose on businesses and constituents in our districts. We are often dumbfounded at how the law we have enacted have been translated into regulations which have the force of law. In some cases the regulations may be within the scope of our enactments but we frankly did not anticipate what costs and burdens might be necessary to implement our intent. But, in other cases the regulations bear little resemblance to what we thought was our intent in passing those laws. In any case, we still bear the ultimate responsibility for these regulations, no matter how much we might try to pass the buck and scapegoat the bureaucrats.

If you accept the view, as I do, that we bear the ultimate responsibility for regulations, then the question becomes one of how we exercise that responsibility. The legislative veto device was one means whereby we retained a final look at regulations before they took effect—before the damage was done. While it's fine for some in this marble tower on the Hill to point to all the alternatives available to the legislative veto, such as reamending the organic statute, cutting-off funds, or exerting pressures for change through the oversight process, the fact remains that in the meantime those laboring in the vineyards under these regulations have to pay a tremendous price until corrective action is taken through the normal legislative and oversight processes.

Now that the one- and two-House vetoes have been declared unconstitutional, we are again reminded of these time-consuming and belated remedies. We are told that the answer to *Chadha* is to delegate less and legislate with more precision. While we should certainly be more cautious about delegating and precise in legislating, the fact remains that in this modern age regulations will continue to be a necessity and reality. The Congress cannot possibly anticipate every contingency, and it cannot,

for both technical and political reasons, legislate with the precision necessary to implement the laws.

But, the question remains, in the minds of some: "Why should the Congress get involved in these difficult regulatory decisions? Why would we want to reopen these issues we thrashed-out in the original legislation, and get bogged-down in the minutiae of their implementation?"

As I have already indicated, if we bear the ultimate responsibility for these decisions, we should exercise that responsibility before significant damage is done. From a philosophical standpoint, I think we must recognize that we have delegated to the departments and agencies of government a lawmaking power that is ours under the Constitution: rulemaking is lawmaking. The constitutional lawmakers cannot simply turn their backs on regulations because they have delegated those powers to bureaucratic lawmakers.

As Justice White noted in his dissent to *Chadha*:

"If Congress may delegate lawmaking power to independent and executive agencies, it is most difficult to understand Article I as forbidding Congress from also reserving a check on legislative power for itself. Absent the veto, the agencies receiving delegations of legislative or quasilegislative power may issue regulations having the force of law without bicameral approval and without the President's signature."

And that is precisely the position in which *Chada* has left us. This is particularly the case with the independent regulatory agencies, the "Fourth Branch" of government, operating under broad delegations of legislative authority, and yet over which neither the President nor the Congress have any control in the wake of *Chadha*.

Justice White, perhaps prophetically, observed in his dissent that, "The wisdom and constitutionality of these broad delegations are matters that still have not been put to rest." It seems to me that the *Chadha* decision directly challenges the Congress to reassert its constitutional prerogatives over all lawmaking, whether it is termed quisi-lawmaking, rulemaking, or whatever.

In response to the argument that a congressional check on regulations will somehow inundate the institution with new responsibilities and burdens let me make one thing clear: none of the proponents of such a check on regulations realistically expects the Congress to become intimately involved in all the regulations promulgated by various agencies. Some have mistakenly criticized the legislative veto device in the past as an ineffective tool because it was so rarely exercised. But that argument missed the whole point of the deterrent effect the veto could and did have in forcing agencies to consult with Congress and accommodate our concerns before final rules were issued. The very threat of the veto often had the salutary effect of making agencies more accountable to the Congress and the public in their decisionmaking process. Without that threat, agencies felt free to ignore congressional concerns and intent.

At the same time, there are certain regulations of such magnitude that the Congress should become involved in an active sense, and the bill I have introduced takes cognizance of this need. Let me turn now to the specific provisions of H.R. 3939.

AGENCY RULEMAKING IMPROVEMENTS

Title I of H.R. 3939 is entitled, "Agency Rulemaking Improvements," and essentially contains the regulatory reform provisions included in the compromise agreed to by the Speaker, the White House and others in the last session of the 97th Congress. I don't want to dwell on all of those features, but rather highlight those provisions of special concern to this committee as it considers alternatives to the legislative veto for regulations, and those areas in which Title I departs from the compromise to H.R. 746.

It was the feeling of our Republican leadership group in developing this legislation that the bipartisan compromise from the last Congress was a sound political base on which to build, and that meaningful regulatory reform should be a central component in restoring political accountability to the rulemaking process and in making the legislative veto alternative in title II a responsible and workable process.

Under title I, agencies would be required to perform regulatory analyses on major rules and their alternatives. Major rules are defined as those having an annual impact on the economy of $100 million or more or which would otherwise have a significant adverse effect or result in substantial costs or prices. The President would be allowed to add rules to this list. Agencies would then be required to choose the most cost-effective alternative unless another alternative is mandated by law. This latter provision is a departure from the compromise which would have allowed

agencies to choose an alternative other than the most cost-effective, and simply explain why they had not chose the most cost-effective.

Agencies would also be required to establish a review schedule for all existing major rules, to be performed every 10 years. For both new and existing major rules, this schedule for review would be accompanied by a sunset date, at which time the rule would automatically expire unless the agency sought to renew it in the same or modified form, thus requiring a new rulemaking and submission to Congress. This sunset concept is the second departure from the compromise which would have allowed agencies to renew a rule after the review without new rulemaking or submission to Congress. It was our feeling that this provision of the compromise provided too much of an incentive for agencies to retain major rules in their existing form.

The President could add rules to this review schedule, and would be allowed to change the review year for particular rules providing he does not increase the number of rules an agency has scheduled for review in any one year. This provision, combined with limited Executive oversight of the major rule process, would permit some coordination of related rules of different agencies—something which is sadly lacking at present and which has given rise to various conflicting regulations.

CONGRESSIONAL REVIEW OF RULEMAKING

Title II of the bill is entitled, "Congressional Review of Agency Rulemaking," and provides that all rules subject to informal rulemaking under section 553 of the Administrative Procedure Act must be submitted to Congress for a 90-day review period. Within that period, major rules must be approved, and other rules could be disapproved, by the enactment of a joint resolution. This would require the signature of the President in both instances, and thus meets the *Chadha* test for congressional and Presidential involvement. The American Law Division of the Congressional Research Division, in a legal memorandum of July 20, 1983, has confirmed that this approach would be constitutional.

Why should we require the affirmative action of the Congress and President for major regulations? Why not subject all regulations to disapproval resolutions? The main reason is that these regulations, by their very definition, will have a substantial impact on the economy and thus deserve the special attention of both branches. As the *Chadha* decision has underscored, lawmaking requires the active involvement of both the legislative and executive branches under our Constitution, and major regulations are more than mere technical rules to implement a law: they also constitute major new laws, just as if we had gone back to amend the organic statute to fill-in the blanks.

Second, affirmative action on major regulations is necessary from a practical standpoint. Obviously, if an executive branch regulation were only subject to disapproval, the President could veto that resolution and it would then require two-thirds of both Houses to block that regulation. Put another way, in such a situation, one-third plus one Member of either House could put a major regulation into effect, thus turning the Constitution on its head.

It has been charged by some that this approval approach to major regulations converts agencies into mere advisory bodies to the Congress. I strongly disagree with that characterization. No one is proposing that the Congress completely duplicate the rulemaking proceedings of the agencies. We will obviously have to depend heavily on the proceedings and analyses conducted by the agencies. Moreover, unlike legislation proposed by the Executive, we will not be able to amend these regulations under this process; we will simply be able to accept or reject them in the form presented. There will be a heavy responsibility on us to indicate an alternative in our committee reports or floor debates if we plan to reject a particlar rule. And this is where the requirement for agencies to perform analyses of various alternatives to a major rule will be most helpful to us.

Under the bill, all rules submitted to Congress would be referred to the one committee of each House which has primary legislative jurisdiction over the statute or agency under which the rule is promulgated. For major rules, the chairman of the committee would be required to introduce a resolution of approval no later than 1 day after the rule is submitted. The committee would then be required to report the resolution not later than 45 days after submission, and if it does not, it would be discharged, and the resolution would be placed on the appropriate calendar and would be privileged for consideration.

I should point out here that this expedited process is drawn directly from the Executive Reorganization Act's expedited procedures for considering reorganization plans submitted by the President. It has been retained in this year's bill extending that act as reported by the House Government Operations Committee. That bill also

switches from disapproval of reorganization plans by concurrent resolution, to approval by joint resolution. So, we have Chairman Brooks to thank in part for the innovative approach taken by our bill with respect to major regulations.

For nonmajor rules, if a resolution of disapproval is introduced, it is in order at anytime thereafter for a Member to file at the Clerk's desk what I have termed, a motion for consideration. This could be filed up to 25 days after the rule is submitted, and, if a Member collects the signatures of one-fourth of the House involved by the 30th day, the committee to which the resolution was referred would be required to consider and report it, either favorably or adversely. If it does not do so by the 45th day after the submission of the rule, the committee would be discharged, the resolution would be placed on the appropriate calendar, and would be privileged for consideration.

The motion for consideration is what I call a "front-end discharge" device, specifically designed to give committees adequate notice and time for deliberation if there is substantial support for a disapproval resolution. As such it differs from other discharge mechanisms often associated with legislative vetoes which have permitted Members to blindside committees at the last minute and bring up resolutions on the floor without time for the committee to make a recommendation. The front-end discharge approach, on the other hand, accords proper deference to the role of committees in the legislative process, but more importantly is designed to give the Congress the benefit of committee findings and recommendations in reaching an informed decision. This is particularly important with respect to regulations which often involve highly technical issues.

THE NEED FOR EXPEDITED PROCEDURES

It may be asked: Why, if you're so concerned with protecting the prerogatives of committees, does your bill provide for special discharge mechanisms if they don't act by a certain time? The simple answer is that we're ultimately concerned with protecting the right of the Congress to act and in protecting the public before they are saddled with regulations that may be too costly or burdensome.

I appreciate the fact that there are some on this committee who are deadset against any kind of expedited procedures that allow committee reporting prerogatives and leadership scheduling prerogatives to be circumvented or mandated. But I would submit that such procedures are essential in the case of regulations to the workability and credibility of the entire process.

For resolutions of approval, the need for bringing these matters to a vote is obvious, since major rules cannot take effect without the affirmative action of both Houses and the President. But, for nonmajor rule resolutions, expedited procedures are especially critical because of the perceived cozy relationship between certain committees and their sister agencies, and the prospect that these committees might otherwise bottle-up resolutions and prevent a vote on them. The special discharge procedures are therefore necessary to break this iron triangle lock on resolutions if committees do not report them as they are required to do under the bill. And I think it's important to emphasize that the special discharge procedure is simply an enforcement mechanism to ensure that committees report when required. If they do, then the discharge mechanism will never be necessary.

A second and related aspect of the discharge threat is its importance to making the congressional review process credible to the agencies in the case of nonmajor rules. As I mentioned previously, the main benefit of the traditional legislative veto was not in its actual exercise but in the real possibility that it might be used. This prospect is diminished when there is not the discharge alternative if agencies think they can prevail on their parent committees to bottle-up a resoluton. If, on the other hand, they think a substantial number of Members can force the issue to the floor anyway, then they are more likely to take congressional concerns into account even before they promulgate a final regulation.

A third need for expedited procedures is the short time available for acting on such resolutions—90-days of continuous session for the whole process to run, and only 45 days for a committee to report. These shortened time periods are needed to avoid the charge that Congress is unnecessarily delaying the effective-date of a regulation. Obviously the normal legislative process often takes months to run its course, a luxury that cannot be afforded when it comes to regulations. While it may be argued that that is one good reason not to subject such regulations to even an abbreviated legislative process, I think the expedited course for legislations can be justified on two grounds: First, it will not be necessary for Congress to duplicate all the hearings and analyses already performed by the agencies; and second, the reso-

lutions will not be subject to amendment in committee or on the floor as a normal bill would be, and therefore the issues and alternatives will be less complicated.

Another aspect of the expedited procedures in this bill is the privilege attached to resolutions of approval and disapproval once they have been reported or discharged. This has been a cause of concern to the leadership in the past with respect to legislative veto resolutions because such privilege takes the scheduling prerogative out of the hands of the leadership and would permit Members to call up such resolutions at any time. H.R. 3939 addresses this concern in a title III amendment to House rules by establishing a Regulatory Review Calendar in the House to which these resolutions would be referred. This calendar would be called on the first and third Mondays and second and fourth Tuesdays of each month, after the approval of the Journal. Priority consideration would be given to resolutions for regulations whose review period would expire before the next calling of the calendar. A House majority could always reject a motion to proceed to the consideration of a resolution, thus dispelling the notion that less than a majority can actually force consideration of a resolution. The vote on consideration thus replaces the duplicative vote we now have on discharge motions under existing House rules. In the case of those nonmajor rule resolutions which have been discharged, a total of 20-minutes of debate, divided between proponents and opponents, would be allowed on the motion to proceed to consideration—comparable to the debate time now allowed on discharge motions.

For major rules resolutions reported or discharged, and for nonmajor rules resolutions reported, there would be no debate on the motion to proceed to the consideration of the resolution. Once a motion to consider is adopted, the major rules resolutions would be debatable for 2 hours, and the nonmajor rules resolutions for 1 hour. As I have previously indicated, these resolutions would not be subject to amendment.

While some might argue that 90 days of continuous session is still too long a review period before a rule may take effect, I would point out that the bill allows agencies to put a nonmajor rule into effect sooner if neither House has acted on a disapproval resolution within 60 days, or at any time after either House has rejected such a resolution.

HOUSE RULES AMENDMENTS

Title III of the bill is entitled, "Regulatory Oversight and Control Amendments to House Rules." It amends House Rules in three ways. The first is in the establishment of the Regulatory Review Calendar which I have already mentioned.

The second amendment goes to the new appropriations amendment rule contained in rule XXI, clause 2. As you will recall, at the beginning of the Congress the Democratic Caucus recommended a rule that was adopted that placed a limitation on the offering of so-called limitation amendments to appropriations bills. They cannot now be offered until all other amendments are first disposed of, and only if the House defeats the motion that the Committee of the Whole rise and report the bill back to the House.

H.R. 3939 would permit the up-front consideration of such limitation amendments for regulations in certain instances, without the need to first jump through the procedural hoop. Such limitation amendments could be considered during the normal amendment process for nonmajor regulations which either have not been considered by the House or whose disapproval resolutions have passed the House but have not been enacted during the 90-day review period.

While I still feel strongly that the current impediment to the offering of limitation amendments should be repealed in its entirety, I think this is an important and urgent first step as an immediate response to *Chadha*. This provision is drawn in such a way as to emphasize the importance of giving the authorizing committees a first crack at the regulations and reserving the appropriations process as a last resort if that process does not satisfactorily address the situation.

Finally, title III contains a set of amendments to House oversight rules in recognition of the need for better, ongoing oversight as part of our institutional responsibility to scrutinize the programs, agencies and regulatory activities already on the books. The bill does not contain as many formal procedural oversight requirements as the "Sunset Review Act" (H.R. 58) introduced by Congressman Gillis Long of this committee, but it does take a somewhat similar approach.

First, all standing committees would be required to adopt their oversight plans at the beginning of a Congress and submit these to the Committee on Government Operations. At present, not one House committee formally acts on its plans and this is basically a staff operation to which committees pay little heed, if indeed their mem-

bers are even aware of such plans. Like H.R. 58, the bill would prohibit the consideration of committee funding resolutions unless these plans have been adopted and submitted.

Unlike H.R. 58, my bill would not require that these plans be adopted and amended by the House in an omnibus resolution. However, the bipartisan leadership would be permitted to include additional suggested areas for oversight as part of the report published by the Government Operations Committee in order to reflect certain priorities and hopefully bring better coordination between House committees and the Senate.

In addition, my bill would give the Speaker, with House approval, the authority to appoint special, ad hoc oversight committees from the membership of two or more committees having shared oversight responsibility over a specific matter. At present the Speaker has the authority to appoint such ad hoc committees only for legislative purposes. These ad hoc committees could be used for reviewing particular regulations if there is not one clear committee of primary jurisdiction.

Finally, committees would be required in the final activity reports they are now required to issue at the end of a Congress to include a separate oversight section summarizing all their oversight activities and findings, and a special accounting of the disposition of their original oversight plans.

CONCLUSION

In conclusion, Mr. Chairman, I think H.R. 3939 offers a comprehensive and workable response to *Chadha* for restoring political accountability to the regulatory process.

While there are certain to be objections to particular provisions of this bill, I would ask the committee to seriously consider the alternatives to such a generic approach. I think when you do you will conclude as I have that you will either be left with unbridled delegations and runaway regulations; or you will witness new proliferation of veto alternatives on individual authorizations, much as the original legislative veto spread like wildfire in a windstorm. These may or may not be workable, credible and consistent veto alternatives, but the chances are great they will present us with such a confusing mish-mash of rules and procedures for different agencies and regulations that no one will know which end is up. This committee can and should act now to impose some measure of uniformity and predictability on the system by giving serious consideration to a generic approach such as H.R. 3939. Thank you.

[The text of H.R. 3939 follows:]

98TH CONGRESS
1ST SESSION

H. R. 3939

To amend title 5, United States Code, and the Rules of the House of Representatives and the Senate to make regulations more cost-effective, to ensure review of rules, to improve regulatory planning and management, to provide for periodic review of regulations, and to enhance public participation in and congressional oversight and control of the regulatory process, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 20, 1983

Mr. LOTT (for himself, Mr. FISH, Mr. QUILLEN, Mr. BROYHILL, Mr. KINDNESS, Mr. KEMP, Mr. CHENEY, Mr. MARTIN of North Carolina, Mr. EDWARDS of Alabama, Mr. VANDER JAGT, Mr. LAGOMARSINO, Mr. LATTA, Mr. TAYLOR, Mr. LEWIS of California, Mr. HYDE, Mr. PASHAYAN, Mr. THOMAS of California, and Mr. COLEMAN of Missouri), introduced the following bill; which was referred jointly to the Committees on the Judiciary and Rules

DECEMBER 2, 1983

Additional sponsors: Mr. BLILEY, Mr. BREAUX, Mr. BROWN of Colorado, Mr. CORCORAN, Mr. DAUB, Mr. DEWINE, Mr. DREIER of California, Mr. EDWARDS of Oklahoma, Mr. EMERSON, Mr. FORSYTHE, Mr. HANSEN of Utah, Mr. KRAMER, Mr. LEVITAS, Mrs. LLOYD, Mr. LOEFFLER, Mr. MCCANDLESS, Mrs. MARTIN of Illinois, Mr. MONTGOMERY, Mr. MOORHEAD, Mr. PARRIS, Mr. RATCHFORD, Mr. ROBINSON, Mr. SAWYER, Mr. SILJANDER, Mr. TAUKE, Mr. WHITTAKER, Mr. WYLIE, Mr. BARNARD, Mr. ARCHER, Mr. BADHAM, Mr. BROOMFIELD, Mr. CAMPBELL, Mr. COUGHLIN, Mr. PHILIP M. CRANE, Mr. DANNEMEYER, Mr. DUNCAN, Mr. ERLENBORN, Mr. EVANS of Iowa, Mr. GINGRICH, Mr. HARTNETT, Mr. HILER, Mrs. HOLT, Mr. LIVINGSTON, Mr. LUJAN, Mr. MCKINNEY, Mr. MARTIN of New York, Mr. MOORE, Mr. RUDD, Mr. SHUMWAY, Mr. DENNY SMITH, Ms. SNOWE, Mr. STANGELAND, Mr. STUMP, Mr. WHITEHURST, Mr. WINN, Mr. WOLF, Mr. WORTLEY, and Mr. SKEEN

A BILL

To amend title 5, United States Code, and the Rules of the House of Representatives and the Senate to make regulations more cost-effective, to ensure review of rules, to improve regulatory planning and management, to provide for periodic review of regulations, and to enhance public participation in and congressional oversight and control of the regulatory process, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Regulatory Oversight and Control Act of 1983".

TABLE OF TITLES

TITLE I—AGENCY RULEMAKING IMPROVEMENTS

TITLE II—CONGRESSIONAL REVIEW OF AGENCY RULES

TITLE III—REGULATORY OVERSIGHT AND CONTROL AMENDMENTS TO HOUSE RULES

EFFECTIVE DATE

SEC. 2. This Act shall take effect one hundred and eighty days after the date of the enactment of this Act, except that the provisions of subchapter II of chapter 6 of title 5, United States Code, as added by section 101(c) of this Act, the amendment made by section 102(a) of this Act, the amendment made by section 104 of this Act (to the extent such amendment applies to rules), and the amendment made by section 201(a) of this Act shall apply only to rules for which notice of proposed rulemaking is given after such effec-

tive date and to rules promulgated after such effective date for which a notice of proposed rulemaking is not required.

TITLE I—AGENCY RULEMAKING IMPROVEMENTS

SEC. 101. (a) Chapter 6 of title 5, United States Code, is amended—

(1) by inserting immediately after the chapter heading the following:

"SUBCHAPTER I—REGULATORY FLEXIBILITY";

(2) by inserting immediately before section 601 the following:

"SUBCHAPTER I—REGULATORY FLEXIBILITY";

and

(3) by striking out "this chapter" each place it appears and inserting in lieu thereof "this subchapter".

(b) Such chapter 6 is further amended by inserting at the end of the chapter analysis the following:

"SUBCHAPTER II—ANALYSIS OF AGENCY PROPOSALS

"Sec.
"621. Definitions.
"622. Additional procedures for major rules.
"623. Judicial review.
"624. Executive oversight.
"625. Review by Comptroller General.
"626. Authority of agencies and the President.

"SUBCHAPTER III—ESTABLISHING AGENCY PRIORITIES AND SCHEDULES FOR COMPLETING PROCEEDINGS

"631. Regulatory agenda.

"SUBCHAPTER IV—AGENCY REVIEW OF RULES

"641. Review of rules.".

(c) Such chapter 6 is further amended by adding at the end thereof the following:

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"SUBCHAPTER II—ANALYSIS OF AGENCY PROPOSALS

"§ 621. Definitions

"(a) For purposes of this subchapter, subchapter III, and subchapter IV—

"(1) the term 'agency' means an agency as defined in section 551(1) of this title;

"(2) the term 'benefit' means any direct or indirect beneficial economic, health, safety, environmental, or other effect;

"(3) the term 'cost' means any direct or indirect adverse economic, health, safety, environmental, or other effect;

"(4) the term 'economic cost' means a cost (as defined in paragraph (3) of this subsection) that is reasonably quantifiable in monetary terms;

"(5) the term 'rule' means a rule as defined in section 551(4) of this title but does not include—

"(A) a rule of particular applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting, or practices relating to such rates, wages, structures or reorganiza-

tions, prices, facilities, appliances, services, or allowances;

"(B) a rule relating to monetary policy proposed or promulgated by the Board of Governors of the Federal Reserve System;

"(C) a rule that is required by statute to be made on the record after an opportunity for an agency hearing; or

"(D) a rule described in section 553(a) of this title;

"(6) the term 'major rule' means a rule or group of closely related rules that—

"(A) imposes economic costs which are likely to result in an annual impact on the economy of $100,000,000 or more; or

"(B) otherwise is designated a major rule by the agency proposing the rule, or by the President (not later than thirty days after the publication of the notice of proposed rulemaking for that rule)—

"(i) because the rule would have significant adverse effects on the environment, health or safety, competition, employment, investment, productivity, innovation, or the ability of enterprises, the principal places of

business of which are in the United States, to compete in domestic or export markets; or

"(ii) because the rule would cause a substantial increase in costs or prices for wage earners, consumers, individual industries, nonprofit organizations, Federal, State, or local government agencies, or geographic regions.

"(b)(1) Any designation of a major rule made by the President under subsection (a)(6)(B) of this section shall be published in the Federal Register, together with a succinct statement of the basis for the designation. The President may not delegate his authority to make such a designation.

"(2) The term 'major rule' as defined in subsection (a)(6)(A) of this section does not include—

"(A) a rule involving the internal revenue laws of the United States;

"(B) a rule relating to the viability, stability, asset powers, or categories of accounts of, or permissible interest rate ceilings applicable to depository institutions, the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Share Insurance Fund of the National Credit Union Administration Board;

"(C) a rule promulgated under the Agricultural Adjustment Act to encourage or to regulate the orderly marketing of agricultural commodities and products, or a rule promulgated under the Agriculture Act of 1949 to make available price support for agricultural commodities and products; or

"(D) a rule promulgated on an annual basis which governs the hunting of migratory birds.

"§ 622. Additional procedures for major rules

"(a) Before providing notice of proposed rulemaking for any rule, the agency proposing the rule shall determine whether the rule is a major rule and shall include in that notice an explanation of that determination.

"(b) Not later than the date on which an agency provides notice of proposed rulemaking for a major rule (or, in the case of a rule designated by the President under section 621(a)(6)(B) of this title, as soon as reasonably practicable after such designation), the agency shall issue—

"(1) a statement of the need for, and objectives of, the proposed rule;

"(2) a description of those reasonable alternatives to the proposed rule and its main elements that may accomplish the stated objectives of the proposed rule in a manner consistent with the applicable statutes, and, subject to paragraph (4)(C) of this subsection, if the

proposed rule does not have lower economic costs than each such alternative, an identification of the alternative which has the lowest economic costs;

"(3) an analysis of the need, if any, for the establishment or application of requirements in the proposed rule in order to accommodate regional differences, including economic, environmental, demographic, and land-use differences;

"(4)(A) an analysis of the benefits and costs of the proposed rule and of each of the principal alternatives described in paragraph (2) (including, where applicable, the alternative identified in such paragraph having the lowest economic costs);

"(B) a comparison of the cost effectiveness of the proposed rule and each of the principal alternatives; and

"(C) where it is not expressly or by necessary implication inconsistent with the provisions of the statute pursuant to which the agency is proposing the rule, an explanation of how the benefits of the proposed rule are likely to justify the costs of the proposed rule, and an explanation of how the proposed rule is likely to achieve substantially the rulemaking objectives in a more cost-effective manner than the alternatives to the proposed rule;

"(5) an analysis, where applicable, of the relative advantages and disadvantages of adopting performance standards rather than design standards in the proposed rule;

"(6)(A) an identification of any scientific, economic, or other technical report or study upon which the agency has relied substantially or expects to rely substantially in the rulemaking; and

"(B) a description of how the agency has evaluated or intends to evaluate the quality, reliability, accuracy, and relevance of any such scientific or economic report or study; and

"(7) if the proposed rule would regulate activities which, before the rule was proposed, were regulated only by State law, a statement of the legal authority for the agency to regulate such activities.

"(c) Not later than the date on which an agency provides notice of the promulgation of a major rule, the agency shall issue—

"(1) a statement of the need for, and the objectives of, the rule;

"(2) a description of those alternatives to the rule with respect to which an analysis was made pursuant to subsection (b)(4);

"(3) an analysis of the extent to which the requirements of the rule reflect regional differences, including economic, environmental, demographic, and land-use differences;

"(4) an analysis of the benefits and costs of the rule;

"(5) an explanation, where applicable, for the adoption of design standards rather than performance standards in the rule;

"(6)(A) an identification of any scientific, economic, or other technical report or study upon which the agency relied substantially in the rulemaking; and

"(B) a description of how the agency evaluated the quality, reliability, accuracy, and relevance of any such scientific or economic report or study; and

"(7) if the rule regulates activities which, before the issuance of the rule, were regulated only by State law, a statement of the legal authority for the agency to regulate such activities.

An agency may not issue a final major rule unless, where it is not expressly or by necessary implication inconsistent with the provisions of the statute pursuant to which the agency is promulgating the rule, the agency makes a reasonable determination, based upon the rulemaking file considered as a whole, that the benefits of the rule justify the costs of the

rule, and that the rule will substantially achieve the rulemaking objectives in a more cost-effective manner than the alternatives described in the rulemaking, and includes that determination in the material issued pursuant to this subsection.

"(d)(1) In lieu of preparing material required by subsection (b) or (c) of this section, an agency may incorporate by reference in any material that it issues pursuant to either such subsection information contained in any other statement or analysis, to the extent that such information satisfies any of the requirements of either such subsection.

"(2) Each agency shall include, in the notice of each proposed and final major rule, a statement of how the public may obtain copies of the material issued pursuant to subsections (b) and (c). An agency may charge a reasonable fee for the copying and mailing of such material. Such material shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is primarily of benefit to the general public.

"(3) Subject to section 553(f)(2) of this title, each agency shall include in the rulemaking file required by section 553(f) of this title—

"(A) a copy of the material issued pursuant to subsections (b) and (c) of this section and of any transcript prepared pursuant to subsection (e) of this section; and

"(B) a copy of any scientific, economic, or other technical report or study that the agency actually considered in connection with the rulemaking, if information in such report or study pertains directly to the rulemaking and was prepared by officers or employees of the agency or under contract with the agency.

"(4) Each agency shall send to the President a copy of all material issued pursuant to subsection (b) or (c) of this section.

"(e)(1) An agency shall, in the case of rulemaking to promulgate a major rule, provide an opportunity for oral presentation of views and information at informal public hearings. Transcripts shall be made of all such public hearings.

"(2) The agency shall permit cross-examination of individuals who present testimony, documents, or studies at such hearings but only to the extent the agency determines that other procedures would be inadequate for resolution by the agency of significant issues of fact upon which the rule is based. This paragraph shall not apply to any rulemaking for which cross-examination is otherwise required by statute.

"(3) The agency shall regulate the course of informal public hearings required by this subsection so as to ensure orderly and expeditious proceedings. The agency may take such actions as it considers necessary to achieve this objective, including—

"(A) limiting the time allowed for oral presentations and cross-examination;

"(B) establishing procedures designed to limit cross-examination to the significant issues of fact referred to in paragraph (2) of this subsection; and

"(C) designating representatives to make oral presentations or engage in cross-examination on behalf of persons with a common interest in the rulemaking.

"(f) An agency may delay complying with any requirement of this section with respect to a rule if—

"(A) the agency finds, for good cause, that complying with such requirement before making the rule effective would be impracticable, unnecessary, or contrary to the public interest; and

"(B) the agency publishes the rule in the Federal Register with a statement of such finding and a succinct explanation of the reasons therefor.

Unless such a rule will, by its terms, cease to be effective within two years after its effective date, the agency shall comply with the requirements of this section with respect to the rule as soon as reasonably practicable after promulgating the rule.

"(g) The requirements of this section do not change the standards applicable to agency action under any other provi-

sion of law or relieve an agency of procedural requirements imposed by any other provision of law.

"§ 623. Judicial review

"(a) In any action for judicial review of a rule, any material issued under section 622 of this title may, to the extent relevant, be considered by the court in determining the lawfulness of the rule, but the court shall not have any authority to review agency compliance or noncompliance with the requirements of this subchapter or subchapter III or IV, or to compel any action by the agency promulgating the rule or to hold unlawful, set aside, or remand the rule on the ground that the agency has failed to comply with one or more of such requirements.

"(b) Any exercise of authority granted under section 621, 624, or 641 of this title, or any failure to exercise such authority, by the President or by an officer to whom such authority has been delegated, shall not be subject to judicial review in any manner.

"§ 624. Executive oversight

"(a) The President shall establish guidelines and procedures for agency implementation of the requirements of this chapter. The President shall monitor and review agency actions and materials for compliance with the provisions of this chapter and shall comment upon the adequacy of such compliance.

"(b) Any guidelines and procedures established by the President for agency implementation of this chapter shall be adopted after the public has been afforded notice and an opportunity to comment thereon, and shall be consistent with the prompt completion of rulemaking proceedings. Such guidelines and procedures may provide for review and evaluation by the President of material the agency intends that it will issue under sections 622(b) and 622(c) of this title in order to comment upon whether such material complies with the requirements of this chapter. The time for any such review shall not exceed thirty days following receipt of the material by the President, except that the President may extend the time for such review for one additional period not in excess of thirty days.

"(c) Nothing in this section—

"(1) provides authority to the President, or limits any authority that the President may possess under the Constitution or other provisions of law—

"(A) to prevent an agency from proceeding with a rulemaking or issuing a proposed or final rule; or

"(B) to require an agency to modify a proposed or final rule or comply with the guidelines or procedures established pursuant to subsection (a) of this section;

"(2) changes the standards applicable to agency action under any other provision of law or relieves an agency of procedural requirements imposed by any other provision of law; or

"(3) relieves an agency of its responsibilities to comply with the requirements of this chapter.

"(d)(1) The President may delegate the authority granted by subsection (a) of this section, in whole or in part, to the Vice President or to an officer within the Executive Office of the President whose appointment has been subject to the advice and consent of the Senate. Notice of any such delegation, or any revocation or modification thereof, shall be published in the Federal Register.

"(2) Any person to whom authority is delegated under this subsection shall be subject to all of the provisions of this section applicable to the exercise of such authority by the President.

"§ 625. Review by Comptroller General

"(a) The Comptroller General of the United States may review the compliance by agencies with the provisions of this chapter.

"(b) Each agency shall make available to the Comptroller General, in accordance with section 716 of title 31, United States Code, such information as the Comptroller General may request in order to carry out subsection (a).

"§ 626. Authority of agencies and the President

"(a) Nothing in this chapter—

"(1) limits agency jurisdiction to prescribe a rule,

"(2) relieves an agency of statutory requirements applicable to rulemaking, or

"(3) displaces rulemaking authority vested by statute in an agency.

"(b) Nothing in this chapter limits the exercise by the President of the authority and responsibility that he otherwise possesses under the Constitution and other laws of the United States.

"SUBCHAPTER III—ESTABLISHING AGENCY PRIORITIES AND SCHEDULES FOR COMPLETING PROCEDURES

"§ 631. Regulatory agenda

"(a) Each agency shall publish a regulatory agenda in the Federal Register in April and October of each year. Each such agenda shall contain a list of all rules that the agency expects to propose, promulgate, modify, repeal, or otherwise consider in a rulemaking proceeding in the succeeding twelve months. The agendas of all agencies shall be published in a single issue of the Federal Register in accordance with guidelines issued by the Director of the Office of Management and Budget to ensure a useful, uniform, and consistent publication.

"(b) With respect to each rule listed on a regulatory agenda, the agenda shall include a description of the rule; the objectives of and the legal basis for the rule; any dates established or anticipated by the agency for taking action, including dates for advance notices of proposed rulemaking, notices of proposed rulemaking, and final agency action; a statement of the sectors of the economy likely to be affected by the rule; and the agency's assessment of whether the rule is or is expected to be a major rule. If consistent with any guidelines issued by the Office of Management and Budget, an agency may consider a group of closely related rules as one rule for the purpose of providing the information required by this subsection.

"(c) Each regulatory agenda shall include a list of rules scheduled to be reviewed in accordance with section 641 of this title during the succeeding twelve months and the status of all rules listed on the previous agenda for which rulemaking proceedings have not been completed or which have not been explicitly withdrawn from consideration by the agency.

"(d) Each regulatory agenda shall include the name, address, and telephone number of an agency official responsible for handling inquiries about each rule listed on the agenda.

"(e) Failure of an agency to include a rule in a regulatory agenda shall not preclude the agency from proposing or issuing that rule.

"SUBCHAPTER IV—AGENCY REVIEW OF RULES

"§ 641. Review of rules

"(a)(1) Not later than nine months after the effective date of this section, each agency shall prepare and publish in the Federal Register for comment a proposed schedule for the review, in accordance with this section, of each rule of the agency which is in effect on such effective date and which, if adopted on such effective date, would be a major rule under section 621(a)(6)(A) of this title, and of such other rules as the agency has selected for review.

"(2) At least ninety days before publishing in the Federal Register the proposed schedule required by paragraph (1), each agency shall make the proposed schedule available to the President. The President may select for review under this section any additional rule that the President determines to be a major rule under section 621(a)(6)(A) of this title. The President may not delegate the authority conferred by this paragraph.

"(3) Each rule referred to in paragraphs (1) and (2) of this subsection shall cease to be effective not more than ten years after the date on which the final schedule is published pursuant to paragraph (5) of this subsection.

"(4) Each proposed schedule required by paragraph (1) shall include a brief explanation of the reasons the agency or the President, as the case may be, considers each rule on the

schedule to be a major rule or of the reasons why the agency selected the rule for review, the date on which the rule shall cease to be effective, and the date set by the agency for the completion of the review of each such rule. The agency shall set a date to initiate review of each rule on the schedule in a manner which will ensure the simultaneous review of related items and which will achieve a reasonable distribution of reviews over the period of time covered by the schedule.

"(5) Not later than six months after publishing the proposed schedule as required by paragraph (1) of this subsection, each agency shall publish in the Federal Register a final schedule for the review of the rules referred to in paragraphs (1) and (2) of this subsection. The final schedule shall include the date on which each such rule shall cease to be effective. Each agency shall publish with the final schedule the response of the agency to comments received concerning the proposed schedule.

"(6) Each agency shall include with the publication in the Federal Register of a major rule a date for completion of the review of the major rule. Each such major rule shall cease to be effective not more than ten years after the date of such publication. The agency shall include with such publication the date on which the rule shall cease to be effective.

"(b) The agency shall, pursuant to subsections (c) through (e) of this section, review each rule on the final schedule.

"(c) An agency shall publish notice in the Federal Register of the initiation of the review of a rule under this section. The notice shall include—

"(1) an identification of the legal authority under which the rule was promulgated and a determination by the agency of whether the rule presently fulfills the objectives of that authority;

"(2) a brief summary of the benefits and costs of the rule during the calendar year preceding the publication of such notice, and of the benefits and costs the agency projects for the rule if it remains in effect;

"(3) an analysis of whether the objectives of the rule can be met through an alternative having lower economic costs than the existing rule;

"(4) an analysis of whether greater benefits can be achieved through an alternative having costs which are comparable to those of the existing rule;

"(5) a description of any problems encountered by the agency in obtaining compliance with the rule;

"(6) an analysis of the extent to which the rule overlaps or duplicates other rules; and

"(7) a statement that the agency seeks comments from the public as to whether the rule should be retained, amended, or repealed.

An agency may include a group of closely related rules in a single notice under this subsection.

"(d) After publishing the notice required by subsection (c) of this section, the agency shall provide a period of not less than sixty days during which the public may submit comments in response to such notice.

"(e) Within one hundred and eighty days after the close of the comment period required by subsection (d) of this section, the agency shall take one of the following two actions:

"(1) The agency shall publish a notice of proposed rulemaking to reissue the rule or to amend the rule and shall conduct a rulemaking proceeding with respect to the rule in accordance with the requirements of this chapter, if applicable, and of section 553 of this title or any other applicable law. Such requirements and other applicable requirements of law, including those relating to judicial review, shall apply to the same extent and in the same manner as in the case of a proposed agency action to issue or amend a rule which is not taken pursuant to the review required by this section.

"(2) The agency shall publish a notice of its decision to allow the existing rule to expire, together with a statement explaining the reasons for that decision.

Any major rule which an agency determines to reissue or amend pursuant to paragraph (1) of this subsection shall be submitted to the Congress in accordance with the provisions of section 802 of this title in adequate time for review and approval by the Congress, in accordance with chapter 8 of this title, before the date on which the rule shall cease to be effective.

"(f) An agency may, with the concurrence of the President, alter the timing of review of rules under this section if an explanation of such alteration is published in the Federal Register at the time such alteration is made. The President may direct an agency to alter the timing of the review of rules under this section, except that the President may not increase the number of rules to be reviewed by one agency in any calendar year.".

(d) The chapter heading of chapter 6 of title 5, United States Code, is amended to read as follows:

"CHAPTER 6—PLANNING AND MANAGEMENT OF AGENCY FUNCTIONS".

(e) The chapter analysis of part I of title 5, United States Code, is amended by inserting after the item relating to chapter 5 the following new item:

"6. Planning and Management of Agency Functions..... 601".

RULEMAKING PROCEDURES

SEC. 102. Section 553 of title 5, United States Code, is amended to read as follows:

"§ 553. Rulemaking

"(a) This section applies according to the provisions thereof, except to the extent that there is involved—

"(1) a military or foreign affairs function of the United States;

"(2) a matter relating to public property or contracts or to agency management or personnel practices; or

"(3) any interpretative rule or general statement of policy unless such rule or statement has general applicability and substantially alters or creates rights or obligations of persons outside the agency.

"(b)(1) Notice of proposed rulemaking shall be published in the Federal Register, unless persons subject to the proposed rule are named and either personally served or otherwise have actual notice of the rulemaking in accordance with law. Each notice of proposed rulemaking shall include—

"(A) a statement of the time during which public comments will be received concerning the proposed rule, and the time, place, and nature of any informal public hearings to be held concerning the proposed rule;

"(B) a statement of the specific objectives to be attained by the proposed rule;

"(C) a statement of the specific legal authority under which the rule is proposed;

"(D) either the terms or substance of the proposed rule or a description of the subjects and issues involved;

"(E) a statement that the agency seeks proposals from the public for alternative methods to accomplish the objectives of the proposed rule that are more effective or less burdensome than the methods used in the proposed rule; and

"(F) a statement of where the file of the rulemaking proceeding required by subsection (f) of this section may be inspected or copies of the file may be obtained.

"(2) Except when notice or hearing is required by statute, this subsection and subsection (c) do not apply to rules of agency organization, procedure, or practice, or a rule to the extent the agency for good cause finds that notice and public procedure with respect to the rule are impracticable, unnecessary, or contrary to the public interest and publishes, at the time of publication of the final rule, such finding and a brief statement of the reasons therefor.

"(c)(1) An agency shall provide a public comment period of at least sixty days after the issuance of a notice of pro-

posed rulemaking pursuant to subsection (b). During the public comment period, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentations. After the consideration of the relevant matter presented, the agency shall publish any rule adopted with a concise general statement of the basis and purpose of the rule. The statement shall include a response to the significant issues raised by the comments concerning the proposed rule received by the agency during the public comment period. When rules are required by statute to be made on the record after an opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

"(2) In promulgating a rule, unless otherwise permitted by law, an agency may not rely substantially on any report, study, or other document containing significant factual material of central relevance to the rulemaking that was not placed in the rulemaking file at the time the notice of proposed rulemaking was issued or, if publicly available, identified in such notice, unless—

"(A) the public has had an adequate opportunity to comment upon such report, study, or other document if it was developed by or under contract with the agency; or

"(B) such report, study, or other document, if not developed by or under contract with the agency, was placed in the rulemaking file required by subsection (f) of this section promptly after—

"(i) its receipt by the agency, in the case of material received by the agency in the course of the rulemaking proceeding, or

"(ii) its review by the agency, in the case of material that was obtained by the agency outside the course of the rulemaking proceeding.

For purposes of subparagraph (A) of this paragraph, an agency shall be deemed to have afforded an adequate opportunity to comment on any document received during or after the initial comment period if it provides an additional comment period of twenty-one days from the date on which notice of such additional comment period is published in the Federal Register.

"(d) An agency issuing a final rule shall publish that rule in the Federal Register, unless persons subject to the rule are named and either personally served or otherwise have actual notice of the rule in accordance with law. Such publication or service shall be made not less than thirty days before the effective date of the final rule, except in the case of a rule that grants or recognizes an exemption or relieves a

restriction, or as otherwise provided by the agency for good cause found and published with the rule.

"(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

"(f)(1) Except as provided in paragraph (2) of this subsection, each agency shall maintain a file of each rulemaking proceeding conducted pursuant to this section, beginning no later than the date on which the agency issues the notice of proposed rulemaking for that proceeding pursuant to subsection (b) or, if the agency is not required to issue such a notice, no later than the date the agency first issues or receives material required to be included in the file. The file shall be made available to the public and shall include—

"(A) the notice of proposed rulemaking and any supplemental notice concerning the rulemaking;

"(B) a copy of all written comments on the proposed rule which were submitted to the agency after the publication of the notice of proposed rulemaking;

"(C) all material which the agency by statute or rule is required to issue in connection with the rulemaking or which the agency decides to make part of the record;

"(D) a copy of all written material pertaining to the rule, including any drafts of the proposed or final

rule, submitted by the agency to the President or the designee directed by the President to review proposed or final rules for their regulatory impact; and

"(E) a written explanation of the specific reasons for any significant changes made by the agency in the drafts of the proposed or final rule which respond to any comment received by the agency on the draft proposed, proposed draft final, or final rule, made by the President or the designee directed by the President to review proposed or final rules for their regulatory impact.

"(2) The file required by paragraph (1) of this subsection need not include any material described in section 552(b) of this title. If the agency is permitted by law to rely on, and does rely on, such material in promulgating a rule, the agency shall include in such file a statement noting the existence of any such material and the statutory basis upon which the material is exempt from public disclosure. Notwithstanding the preceding sentence, the file shall include all material described in subparagraph (D) or (E) of paragraph (1).

"(3) No court shall hold unlawful or set aside an agency rule because of a violation of subparagraph (D) or (E) of paragraph (1) of this subsection unless the court finds that such violation has precluded fair public consideration of a material issue of the rulemaking taken as a whole. Judicial

review of compliance or noncompliance with subparagraphs (D) and (E) of paragraph (1) of this subsection shall be limited to review of action or inaction on the part of an agency.".

JUDICIAL REVIEW

SEC. 103. Section 706 of title 5, United States Code, is amended to read as follows:

"§ 706. Scope of review

"(a) To the extent necessary to decision and when presented, the reviewing court shall independently decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

"(1) compel agency action unlawfully withheld or unreasonably delayed; and

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

"(D) without observance of procedure required by law;

"(E) unsupported by substantial evidence in a proceeding subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

"(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

"(b) In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

"(c) In deciding questions of law pursuant to the following sentences of this subsection, the court shall exercise its independent judgment without according any presumption in favor of or against agency action. In making determinations on questions of law, other than statutory jurisdiction, the court shall give the agency's interpretation such weight as it warrants, taking into account factors such as the discretionary authority provided to the agency by law. In making determinations of law concerning statutory jurisdiction under subsection (a)(2)(C) of this section, the court shall determine whether the agency's action is within the scope of the agency's jurisdiction on the basis of the language of the statute or, in the event of ambiguity, other indicia of ascertainable legislative intent.

"(d) In determining whether agency action in adopting a rule, other than a rule to which subsection (a)(2)(E) of this section applies, is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, the court shall consider whether there is substantial support in the rulemaking file, viewed as a whole, for determinations of fact on which the agency was required to rely in adopting the rule or which the agency asserted as the basis for the rule.".

APPEALS OF AGENCY ORDERS

SEC. 104. (a) Section 2112(a) of title 28, United States Code, is amended by striking out the last three sentences and inserting in lieu thereof the following: "If proceedings are instituted in two or more courts of appeals with respect to the same order, the court in which the agency, board, commission, or officer concerned is to file the record shall be determined as follows:

"(1) If within ten days after issuance of the order the agency, board, commission, or officer receives written notice, in a manner that the agency shall prescribe by rule, that proceedings have been instituted in two or more courts of appeals, the agency, board, commission, or officer shall, promptly after the expiration of that ten-day period, so inform the Administrative Office of the United States Courts and shall identify each such court in which such proceedings are pending. As soon

as is practicable after receiving such notice, the Administrative Office of the United States Courts shall designate one court, according to a system of random selection, from among those identified by the agency, board, commission, or officer, and the record shall be filed in the court so designated.

"(2) If within ten days after issuance of the order the agency, board, commission, or officer has received written notice, as provided in the rules prescribed pursuant to paragraph (1) of this subsection, that proceedings have been instituted in only one court of appeals, the record shall be filed in that court notwithstanding the institution of any proceedings in any other court of which such written notice was not received by the agency, board, commission, or officer within that ten-day period.

"(3) In all other cases, the record shall be filed in the court in which proceedings with respect to the order were first instituted.

All courts in which proceedings have been instituted with respect to the same order, other than the court in which the record is filed pursuant to this subsection, shall transfer those proceedings to the court in which the record is so filed. For the convenience of the parties in the interest of justice, the court in which the record is filed may thereafter transfer all

the proceedings with respect to that order to any other court of appeals. Until the record concerning an order is filed in a court pursuant to this subsection, any court of appeals in which proceedings with respect to that order have been instituted within ten days after the issuance of such order may, to the extent authorized by law, postpone the effective date of the order as necessary to permit the designation of a court pursuant to paragraph (1) of this subsection. Such action by the court may thereafter be modified, revoked, or extended by the court in which the record is filed or by any other court of appeals to which the proceedings are transferred.".

(b) Section 604(a) of title 28, United States Code, is amended by redesignating paragraph (17) as paragraph (18) and by inserting immediately after paragraph (16) the following new paragraph:

"(17) Where proceedings with respect to an order of any agency, board, commission, or officer have been instituted in two or more courts of appeals and the agency, board, commission, or officer, pursuant to section 2112(a)(1) of this title, has been notified of such proceedings within ten days after issuance of the order, administer a system of random selection to determine the appropriate court in which the record is to be filed;".

PARTICIPATION EXPENSES

SEC. 105. (a) Subchapter I of chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following new section:

"§ 505. Participation expenses

"(a) No agency may, except as provided in section 504 of this title or unless specifically authorized by any other statute, provide financial assistance to pay the expenses of persons participating or intervening in an agency proceeding.

"(b) For the purposes of this section—

"(1) 'agency' means an agency as defined in section 551(1) of this title; and

"(2) 'agency proceeding' means any agency proceedings as defined in section 551(12) of this title.".

(b) The section analysis of chapter 5 of title 5, United States Code, is amended by inserting after the item relating to section 504 the following new item:

"505. Participation expenses.".

TECHNICAL AND CONFORMING AMENDMENTS

SEC. 106. (a) Section 551(4) of title 5, United States Code, is amended by striking out "services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing" and inserting in lieu thereof "services, or allowances therefor or of valuations, costs or accounting, or practices relating to such rates, wages, struc-

tures or reorganizations, prices, facilities, appliances, services, or allowances".

(b) Section 551(5) of such title is amended by striking out "rule making" and inserting in lieu thereof "rulemaking".

(c) Section 556(d) of such title is amended in the last sentence by striking out "rule making" and inserting in lieu thereof "rulemaking".

(d) Section 557(b) of such title is amended by striking out "rule making" and inserting in lieu thereof "rulemaking".

(e) The item relating to section 553 of title 5, United States Code, in the section analysis of chapter 5 of such title is amended by striking out "Rule making" and inserting in lieu thereof "Rulemaking".

TITLE II—CONGRESSIONAL REVIEW OF AGENCY RULES

SEC. 201. (a) Part I of title 5 of the United States Code is amended by inserting after chapter 7 the following new chapter:

"CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

"Sec.
"801. Definitions.
"802. Congressional review of agency rules.
"803. Procedure for committee consideration of resolutions.
"804. Procedure for floor consideration of resolutions.
"805. Computation of calendar days of continuous session.
"806. Rulemaking power of Congress.
"807. Effect on judicial review.

"§ 801. Definitions

"(a) For purposes of this chapter—

"(1) the term 'agency' means an agency as defined in section 551(1) of this title;

"(2) the term 'rule' means a rule as defined in section 621(5) of this title which is subject to section 553 of this title;

"(3) the term 'major rule' means a major rule within the meaning of section 621 of this title;

"(4) the term 'emergency rule' means a rule which an agency may make effective, for a period of not more than two hundred and ten days, notwithstanding any requirement for public notice and comment and is promulgated pursuant to a finding by the agency that delay in the effective date would—

"(A) seriously injure an important public interest,

"(B) substantially frustrate legislative policies, or

"(C) seriously harm a person or class of persons without serving any important public interest;

"(5) the term 'promulgate' or 'promulgation' means to file or the filing of a final rule with the Office of the Federal Register for publication;

"(6) the term 'appropriate committee' means—

"(A) the one committee of each House of Congress which has primary legislative jurisdiction over the statute under which a rule is promulgated or over the agency which has promulgated a rule, or

"(B) if the presiding officer of the Senate or the House of Representatives determines that there is more than one standing committee of primary jurisdiction described in subparagraph (A), a special ad hoc committee, appointed by such presiding officer, with the approval of the Senate or the House, as the case may be, from the membership of such committees of primary jurisdiction;

"(7) the term 'appropriate resolution' means—

"(A) in the case of a major rule, a joint resolution approving the rule, the matter after the resolving clause of which is as follows: 'That the Congress approves the rule entitled , transmitted to the Congress by on , 19 , and which shall cease to be effective on , 19 .', with the appropriate title of the rule, agency, date of transmittal, and date of termination inserted in the blanks, respectively; and

"(B) in the case of any other rule subject to section 802 of this title, a joint resolution disapproving the rule, the matter after the resolving clause of which is as follows: 'That the Congress disapproves the rule entitled , transmitted to the Congress by , on , 19 .', with the appropriate title of the rule, agency, and date inserted in the blanks, respectively; and

"(8) the term 'transmitted to the Congress', with respect to a rule, means transmitted to the Congress pursuant to section 802(a)(1) of this title.

"§ 802. Congressional review of agency rules

"(a)(1) On the first day on which both Houses of Congress are in session after the promulgation of a rule, the agency shall transmit a copy of the rule to the Secretary of the Senate and the Clerk of the House of Representatives. Such rule shall be considered only as a recommendation of the agency to the Congress and shall have no force and effect as a rule unless the rule has become effective in accordance with this section.

"(2) A major rule may not take effect unless an appropriate resolution is enacted within ninety days after the date on which the major rule is transmitted to the Congress.

"(3)(A) Subject to subparagraph (B), a rule other than a major rule may not take effect if within ninety days after the rule is transmitted to the Congress an appropriate resolution is enacted with respect to the rule.

"(B) A rule other than a major rule may take effect—

"(i) at the end of the period of sixty days after the date the rule is transmitted to the Congress if neither House of Congress has completed action on an appropriate resolution with respect to the rule;

"(ii) upon the rejection by one House of an appropriate resolution with respect to the rule; or

"(iii) on such later date as the rule may specify.

"(b)(1) An agency may not promulgate a new rule substantially the same as—

"(A) a major rule for which an appropriate resolution has not been enacted; or

"(B) any other rule subject to this section for which an appropriate resolution has been enacted.

"(2) If a rule of an agency does not become effective under subsection (a) and the agency, subject to paragraph (1), promulgates a rule which relates to the same subject matter as the disapproved rule, such rule may be based in whole or in part on the rulemaking record of the first rule. The new rule shall be subject to subsection (a).

"(c) If a rule which was promulgated subject to a statutory time limit for rulemaking does not become effective under subsection (a), the statutory time limit shall apply also to the rulemaking begun as a result of the disapproval of the rule but shall begin on the date on which the rule was precluded from becoming effective under subsection (a).

"(d)(1) On the same day on which an agency transmits a rule to the Congress pursuant to this section, that agency shall transmit a copy of the rule to the Comptroller General of the United States.

"(2) In order to assist the Congress in the exercise of its functions under this chapter, the Comptroller General may, on his own initiative, or shall, upon the request of an appropriate committee, inform such committee as promptly as practicable as to whether the Comptroller General considers the rule to be consistent with the statutory authority under which the rule was promulgated.

"(e) The provisions of paragraphs (2), (3), and (4) of subsection (a) shall not apply with respect to an emergency rule if the agency submits to the appropriate committees a written notice of its determination that the rule is an emergency rule and of the period of time during which the rule will be effective, and of its intention to issue a final rule to take effect when the emergency rule expires, if the agency

determines such a final rule is necessary. Any such final rule shall be subject to all the provisions of subsection (a).

"§ 803. Procedure for committee consideration of resolutions

"(a)(1) With respect to a major rule, the chairman of the appropriate committee to which it has been referred, or a Member designated by the chairman, shall introduce an appropriate resolution (by request) no later than the first day of the session following the day on which the rule is transmitted to the Congress, and the resolution shall be referred to the appropriate committee.

"(2) The appropriate committee to which an appropriate resolution with respect to a major rule is referred shall undertake a review of the rule and report the resolution, together with its recommendations, to the House involved not later than forty-five days after the date on which the rule is transmitted to the Congress.

"(3) If the appropriate committee to which an appropriate resolution with respect to a major rule is referred pursuant to paragraph (1) has not reported the resolution at the end of forty-five days after the rule is transmitted to the Congress, the committee shall be deemed to be discharged from further consideration of the resolution, and the resolution shall be placed on the appropriate calendar of the House involved.

"(b)(1) An appropriate resolution with respect to any rule other than a major rule shall be referred to the appropriate committee.

"(2) It shall be in order to present to the Secretary of the Senate or the Clerk of the House in writing a motion for consideration of an appropriate resolution with respect to a rule other than a major rule at any time after the introduction of the resolution but not later than twenty-five days after the rule is transmitted to the Congress.

"(3) If a motion for consideration described in paragraph (2) is signed by twenty-five Members of the Senate or one hundred and nine Members of the House, as the case may be, not later than thirty days after the rule involved is transmitted to the Congress, the motion shall be entered on the Journal, printed with the signatures thereto in the Congressional Record, and the Secretary of the Senate or the Clerk of the House shall notify the appropriate committee of the motion. The appropriate committee shall then undertake a review of the rule and report the appropriate resolution to which the motion relates, together with its recommendations, not later than forty-five days after the rule is transmitted to the Congress.

"(4) If the appropriate committee has not reported the appropriate resolution at the end of that period of forty-five days, pursuant to paragraph (3), then the committee shall be

deemed to be discharged from further consideration of the resolution and the resolution shall be placed on the appropriate calendar of the House involved.

"(5) An appropriate committee may review any rule referred to it and may report any appropriate resolution referred to it not later than forty-five days after the rule which is the subject of the resolution is transmitted to the Congress, and the resolution shall be referred to the appropriate calendar of the House involved.

"(c) Whenever a committee reports an appropriate resolution pursuant to this chapter, the resolution shall be accompanied by a committee report which shall include the text of the rule, together with the agency's explanation of the rule and the committee's reasons for recommending the adoption or rejection of the resolution.

"§ 804. Procedure for floor consideration of resolutions

"(a)(1) When a committee of the Senate has reported or has been discharged from the further consideration of an appropriate resolution, it shall be in order at any time thereafter (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution.

"(2) When a committee of the House has reported or has been discharged from the further consideration of an appropriate resolution, the appropriate calendar on which the

resolution is placed shall be the Regulatory Review Calendar in accordance with clause 1 of rule XIII of the Rules of the House of Representatives.

"(b)(1) Any motion in the Senate to proceed to the consideration of an appropriate resolution is privileged and is not debatable. The motion shall not be subject to any intervening motion except a motion to lay on the table. An amendment to the motion is not in order, and it is not in order to reconsider the vote by which the motion is agreed to or disagreed to.

"(2) Any motion in the House of Representatives to proceed to the consideration of an appropriate resolution is privileged but may only be made on days designated in clause 9 of rule XXIV of the Rules of the House and in accordance with procedures prescribed by that clause.

"(c) Debate on an appropriate resolution with respect to a major rule shall be limited to not more than two hours, and with respect to any rule other than a major rule shall be limited to not more than one hour, to be equally divided between the proponents and opponents of the resolution. A motion to further limit debate is not debatable. An amendment to or a motion to recommit the resolution is not in order and it is not in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

"(d)(1) If, before the passage by one House of an appropriate resolution of that House with respect to a rule, that

House receives an appropriate resolution with respect to the same rule from the other House, then—

"(A) at the end of the period of seventy-five days after the rule was transmitted to the Congress pursuant to section 802(a) of this title—

"(i) if the appropriate resolution from the other House has been referred to the appropriate committee and that commitee has not reported or been discharged from further consideration of that resolution or another appropriate resolution with respect to the same rule, that committee shall be deemed to be discharged from further consideration of the resolution of the other House and the resolution shall be placed on the appropriate calendar of the House involved; or

"(ii) if the appropriate resolution from the other House has not been referred to the appropriate committee, the resolution shall be placed on the appropriate calendar of the House involved; and

"(B) the vote on final passage shall be on the appropriate resolution from the other House.

"(2) Except as provided in paragraph (1), it shall not be in order to consider more than one appropriate resolution with respect to the same rule in the same Congress, except

that this paragraph shall not prohibit the consideration in one House of an appropriate resolution from the other House if the House receiving it has already passed an appropriate resolution introduced in that House with respect to the same rule.

"§ 805. Computation of calendar days of continuous session

"(a) For purposes of this chapter—

"(1) 'days' means only days of continuous session of Congress;

"(2) the days on which either House of Congress is not in session because of an adjournment of more than three days are excluded in the computation of days of continuous session; and

"(3) the days occurring during the period beginning on the date on which an appropriate resolution is adopted by the Congress and ending either on the date on which the resolution is approved by the President, or, if the resolution is disapproved by the President, on the date on which the resolution is returned to the Congress with the President's disapproval, are excluded in the computation of days of continuous session.

"(b) If an adjournment sine die of a Congress occurs after an agency has submitted a rule under section 802 of this

title and before the expiration of the applicable period specified in such section, the agency shall—

"(1) resubmit the rule to the Congress; or

"(2) initiate rulemaking proceedings to amend or repeal such rule.

If the rule is resubmitted or an amended rule is submitted to the Congress, the periods specified in section 802 of this title shall begin on the date of such resubmission or submission.

"§ 806. Rulemaking power of Congress

"The provisions of sections 803 and 804 of this title are enacted by the Congress—

"(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions described in section 802 of this title, and such provisions supersede other rules only to the extent that they are inconsistent with such other rules; and

"(2) with full recognition of the constitutional right of either House of the Congress to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

"§ 807. Effect on judicial review

"(a) Congressional inaction on or rejection of an appropriate resolution disapproving a rule shall not be deemed an expression of approval of that rule.

"(b) The enactment of an appropriate resolution approving a rule shall not be construed to create any presumption of validity with respect to such rule and shall not affect the review of the rule under chapter 7 of title 5, United States Code."

(b) The table of chapters for part I of title 5 is amended by inserting immediately after the item relating to chapter 7 the following:

"8. Congressional Review of Agency Rulemaking ..... 801".

(c) The provisions of chapter 8 of title 5, United States Code, shall supersede any other provision of law governing procedures for congressional review of agency rules to the extent such other provisions are inconsistent with such chapter.

TITLE III—REGULATORY OVERSIGHT AND CONTROL AMENDMENTS TO HOUSE RULES

HOUSE REGULATORY REVIEW CALENDAR

SEC. 301. (a) Rule XIII of the Rules of the House of Representatives is amended—

(1) in clause 1 by striking out "three" and inserting in lieu thereof "four", and

(2) by adding at the end thereof the following:

"Fourth. A Regulatory Review Calendar, to which shall be referred all resolutions in accordance with the provisions of chapter 8 of title 5, United States Code.".

(b) Rule XXIV of the Rules of the House of Representatives is amended by adding at the end thereof the following new clause:

"9. (a) On the first and third Monday and the second and fourth Tuesday of each month, immediately following the approval of the Journal, the Speaker shall direct the Clerk to call the resolutions on the Regulatory Review Calendar, and priority consideration shall be given to resolutions respecting any rule for which the review period in the House under section 802(a) of title 5, United States Code, will expire before the next calling of resolutions on the Calendar under this paragraph. It shall be in order on any such day to consider a motion to dispense with the further reading of the Calendar, and such motion shall not be subject to debate.

"(b) Upon the calling of a resolution on the Regulatory Review Calendar under paragraph (a), it shall be in order to move to proceed to the immediate consideration of the resolution. The motion is privileged and is not debatable, except in the case of a resolution discharged from a committee pursuant to a motion for consideration under section 803 of title 5, United States Code, in which case the motion shall be debatable for twenty minutes, equally divided between proponents

and opponents of the motion. The motion shall not be subject to an intervening motion, except a motion to lay on the table and a motion to postpone to a day certain. An amendment to the motion is not in order and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

"(c) Debate on a resolution with respect to a major rule shall be limited to not more than two hours, and on a resolution with respect to any other rule shall be limited to not more than one hour, to be equally divided between proponents and opponents of the resolution. The resolution shall not be subject to amendment or a motion to recommit, and it shall not be in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.".

REGULATORY LIMITATION AMENDMENTS TO HOUSE APPROPRIATION BILLS

SEC. 302. Rule XXI of the Rules of the House of Representatives is amended in clause 2 by adding at the end thereof the following new paragraph:

"(e) Notwithstanding paragraphs (c) and (d) of this clause, it shall be in order during the reading of a general appropriation bill for amendment to consider any germane amendment proposing a limitation restricting the implementation of any agency rule subject to chapter 8 of title 5, United States Code (other than a major rule), for which an

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appropriate resolution has not been considered by the House, or has been passed by the House but has not been enacted, within the period of time specified in section 802(a) of that title.".

HOUSE COMMITTEE OVERSIGHT IMPROVEMENTS

SEC. 303. (a) Clause 2(c) of rule X of the Rules of the House of Representatives is amended to read as follows:

"(c)(1) Not later than March 1 in the first session of a Congress, each standing committee of the House shall, in a meeting which is open to the public and with a majority of members present, consider and adopt its oversight plans for that Congress.

"(2) In developing such oversight plans, each committee shall, to the maximum extent feasible—

"(A) consult with other committees of the House and the Senate which have jurisdiction over the same or related laws, programs, agencies, or regulatory activities within its jurisdiction with the objective of assuring that such laws, programs, agencies, and regulatory activities are reviewed in the same Congress and that there is maximum coordination and cooperation between such committees in the conduct of such review; and such plans shall include an explanation of what steps have been or will be taken to assure such coordination and cooperation;

"(B) give priority consideration to including in its oversight plans the review of those laws, programs, agencies, or regulatory activities operating under permanent budget authority or permanent statutory authority; and

"(C) have a view toward ensuring that all significant laws, programs, agencies, and regulatory activities within its jurisdiction are subject to review at least once every ten years, with special attention to those major agency rules subject to review and termination during that Congress.

"(3) Immediately upon the adoption of its oversight plans, each committee shall submit these plans to the Committee on Government Operations.

"(4) Not later than March 15 in the first session of a Congress, after consultation with the Speaker, the majority leader, and the minority leader, the Committee on Government Operations shall report to the House the oversight plans submitted by each committee pursuant to this paragraph, together with any recommendation which the Committee on Government Operations may make, or the Speaker, majority leader, and minority leader may jointly make, to assure the most effective coordination of such plans and otherwise achieve the objectives of this clause.".

(b) Clause 2 of rule X of the Rules of the House of Representatives is amended by adding at the end thereof the following new paragraph:

"(e) The Speaker, with the approval of the House, may appoint special ad hoc oversight committees for the purpose of reviewing a specific matter within the jurisdiction of two or more standing committees of the House, such ad hoc committees to be appointed from the membership of such standing committees.".

(c) Clause 1(d) of rule XI of the Rules of the House of Representatives is amended to read as follows:

"(d)(1) Each committee shall submit to the House of Representatives, not later than January 2 of each odd-numbered year, a report on the activities of that committee under this rule and Rule X during the Congress ending at noon on January 3 of such year.

"(2) Such report shall include separate sections summarizing the legislative and oversight activities of that committee during that Congress.

"(3) The oversight section of such report shall include a summary of the oversight plans submitted by that committee pursuant to clause 2(c) of Rule X, a summary of the actions taken and recommendations made with respect to such plans, and a summary of any additional oversight activities under-

taken by that committee, and any recommendations made or actions taken thereon.".

(d) Clause 5(a) of rule XI of the Rules of the House of Representatives is amended—

(1) by striking out "(1)" and "(2)" and inserting in lieu thereof "(A)" and "(B)", respectively;

(2) by inserting "(1)" after "(a)"; and

(3) by adding at the end thereof the following:

"(2) It shall not be in order in the House to consider a primary expense resolution for any committee which has not submitted its oversight plans to the Committee on Government Operations pursuant to clause 2(c) of Rule X.".

Mr. MOAKLEY. I think what the Supreme Court—they may not have said it—we have to be more specific in our legislation.

You say that word "cumulative." But on many occasions a bill would come out of committee and they would purposely put an ambiguous word in it—some so-and-so from South Carolina won't object, and so-and-so from Maine won't object. The regulators get the thing and say, "What did Congress mean by this?" And they try to fashion what we meant, and they put something through, and everybody says that is not what we meant.

I have gone through symposiums and seminars where someone who never served one day in Congress will tell you what the congressional intent of every bill is, when Members serving in that Congress didn't know what the congressional intent was themselves.

Mr. LOTT. What makes me mad is that the regulators in some instances are specifically changing the language of the bill we passed.

Mr. BEILENSON. Can't that be changed by law?

Mr. LOTT. Take nuclear waste disposal. The rules come over to the Department of Energy. The same people there 5 years ago, going to be there 5 years from now, they develop what they want the regulations to say. They come in and put it before the Secretary. The Secretary says,

> What is all this?
> These are the regulations on the nuclear waste bill.
> Is it all right?
> Yes, it is fine.

He signs it; that is it. But we have language in that bill that says you cannot put nuclear waste in national forests, and the bureaucrats are specifically writing regulations that reverse that. How are we going to deal with that? The court challenge doesn't come in many instances until many years after the damage is done.

The regulators are writing our laws, or rewriting them. I think we ought to deal with it. There has to be some process to deal with that.

Mr. MOAKLEY. Don't you agree it turns our process on the head, makes us legislator-regulators dealing with a lot of laws that we don't really have the expertise to deal with, a lot of regulations we don't have the expertise to set up? We give the basis. If we are narrow enough and specific enough, we should be able to do the job.

Mr. LOTT. I think the reverse is true. It makes the regulators be regulators; not lawmakers. You are talking about being strict.

Mr. MOAKLEY. If we become regulators, they will have to become lawmakers because they will have no place to go.

As I said in my statement, we give to each branch of Government the job they are least able to handle.

Mr. LOTT. That may be true.

One of the things that bothers me with writing strict laws, since you and I have been here we have gotten more and more where we write bills on the floor of the House. When you and I came here, when Wilbur Mills brought a bill out of Ways and Means and said this is it, it is right, you didn't amend it on the floor if you knew what was good for you. The same with Bob Jones; you could not

even vote for an amendment on a bill out of Public Works without him threatening your life. Those days are gone.

We have had a proliferation of subcommittees and staff all over the place, and Members are tied up with so many issues. Many of these bills are not well written when they come out of committee. They go to the floor of the House. We have perfecting amendments to the amendments.

Yesterday, how many of us really know what we were voting on when the amendment was divided?

Mr. MOAKLEY. We recognized the title.

Mr. LOTT. I know. My point is, you cannot write very strictly structured law and amend it on the floor.

Mr. MOAKLEY. One thing I would like to ask you is, I know you and I have knocked this back and forth and both of us are very jealous about our prerogatives as interfered with by the courts. Yet, you include the Bumpers amendment which brings the courts in pall-mall right from the conception.

Mr. LOTT. I have mixed emotions about that. I don't love that as much as I do some other parts of it. I have to confess I put it in there at the urging of a Member that was very interested in the whole process and felt strongly it should be included.

Mr. MOAKLEY. You knew you had to give something away.

Mr. LOTT. I just wanted to make sure every facet was properly considered.

Mr. BEILENSON. I agree with a lot of things you say, especially what you said toward the end of your presentation about spending more time on oversight, seeing if we have done the right thing. I think, in fact, this is happening.

Second, it is obvious, Mr. Chairman, that our colleague and friend here has put a lot of time and effort into his proposal. I would urge us, even though I start with a bias, such as yours—probably not wanting to do some of these things—that we come back to his specific proposal and others later on, after we have heard from everybody else. Because when you approach them in terms of the specifics that are being suggested to us, some of them do not sound so bad, even though in theory I would not like us to be doing this sort of thing.

I am talking specifically about the proposal with respect to major rules. These folks may, in fact, have stumbled on to something. It may not be all that bad. We ought to think some more about it.

All I am suggesting is that we do come back later, not necessarily for a markup, but to go through a little more carefully and more slowly some of the specific proposals. We did not give Mr. Lott an awful lot of time today. I think if we look at some of them specifically we might be able to separate out those a majority of us might find useful and helpful.

Mr. MOAKLEY. In answer to the gentleman's remarks, the bill has been referred to our subcommittee. We will be looking at it as the full committee looks at the bigger question on constitutionality, and looking at it in the subcommittee role as looking at new alternatives.

The committee will be in recess subject to call of the Chair.

[Whereupon, at 12:50 p.m., the committee adjourned, subject to the call of the Chair.]

LEGISLATIVE VETO AFTER CHADHA

THURSDAY, NOVEMBER 10, 1983

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RULES,
Washington, D.C.

The committee met, pursuant to call, at 10 a.m., in room H-313, the Capitol, Hon. Joe Moakley (member of the committee) presiding.

Present: Representatives Pepper, Long, Moakley, Derrick, and Beilenson.

Mr. MOAKLEY. The Committee on Rules will now come to order.

Today we will be hearing from the Honorable Elliott Levitas and the Honorable Mo Udall. We will have a panel of Dean Joseph Cooper of Rice University; Dr. Louis Fisher, Congressional Research Service; Dr. Charles O. Jones, University of Virginia; Dr. Morris Ogul, chairman, department of political science, University of Pittsburgh; and Dr. Norman Ornstein, American Enterprise Institute for Public Policy Research.

The committee is privileged to have with us this morning as the leadoff witness the Honorable Mo Udall.

STATEMENT OF HON. MORRIS K. UDALL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. UDALL. Thank you very much, Mr. Chairman. Reading your list of witnesses impelled me to say you will have in this one room more academic clout at any time since Gillis Long dined alone.

Mr. Chairman, I think this is an excellent move on the part of the Rules Committee. I am just delighted you are going to proceed, and I will do everything I can to help come to the right recommendations as we deal with one of the most serious matters before the country and the Congress.

I would emphasize the views today are mine and not necessary the views of other Interior Committee members.

I am concerned about the implications of the *Chadha* decision in terms of both existing and future legislation. Over the years, the legislative veto has proven to be a convenient and effective tool.

Our committee, like many other committees of the House, has relied upon the legislative veto as a check against administration action and also as a means of securing broader support for legislative initiatives.

While legal scholars are still debating the scope of the recent Supreme Court decision in *Immigration and Naturalization Service* v. *Chadha,* it is clear that a constitutional cloud now hangs over all legislative vetoes.

The loss, or potential loss, of the legislative veto authority poses a great problem for this House and the other body. It casts a pall over as many as 200 statutes and raises serious questions about the future of the relationship between the legislative and executive branches.

For that reason, I think it is important that we seek further clarification of the *Chadha* decision and its reach, as well as two lower court decisions recently upheld by the Court. I should also note that a suit is presently pending in the U.S. District Court for the District of Columbia challenging former Secretary Watt's decision to proceed with the sale of Government leases in the Fort Union area of North Dakota and Montana—despite a House Interior Committee vote barring such immediate action.

I will talk more about this case later in my testimony, but this court action, and others that will follow, will help to better define what is, and what is not, constitutionally permissible.

It is my hope, and it is only a hope, that the Supreme Court will act quickly in resolving pending legal challenges and giving clearer definition to the *Chadha* decision.

I am not suggesting, however, that we can wait indefinitely for further judicial clarification. It could be several years before all the constitutional questions are resolved. I think it is incumbent upon Congress to do its part in resolving this constitutional quandary, and to do so in a way that is both responsible and timely.

In that regard, I want to commend this committee and you, Mr. Chairman, for your decision to hold hearings on this subject. Let me make a few general observations.

First, I think we should avoid broadbrushed or so-called general solutions. The use of the legislative veto, has evolved over several decades.

In so doing, it has taken on several forms, including a one-House veto, a two-House veto and a committee veto. Various refinements also have been made, including the report and wait approach that I will talk about briefly.

In each instance, the veto power has been carefully tailored to meet various objections and satisfy various concerns. In areas involving highly technical matters or routine appointments, the veto often has been exercised by committee.

In other instances, where this House or the other body has expressed a particularly strong interest in an action, a one-House veto has been set up. In areas less sensitive or important, a two-House veto requirement has been established.

Experience suggests that for legislative vetoes, like shoes, one size does not fit all. The same principle will apply, I think, when we seek to replace unconstitutional legislative vetoes with constitutionally acceptable substitutes.

Second, in whatever approach or approaches we choose, I hope we will rely in large part upon the expertise of the committee or committees responsible for the drafting of the original legislative veto authority.

Again, I think legislative veto questions involve highly complex considerations best handled by those most acquainted with the action that may be subject to veto. As long as the constitutional guidelines are clear, they can best fashion an appropriate remedy.

That is not to say that this committee should not play a highly significant role in coordinating House action in this area; I think it should. It can best start by determining the scope of the problem and evaluating the strengths and weaknesses of the various alternatives.

At some point, it may become necessary for the House to act in concert on the legislative veto problem. There are several possible approaches.

One possible course would be for this committee with the assistance of other House committees to compile a list of all statutes containing legislative vetoes that may be constitutionally infirm, along with a catalog of possible options.

Upon completion of that list, this committee could direct the other committees of the House to recommend remedial changes in some or all of the statutes within their jurisdiction. In turn, those committee recommendations could be drawn together by this committee and presented to the floor as a package under a closed or modified closed rule.

A similar process is already used in this House for budget reconciliation.

While a reconciliation approach may someday be needed, at the moment it is premature. For the moment, I think we should seek further judicial clarification, either through test cases or through the normal judicial appeals process.

Now, before I close, I want to discuss briefly one avenue that the Committee on Interior and Insular Affairs has used that has not—at least so far—been held unconstitutional. It represents a type of report and wait approach.

Under the Federal Land Policy and Management Act—or FLPMA—the House Interior and Insular Affairs Committee and the Senate Energy and Natural Resources Committee are empowered to direct the Secretary of the Interior to withdraw public lands from the application of the mineral leasing laws when an emergency situation is determined to exist.

The Secretary is required to make the withdrawal immediately for a period not to exceed 3 years. Before the withdrawal can be revoked, he must submit a comprehensive report to the committee. Then he may proceed if he determines that the withdrawal is no longer necessary.

The point of this process is that it allows an administrative action to be temporarily forestalled while further information is developed and it gives the Congress some time to take such further legislative action as it may deem appropriate.

So far, our committee has used this authority on two occasions. Both times the Court has been urged to find this an unconstitutional congressional veto, but in neither instance has the Court so ruled.

The last one was Fort Union, when Secretary Watt announced the sale of some coal leases in that area. We moved on a stop-and-wait resolution. I think within a few months we will be back to better know how to proceed.

Of course, the case for the validity of our FLPMA authority is buttressed by the special constitutional prerogative of Congress over public lands.

I mention this example not because it will answer all of the problems of the legislative veto issue, but because it indicates that the courts may be looking for a reasonable exercise of this important check on Executive power.

I mention it to further make my point that Congress should not rely upon a single, generic solution to the legislative veto problem.

I repeat, I think we should not try to find one single boilerplate solution. I think we should find three or four different approaches depending on the subject matter in the statute.

Thank you for the opportunity to attend this morning.

Mr. MOAKLEY. Actually, I agree with you on the generic situation. It is my feeling that the Supreme Court that so ably ducked ruling on the legislative veto almost had no choice because of the ground swell for generic legislative veto which would give us some kind of nullification process over every piece of legislation.

I think then the Supreme Court felt we were going too far and they had to send a signal. On that pay raise matter in 1978, they ducked it.

I think they just felt we really were overzealous in our quest to have oversight over everything that happened after we passed it on to the executive branch.

Mr. UDALL. We have a rule in pipelines. You talk about congressional veto. This is a committee veto.

That is carrying it about as far as you can. I hate to bring up pipelines in the light of our recent experience up here. But if a pipeline has worked out all of its problems, they can simply file with the committee their proposed action on it. If we don't do anything in 60 days, it takes effect right away.

Mr. MOAKLEY. That is in the committee.

Mr. UDALL. Yes. I have always thought it is the weakest of all of these kinds of vetos, simply to say one committee of one House by a one-vote margin can undo, slow down, or change previous action by the Congress.

Mr. MOAKLEY. I am sure there are many of those accommodations, like in the Appropriations Committee. But as long as they never reach the court level, they are honored by both parties. As long as a comity exists, I don't think we run into any trouble.

Congressman Long?

Mr. LONG. Thank you, Mr. Chairman.

I had a little bit of a sense of relief with the *Chadha* decision, to tell you the truth about it, for a little different reason than what you and Mr. Moakley are discussing, but I think it all fits in.

We are very concerned about this institution. I am concerned about its ability to operate. It appeared to me that with the application of an extreme type of legislative veto—as an example, your illustration of the pipeline—we were turning ours from an institution that was supposed to be a broad policymaking institution with respect to the problems of the country and its relationship to the world, into merely a city council that overlooks the running of the store every day.

All of us know that when that occurs, those things that start itching get scratched and we don't consider those things that require deep thought and major action.

I do think that we need to come back toward some sort of balance, because I think the veto is an effective tool that can be used if there is an abuse on the other side of something diametrically opposed to what was intended by the statute itself.

But I worry that our concern about an error on that side being translated into a matter of policy of the Government leaves us vulnerable, going to the extreme where I really think it does great harm to this institution.

You have been, pretty well all of your career here, an institutionally oriented man who tries to protect the prerogatives of the legislative branch—tries to make changes in it so that it can more effectively meet the problems of the day.

Some of us have been very frustrated in that attempt, as you know, and have not succeeded nearly to the degree we would like.

Mr. UDALL. The whole history of the Congress and the struggle between the executive branch and the Congress has been the history of the pendulum. I used to tell my students, Woodrow Wilson wrote a book in the 1880's called, "Congressional Government." His complaint was that the Executive was powerless, that the powerful committee chairmen in the Congress were riding roughshod over public policy. Then the pendulum went back the other way in World War II and the Depression, where if Roosevelt wanted a bill, "We will give it to him this afternoon."

It was not until we came out of World War II that people began to look around and see that we had gone too far in favor of the Executive power and it ought to be curbed a little bit.

And a lot of the reforms you and I have worked on have headed in that direction.

Mr. LONG. Thank you.

Mr. MOAKLEY. Going along with the subject that Gil brought up, that we have become a city council, I think what the legislative veto does is turn the process on its head. It gives both branches, the regulatory agencies and the Congress, the power to deal with things that they have the least expertise.

They make us regulators and make the regulators lawmakers. I think people forget what we set the regulatory agencies up for.

We just made policies up here, and we let them dot the "i's" and cross the "t's," and put them into being. But, of course, I think it is Congress fault. I think Congress is not blameless in this matter because we make our legislation so wide and varied in order that we can get it out of committee and then we give it to a panel downtown to determine what we meant by it. We then criticize them when they come up with the regulation that we felt that that is not what we meant, but we really don't know ourselves.

So I think what this is going to do is make Congress write laws more specific and delegate in a much narrower sense.

Mr. LONG. May I add to that?

Of course, all of us recognize the expertise that Dick Bolling had in this field. Last summer, Dick and I talked about this whole problem while we were on vacation. Dick was making the point that if we look at the quality of legislation, in just the 9 years I have been on the Rules Committee and not the time period he had been on, that the quality of the writing of legislation had continually dete-

riorated during that period. We were looking for the reasons for that.

One of them, of course, is that when you go from a system where authority is held at full committee to a system where all the authority is given to the subcommittees, you spread the work out and you don't have as many first-rate experts writing the legislation. Inevitably, the quality of the legislation, the use of proper language, and the use of those words that need to be used declines. But I think that is in keeping with what Joe has said.

Mr. UDALL. Let me say something in response to that. The Fort Union coal sale that Secretary Watt got in trouble with, it was that sale or that action which illustrated a lot of things to me, including the point I have tried to make here this morning that sometimes you don't have a neat, clean solution that takes two paragraphs and does it all, and you don't have to worry about it any more.

This sets up a time. Secretary Watt was prevented from acting by the action of the committee. He got busy to demonstrate in the 90 days or whatever kind of delay we were going to have that the coal sales were good, and he appointed this commission which had the composition of the different kinds of people, as you recall.

This came out of our veto, of our action under the Federal Land Management Policy, to say:

> Look, Secretary Watt, we think you were wrong. Hold off. And in the meantime we will hold some hearings and maybe agree with you that the action was all right. In the meantime, you better get busy and give us a better justification for selling all this coal while coal prices are in a rock-bottom situation.

That is why I think we may want to craft different tools for different situations.

Mr. MOAKLEY. Mr. Derrick?

Mr. DERRICK. I am sorry I missed your presentation.

I think all you need to do is look at the court system to see what happened when the courts gained the right of administrative review. It just absolutely bogged them down. We have had an increase, increase, increase.

I know Clement Haynesworth—I remember having a long discussion with him about it. He was on the Fourth Circuit Court of Appeals in Richmond. He said what happened is they spent all of their time reviewing these administrative decisions and didn't have an opportunity to get down to those substantive areas that the court was originally intended to consider.

I have always opposed the legislative veto, primarily for one reason. You know, the legislative process must come to an end at some point, and I think all you do with the legislative veto is that you give special interest groups or others another whack at it. And it seems to me we give enough whacks before it gets to that point.

This body, as bogged down as it is now, with some 150-odd committees and subcommittees, the last thing we need is another situation such as this which may well be the straw that broke the camel's back, if you don't think it is already broken.

Mr. UDALL. There is a scholar named Patrick Moynihan from New York who did a nice little piece not too long ago. The title—only Moynihan has these titles—the title was "Reactive Government." And he pointed out how Congress creates more subcommittees and staff, and that forces the Executive to hire a lot more

people to interpret them, and that focuses on the court system, and they have to do some things. And we would all do well to slow down. He charts that going back to the early part of this century, how the system has worked.

I got in trouble with the Nixon administration by pointing out that Franklin Roosevelt at the height of World War II, with 15 million men in uniform, had fewer people on the total White House payroll, including clerks, cooks, bartenders. And they keep adding more and more staff. Henry Kissinger, in the National Security Council, had more people in that one little piece of the White House operation than Roosevelt did for the whole ball of wax in World War II.

Mr. DERRICK. I think Gillis' point is so well taken. You get to be operating like a city council, almost.

Mr. MOAKLEY. I am constantly amazed when people think that a body that has trouble passing 700 laws a year can oversee 7,000 rules and regulations. That is what it really boils down to—being responsible for every regulation that emanates from every regulatory agency.

Mr. UDALL. You remember Jimmy Carter ordered each member of his Cabinet to read every single regulation promulgated within a week of the time it was promulgated. These guys found out there was no time to sleep, particularly at HUD and HEW.

Mr. BEILENSON. I have no questions.

Mr. MOAKLEY. Mo, once again, thank you very much for your appearance.

Mr. UDALL. Good luck on this. I will work with you as best I can.

Mr. MOAKLEY. We appreciate it very much.

The committee will now hear the panel: Dean Joseph Cooper, Rice University; Dr. Louis Fisher, Congressional Research Service; Dr. Charles O. Jones, University of Virginia; Dr. Morris Ogul, chairman, department of political science, University of Pittsburgh; and Dr. Norman Ornstein, American Enterprise Institute for Public Policy Research.

Gentlemen, we do have a time constraint, if you can keep your statement within or about 5 minutes. Your entire statements will appear in full in the record.

Prior to this, I would like unanimous consent to enter into the record the Congressional Research Review, fall of 1983, dealing with the legislative veto after *Chadha*.

[The information referred to follows:]

THE LEGISLATIVE VETO AFTER INS v CHADHA

CONGRESSIONAL RESEARCH SERVICE REVIEW

FALL 1983

Special Issue

Introduction to Court's Decision

Foreign Affairs and National Defense

Power of the Purse

Energy Policies

Natural Resources

Federal Regulations

Federal Education

Litigation Prospects

Post-Chadha Developments

Introduction

This special edition of CRS REVIEW is devoted to the Supreme Court's landmark decision on June 23, declaring the legislative veto unconstitutional. In this issue we assess the demise of a 50-year old form of congressional oversight and survey the direction that Congress may take in formulating an institutional response.

The lead article lays the foundation for understanding the legal changes that *Chadha* has already produced and the adjustments that may be contemplated in the future. After summarizing the Court's ruling, this article examines the impact on existing techniques of congressional control. Current and possible future institutional responses, and how such responses may be limited in some instances by the breadth of *Chadha*, are also considered.

Six articles explore the effect of the Court's decision on specific substantive areas: foreign affairs and national security, budgetary policy, energy, public lands, federal rulemaking, and education. These articles explain the programs at stake and identify some likely alternatives to the legislative veto. The concluding article suggests some possible litigation scenarios, focusing on executive reorganization, D.C. Home Rule, and impoundment.

Even in the few months that have elapsed since *Chadha*, legislative and judicial activity has been both intense and extensive. A number of bills have been introduced in Congress in response to the Court's ruling (Appendix A). Important actions have been taken in committee and on the floor (Appendix B). Surprisingly, legislative vetoes continue to be enacted into law, most of them of the committee-veto variety. A total of 17 legislative vetoes have been enacted since *Chadha* (Appendix C). How agencies and committees treat these new provisions will constitute another challenge for executive-legislative accommodation, and will reopen the age-old debate of how much Congress should participate in administrative matters.

Regarding judicial activity, the Supreme Court's decisions has spawned a new generation of litigation on the legislative veto, covering such important topics as federal pay, executive reorganization, and coal leasing (Appendix D). Many of these policy and legal issues are addressed in CRS studies released after *Chadha* (Appendix E).

In assembling these materials, it is our purpose to introduce the reader to some of the basic concepts of the legislative veto, highlight ramifications that are already evident, and prepare the reader for complexities and subtleties that are now unfolding.

Louis Fisher and Morton Rosenberg
Special Issue Editors

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Congressional Life After *Chadha*: Searching for an Institutional Response

As the dust settles from the initial explosive impact of the Supreme Court's June 23 decision in *INS* v. *Chadha*,[1] declaring the legislative veto unconstitutional, it has become apparent that the ruling does not presage the political cataclysm for Congress forecast by media pundits and other instant analysts. Sober reflection makes clear that presidential power is not permanently enhanced at the expense of Congress. The legislative branch is not disabled from constitutionally constraining executive actions or asserting its lawful prerogatives.

But while the Court has not effected a fundamental reallocation of constitutional powers, a problem of equal moment has been created by the sudden dismantling of a host of delicate, often hard-won interbranch accommodations. In recent years many of those political "treaties" have become the basis for working relationships between Congress and the Executive in a number of sensitive areas of continuing political and public concern. Thus it may be somewhat simplistic to suggest, as some have done, that "all" Congress has to do is to be more guarded in making statutory delegations. Nor is it useful to catalog the available congressional resources—its substantial authority through authorizing legislation, the appropriations process, the Senate power over presidential appointments and treaties, the oversight process, the power to alter the standards of judicial review, and its ultimate power to impeach executive branch officials—thereby implying that solutions are readily at hand. There is now, as there has always been, an ample supply of effective weapons available in the legislative arsenal. The difficult questions remain, as always, in the effort to determine which weapon, or combination of them, is appropriate to a particular set of circumstances.

As in the past, the congressional response will be shaped by decades of habit, the practicalities of the legislative process, and the exigencies of the moment. *Chadha* complicates matters by its abrupt and unexpected creation of potential power vacuums in a multitude of fragile policy areas. Administration officials thus far have been restrained and circumspect in their public reactions to the decision.[2] But it would not appear too cynical to observe that in times of crisis and conflict, perceived political advantage is likely to be tested. Interbranch policy disputes over the commitment of armed forces to a variety of hot spots around the globe, the management of the public lands, and containment of budget deficits may be viewed as crises-in-waiting. Past accommodations in these and other areas, put asunder by *Chadha*, are now legally unavailable to temper or avoid serious conflict. The challenge for Congress in the immediate future, then, is to fill those voids expeditiously and in a manner that facilitates the effective functioning of the legislative and administrative decisionmaking processes.

The Chadha Decision

The legislative veto is a term used to describe a statutory provision designed to permit one or both Houses of Congress, or even a committee, to approve or disapprove an action of the President or an administrative agency under authority delegated by the statute. Under such statutes the President is afforded no opportunity to veto the congressional action. Since 1932 about 210 laws containing some 320 separate veto provisions have been enacted, most within the last decade. Over 120 statutes, each with one or more veto provisions, remain on the books.

In *INS* v. *Chadha*, the Supreme Court effectively declared all such provisions unconstitutional. Although the substantive ruling with respect to the statute challenged in that case—a provision that allowed one House to overturn an Attorney General's decision to suspend the deportation of an alien—was not unexpected, the sweeping nature of the Court's rationale surprised many. The significance of the ruling is captured in Justice Powell's observation in his concurring opinion that the Court's decision "apparently will invalidate every use of the legislative veto. The breadth of this holding gives one pause."[3]

Chief Justice Burger, writing for the majority, acknowledged the widespread usage of the veto device and the view of many that it constitutes a "useful political invention," but found that such considerations had to bow to the clear constitutional mandate of bicameral consideration and presentment to the President of all exercises of legislative power. These constitutional requirements, the Chief Justice stated, represent the Framers' decision "that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."[4] Whether an action is an exercise of legislative power will depend on its purpose and effect. Here the Court provided a broad, all-embracing definition: where legislative action has "the purpose and effect of altering legal rights, duties and relations of persons . . . outside the legislative branch"[5] it must be effected through the constitutionally mandated lawmaking process. Thus only those legislative actions specifically excepted by the Constitution, such as impeachment and the Senate au-

thority to advise and consent on presidential appointments and treaties, or which have an effect totally internal to the Congress itself, can escape proscription.

> *. . . Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government and our inquiry is sharpened rather than blunted by the fact that Congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies: . . .*
>
> —INS v. Chadha, majority opinion.

The broad implications of the *Chadha* decision were confirmed less than two weeks later. On July 6 the Court summarily affirmed lower court judgments invalidating one and two-House veto provisions used by Congress to override a natural gas pricing rule promulgated by the Federal Energy Regulatory Commission[6] and the "used car rule" issued by the Federal Trade Commission.[7]

Severability

The Court's holding that veto provisions are unconstitutional does not end all judicial inquiry. A critical determination must be made with respect to each and every existing provision whether the offending veto can simply be excised, leaving the remainder of the statute intact, or whether the veto and the delegated authority to which it is attached are so inextricably interwined that both must fall. Resolution of this issue in each instance is of vital importance. Where only the veto provision is excised, leaving the Executive with a new unencumbered power, Congress is faced with the possibility that it will have to muster two-thirds majorities to retrieve a delegated authority that the President wants to keep.

In *Chadha* the Court reaffirmed its traditional three-part severability test. First, a court will look for the presence or absence of a severability clause which provides that the invalidation of part of an enactment does not invalidate the whole or any other part of it. Such clauses create a presumption that Congress did not intend the validity of the act to depend upon the invalidity of any of its parts. Next, since the presence of a severability clause is not conclusive, a court must look to the legislative history of the act to see whether Congress supplied any evidence that it would not have enacted the provision in question independently of the portion that has been found unconstitutional. A court will attempt to interpret the legislative history in each particular circumstance, a task the *Chadha* Court described as an "elusive inquiry." Finally, consideration must be given to whether the provision, absent the excised part, "survives as a workable administrative mechanism." By implication, if a provision without the veto is not functionally operable, the entire provision or act falls.

The statute in *Chadha* contained a severability clause and after analyzing the legislative history of the act, the Court found indications that even without a legislative veto, the act would serve some of Congress' purposes and therefore would have been enacted absent the veto. It also noted that effective congressional oversight over the delegated authority remained since the Attorney General would still have to report his actions to the Congress.

While this test portends a case-by-case resolution is in the offing, and a period of uncertainty for existing statutory authorities, there is some indication that the Court may view the presumption of severability in veto cases as stronger than in other cases. The *absence* of a severability clause was apparently not a serious impediment to the Court's summary affirmance of the gas pricing case. Lower courts may be inclined to accept severability as the rule in order to avoid prolonged uncertainty or possible wholesale invalidations.

Congressional Responses

A sampling of the immediate congressional reaction to the *Chadha* decision gives some indication of the variety, and vagaries, of the possible responses. It may also provide the basis for a vehicle for developing a considered institutional approach.

Congress' time-honored response to fast-breaking, controversial political events is to hold a hearing. The announcement of the legislative veto decision proved no exception. But instead of becoming vehicles for the excoriation of the Court or calls for legislative defiance or means of subverting or evading the ruling, the sessions were for the most part exercises in information gathering, self-education, and airing of genuine Member concerns over the High Court ruling. They reflected to an unusual degree the deliberative aspect of the legislative process in its best sense. Hearings before the House Committees on the Judiciary and Foreign Affairs and the Senate Committees on Foreign Relations, Judiciary and Finance, provided forums for exchanges between Members, administration and agency officials, legal experts, and academic scholars that appeared to deflect any institutional tendency toward a "Chicken Little" attitude or an impulse for an immediate global response.[8]

Some of the Members did present comprehensive proposals. Representative Jacobs and Senator DeConcini proposed constitutional amendments (H.J. Res. 313, S.J. Res. 135) which would allow one or two-House vetoes of agency rules. Both proposals assume the essentiality of the device but would limit its availability to the rulemaking process alone. In view of the long, unresolved controversy over the veto's efficacy, in addition to foreseeable difficulties in defining basic terms (what is a rule?), such a significant alteration of our fundamental law presents many problems.

Certain to be a popular substitute for the veto will be the joint resolution.[9] Senators Levin, Boren, Grassley, Kasten and DeConcini have sponsored one version (S. 1650) which would provide for a joint resolution of disapproval of all agency rules. Representative Lott introduced a bill under which a *major* rule could not take effect unless Congress enacts a joint resolution of approval within 90 days. *Minor* rules may take effect after 90 days unless a joint resolution of disapproval is enacted within that period (H.R. 3939).

A harbinger of the use of this control device unfolded during the House debate on the Consumer Product Safety Amendments of 1983 (H.R. 2688), six days after the announcement of the *Chadha* decision. In an effort to fill the void left by the now defunct two-House veto of Consumer Product Safety Commission rules, the House adopted an amendment offered by Representative Waxman permitting Congress to disapprove Commission rules within 90 days by joint resolution. The House also adopted an amendment by Representative Levitas requiring Congress to approve Commission rules by joint resolution before they can go into effect. These mutually exclusive provisions are now in conference committee for resolution.

Widespread use of the joint resolution mechanism, however, may be soon limited if the House Rules Committee

has its way. Its popularity in large part rests on the procedures for expedited floor consideration that normally accompany it. The prospect of continued proliferation of such automatic discharge provisions has raised Committee concerns that their cumulative effect has the potential for disrupting the legislative process by giving high priority to too many measures, thereby "prevent[ing] the House from reaching matters of greater importance to which no special procedures attach."[9] These factors, plus the implications for the Rules Committee's jurisdictional authority over floor access, may limit the appeal of this review device.

Chadha has also inspired the revival of the so-called Bumpers Amendment, a proposal which would enlist the courts as more active participants in the effort to make the administrative bureaucracy more responsive to the will of the people as expressed by Congress. In its current version (S. 1766), any presumption for or against the validity of a rule on review before a court is removed and the factual basis of rules under scrutiny have to have "substantial support" in the record of the agency proceeding. In the past the proposal has been criticized for its potential for causing even greater delay in agency action and inspiring excessive litigation. Critics have also questioned whether fostering increased intervention in the administrative process by the courts is an appropriate judicial role. An earlier version of the Bumpers Amendment passed the Senate in 1982 as part of the Regulatory Reform Act (S. 1080).

Another device sure to find expanded use is the "report and wait" requirement which in its usual form delays the effectiveness of administrative action for a specified period to allow Congress time to consider passage of legislation. The Supreme Court in *Chadha* reaffirmed the legal standing of such provisions. Suggested departures from the basic report-and-wait format, however, raise constitutional issues. For example, requirements that allow a committee to waive part of the wait period, or permit a committee to trigger an additional period of time for congressional consideration, are suspect. Arguably, such committee actions are in themselves legislative acts which have an effect "of altering legal rights, duties and relations . . . outside the legislative branch" and thus run afoul of *Chadha*. The Justice Department has adopted this position.

A number of proposals have sought to avoid *Chadha's* strictures by casting review provisions in a way that makes them appear to be exercises of legislative rulemaking authority affecting only internal congressional concerns. A typical provision might authorize a certain executive action but allow for passage of a concurrent resolution urging administrative modification or cancellation of the action. The adoption of such a resolution would make it out of order for either House to consider appropriations which would fund the disapproved activity. This mechanism in the limited form described would appear to unaffected by *Chadha*. The direct and immediate effect of the concurrent resolution is confined to the House and Senate in the matter of appropriations. Although denying funds would impact on executive agency plans, that is a direct result of appropriations action and only tangentially from the concurrent resolution.

An Institutional Approach

The remedial approaches just described represent largely *ad hoc* responses that are neither unexpected nor inutile. *Chadha* abruptly upset a broad range of congressional expectations, understandings, and lawmaking habits. The desire to substitute familiar forms or to reestablish familiar working arrangements is natural. If trial and error should prove that old methods no longer provide the flexibility or desired result in addressing executive actions, that may encourage the creation of new and more useful forms of response.

The *ad hoc* approach, however, suffers from the serious disadvantage of limited view. One lesson to be learned from the 50 years experience with the legislative veto is that for all the legal controversy it engendered, it most often was used in a discrete, situation-oriented manner and often succeeded in facilitating interbranch accommodations in areas of great political sensitivity. It seems that only when the congressional appetite for control of executive action by means of the mechanism appeared to become insatiable, particularly after 1980, and increased resort to its generic use became more common, did judicial sensitivity become aroused. It may be speculated that passage by the Senate in 1982 of a legislative veto provision encompassing all government rules as part of a broad regulatory reform package influenced the Supreme Court's deliberations on the *Chadha* case then pending before it. The prospect that Congress might now be ready to take a preemptive role in administration may go far in explaining why the Court chose as narrow a factual circumstance as the *Chadha* case to issue so broad and definitive a ruling.

The lesson, then, may be that in meeting the situation created by *Chadha*, Congress is presented with the opportunity, if not the necessity, of developing a measured institutional response. Several institutional courses of action have been put forth. Senator Moynihan has proposed the creation of a 12-member bipartisan interbranch study commission which would report its recommendations within a year. Representative Moakley, in a wide-ranging assessment presented before the House Judiciary Committee on July 21, counseled congressional avoidance of the pitfall toward which he felt the veto was heading. He warned that Members should not immerse themselves in every item of agency regulation and adjudication, a task which the institution has no capacity to manage. Rather, individual situations should be met by measured responses tailored to the particular circumstances. Interbranch communications should be facilitated and the development of informal, cooperative arrangements should be encouraged.

Mr. Moakley concluded that a long-run strengthening of the Congress will require facing the need for major structural changes in congressional oversight techniques and the manner in which Congress legislates. In this regard he suggested further consideration of his proposal in the 97th Congress (H.R. 1) as a vehicle for coordinated review of administrative, congressional, and judicial aspects of regulatory reform. A central feature of the bill was establishment of a select committee with broad authority to review proposed and existing rules in a manner not possible under the existing committee system.

Congress, admittedly, has lost a tool which has, in its better applications, proved useful and efficient. But, by restraining Congress from immersing itself in every item of regulation and adjudication, the court has saved Congress from drowning in detail it lacks the institutional capacity to manage, and frees it to act within the scope of its legitimate role for shaping national policy.

—Rep. Joe Moakley, statement before the House Committee on the Judiciary, July 21, 1983.

Finally, in an extraordinary gesture reflecting the deep concern of Members over the impact of *Chadha* on Congress and an apparent willingness to sacrifice some individual jurisdictional prerogatives for the benefit of the body, 17 House Committee chairmen petitioned Chairman Pepper of the Rules Committee to take the lead in formulating the House response to *Chadha*. Noting their unease over the *ad hoc* actions that had already been taken, they stated their belief "that precipitous action in this area could lead to more troubling consequences that those which were raised by the Supreme Court decision . . ." Chairman Pepper has accepted the charge and expects to begin work with in-depth hearings.

This unusual and virtually unprecedented commitment gives promise of opening new avenues to achieving effective oversight and a disciplined approach in the lawmaking process. At the very least it is an historic first step toward finding a meaningful institutional response to *Chadha*.

[1] 103 S.Ct. 2764 (1983).
[2] See, e.g., testimony of Deputy Attorney General Edward C. Schmults and Deputy Secretary of State Kenneth W. Dam, before the House Judiciary Committee on July 18, 1983, and before the House Foreign Affairs Committee on July 20, 1983.
[3] 103 S.Ct. at 2788.
[4] *Id.* at 2784.
[5] *Id.* at 2784.
[6] *Process Gas Consumers Group* v. *Consumers Energy Council of America*, 103 S.Ct. 3556 (1983).
[7] *U.S. Senate* v. *Federal Trade Commission*, 103 S.Ct. 3556 (1983).
[8] For a compilation of these hearings, see Fisher, "Developments After the Supreme Court's Decision in the Legislative Veto Case (*INS* v. *Chadha*)" (CRS, October 11, 1983).
[9] Since joint resolutions are presented to the President after bicameral consideration, they present no problem under *Chadha*.
[10] H. Rept. No. 98-257, Part 3, Export Administration Amendments Act of 1983, House Rules Committee, 98th Cong., 1st Sess., 1983, pp. 3-7.

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LEGISLATIVE-EXECUTIVE BALANCE IN FOREIGN POLICY WITHOUT THE LEGISLATIVE VETO

The Supreme Court's *Chadha* decision has in effect taken away one of the tools that Congress has used to assert its role in foreign affairs: the legislative veto. Provisions permitting Congress to approve or disapprove of executive branch actions without full legislative action have been included in important pieces of foreign policy legislation. While the loss may not be as devastating as it first appeared, Congress may need to sharpen old tools or develop new ones to maintain its role in foreign policy.

One measure illustrates the problem. At the time the *Chadha* decision was handed down on June 23, 1983, the House Foreign Affairs Committee had adopted a bill authorizing military assistance to El Salvador. It required the President to report that El Salvador had made progress toward certain objectives, but permitted Congress by concurrent resolution to disapprove continued assistance. After the Supreme Court decision, the Rules Committee on July 12 refused to send the bill to the House because it contained a legislative veto. The Foreign Affairs Committee substituted for the concurrent resolution a

joint resolution that must be signed by the President and is therefore not affected by the *Chadha* decision. This action met the concerns of the Rules Committee, but since a joint resolution can be vetoed by the President, Congress might have to muster a two-thirds majority in each House to override the President.

Congress has used legislative veto provisions in the foreign policy field for many years to maintain a check on the President. Most of the legislative vetoes, however, have been added since the early 1970's when Congress became determined to play an expanded role in the making of foreign policy. If the leverage imparted by a legislative veto is no longer available, Congress may find it more difficult to check the President without reducing his flexibility, or to share effectively in the formulation of foreign policy without writing into legislation too many administrative details.

Congress has never actually carried out a legislative veto by simple or concurrent resolution in foreign affairs. On two occasions Congress came close. The House passed resolutions to disapprove the sale of nuclear materials to India in 1980 and an AWACS and F-15 enhancement package to Saudi Arabia in 1981, but each time the President waged a successful campaign in the Senate to prevent passage of these concurrent resolutions of disapproval.

On the other hand, experience suggests that the very existence of the legislative veto may have stimulated greater attention to, and respect for, congressional views.

War Powers Resolution

The continuation of the Vietnam War without a congressional declaration of war led to the War Powers Resolution. Passed over President Nixon's veto on November 7, 1973, the War Powers Resolution established an arrangement for mutual exercise of the war powers, which the Constitution divides between Congress (giving it the power to declare war and to maintain an army and navy) and the President (making him Commander-in-Chief).

The War Powers Resolution has two provisions that give teeth to its central purpose: namely, both Congress and the President should share in any decision that might involve U.S. armed forces in hostilities. One provision is a legislative veto of the type struck down by the Supreme Court. Section 5(c) requires the President to remove U.S. forces engaged in hostilities outside the United States "if the Congress so directs by concurrent resolution." The other provision utilizes a procedure that apparently is not affected by the *Chadha* decision. After a report on the introduction of U.S. armed forces into hostilities or imminent hostilities outside the United States is submitted "or is required to be submitted", Section 5(b) requires the President to terminate that use of the armed forces after 60 days (possibly extended to 90 days) unless Congress declares war, extends the period, or enacts a specific authorization for such use.

In testifying before the House Foreign Affairs Committee on July 20, 1983, Deputy Secretary of State Kenneth W. Dam expressed the view that the legislative veto provision was clearly unconstitutional but reaffirmed "the Administration's strong commitment to the principles of consulting and reporting" called for in the resolution.

The problem is that many in Congress have not been satisfied with the executive branch's reporting and consultation. Presidents have filed reports under the resolution in nine situations. Usually the reporting and consultation occurred after the decision to send troops had been made, however, or the reports were not made under the provision that activated the 60-day time limitation. This was the case in the dispatch of Marines to Lebanon that led Congress to determine for itself that congressional authorization under Section 5(b) of the War Powers Resolution was required. In the Multinational Force in Lebanon Resolution, Congress determined that the requirement to report the introduction of troops into hostilities became operative on August 29, 1983, and, consistent with Section 5(b), authorized continued participation in the multinational force for 18 months. In certain other situations, including the increase of military advisers in El Salvador in 1981, the President has not filed a report at all.

> *. . . In the decade since the enactment of the War Powers Resolution, no U.S. forces have been committed to long-term hostilities. It is doubtful that Presidents have refrained from such commitments because of the legislative veto in the War Powers Resolution. It would be equally doubtful that Presidents will now feel freer of restraints because of* Chadha. *The lesson of recent history is that a President cannot sustain a major military involvement without Congressional and public support.*
>
> —Kenneth W. Dam, Deputy Secretary of State, statement before the House Committee on Foreign Affairs, July 20, 1983.

Nevertheless, many Members of Congress believe that the War Powers Resolution has served effectively as a restraint on the President, making him more cautious in the dispatch of troops abroad and more sensitive of the views of Congress. To what extent such restraint will be affected by the *Chadha* decision remains to be tested by experience and in the courts.

Emergency powers legislation

Towards the end of the Vietnam War, Congress focused on the fact that the United States had lived under a state of national emergency, with its implications for growth of executive authority, since 1933. The National Emergencies Act of 1976 allows Congress by concurrent resolution to terminate a declared emergency after six months and requires Congress at six month intervals to consider a vote on such a disapproval resolution. Under the International Emergency Economic Powers Act of 1977, certain presidential authorities may be abated if the national emergency is terminated by Congress pursuant to the legislative veto provision of the National Emergencies Act.

President Carter first invoked the National Emergencies Act to activate the International Emergency Economic Powers Act on November 14, 1979, to deal with the seizure of American hostages in Iran and to block the assets of the Iranian government within the jurisdiction of the United States. The proclamation was continued in 1980, 1981, and 1982. Six months after the first declaration of national emergency, both the House Foreign Affairs and Senate Foreign Relations Committees sent letters advising the President that they supported continuation of the emergency and therefore were not taking action under the legislative veto procedure to terminate it.

Foreign Assistance

Legislative veto provisions have not played a conspicuous role in foreign aid. Congress has been able to maintain reasonable control because it regularly authorizes and appropriates funds for the program. However, the Foreign

Assistance Act of 1961, as amended, has always had a broad legislative veto in Section 617, providing that unless ended sooner by the President, assistance to any country under any provision of the act may be terminated by concurrent resolution of Congress. Congress has never utilized this section to terminate assistance and only a few resolutions have been introduced under it.

Other legislative veto provisions have been added on subjects with which Congress became particularly concerned. Concern over human rights prompted Section 116 that provided for disapproval by concurrent resolution of aid to countries whose governments consistently violate internationally recognized human rights standards unless that aid directly benefits the needy people in those countries. The potential spread of nuclear weapons prompted Section 669 and 670 that provide for concurrent resolutions of disapproval of continued aid to countries that supply or receive items needed for uranium enrichment or reprocessing of spent fuel.[1] After administration resettlement of debts owed by India, France, and the Soviet Union for less than face value, Section 321 of the International Development and Food Assistance Act of 1975 required two-House approval of the settlement of debts by any country under the development and food aid program for less than the full amount.

In addition to the above measures, foreign assistance appropriations acts have prohibited the transfer of foreign assistance funds between appropriation accounts, or the obligation of contingency funds under the Economic Support Fund, without prior written approval of both Appropriations Committees. The Carter and Reagan administrations maintained that this committee veto was unconstitutional, treating it as a requirement for prior notification only. Nevertheless, the executive branch has respected the opinions of the committees.

Arms Export Control Act

Congress has long been interested in arms transfers and gradually added more and more controls to insure that the intent of Congress in legislation was carried out. When arms transfers were made primarily through grants and loans, Congress had a method of control through authorization and appropriation legislation. The legislative veto became especially valuable as the bulk of weapons were transferred through sales.

First placed in the arms transfer legislation in 1974, the scope of the legislative veto gradually was extended and procedures refined to make it more effective in assuring a congressional voice in arms sales. Administration officials complained that the large number of transactions subject to reporting and congressional veto requirements were making the procedure burdensome and that Congress was too involved in operational details.

The principal arms transfer legislation in effect at the time of the *Chadha* decision, the Arms Export Control Act, allowed Congress to disapprove by concurrent resolution transactions in three categories: (1) cash, credit, or commercial sales of defense articles and services; (2) third-country transfers of defense articles and services supplied by the United States; and (3) leases and loans of U.S. defense articles.

Congress never passed a concurrent resolution disapproving an arms transfer. Nevertheless, it appeared to be moving closer to doing so and in several instances the possibility appeared to have an influence on executive branch policy. In 1976, concurrent resolutions were introduced to block the sale of Hawk and Vulcan air defense systems to Jordan. Although the sale continued, the administration secured a pledge from Jordan that the Hawk missile system would be permanently installed at fixed sites as defensive weapons. In 1977 resolutions were introduced against the sale of Airborne Warning and Control System (AWACS) aircraft to Iran and appeared to influence the administration to obtain assurances from Iran on safeguarding the system. In 1978 the Senate rejected resolutions against a package of aircraft sales to Egypt, Israel, and Saudi Arabia, but only after the administration made concessions to alleviate congressional concerns.

Some observers believed that, even with the legislative veto, Congress was not able to influence adequately executive branch arms sales policy. Moreover, the unsuccessful attempt to disapprove the AWACS and F-15 enhancement package to Saudi Arabia in 1981 indicated the difficulty of obtaining enough votes in both the Senate and the House to override the President in a foreign policy confrontation. On the other hand, without the legislative veto, the President might listen to Congress even less on arms transfer policy.

Trade Legislation

Increasingly, Congress has delegated much foreign trade authority to the President. In doing so it has included several legislative veto provisions in foreign trade legislation, but none of these provisions has been successfully used to overturn a Presidential decision. The veto provisions highlight areas in which Congress has been particularly interested in maintaining control: export controls on agricultural products, import relief, and trade with Communist countries.

The Export Administration Act of 1979 authorized the President to impose export controls on the grounds of national security, foreign policy, or short supply. It contained two legislative vetoes relating to agricultural commodities and to the export of domestically produced crude oil. With the Act scheduled to expire on September 30, 1983, the Committee on Foreign Affairs reported a measure the day before the *Chadha* decision with several legislative veto provisions. Under pressure by the Rules Committee, the Foreign Affairs Committee subsequently amended the bill, usually by substituting joint resolutions of approval for concurrent resolutions of disapproval.

The Trade Act of 1974 includes four legislative veto provisions. One allows Congress to disapprove by concurrent resolution the President's determination not to provide import relief for injured industries exactly as recommended by the International Trade Commission. Other legislative vetoes covered the President's extension of trade privileges to non-market (i.e., Communist) countries that deny their citizens the right to emigrate. On August 1, 1983, the House decided to defer indefinitely three resolutions disapproving the President's recommendation to exercise his waiver authority and continue extending most-favored-nation status to Romania, Hungary, and China.

The Export-Import Bank Act of 1945 also contains a legislative veto on financial guarantees in connection with exports to the Soviet Union above $300 million.

Options for Congress

In considering the loss of the legislative veto after the *Chadha* decision, Congress can take two major approaches. One is to seek to maintain the same leverage over execu-

tive branch actions through different legislative mechanisms. A variety of different methods have been discussed in hearings before the House Foreign Affairs, Senate Foreign Relations, and Senate Finance Committees. Options include:

(1) Substitute procedures calling for a joint resolution or bill for legislative veto provisions. Congress has already indicated in foreign aid legislation and the Export Administration Act that this will frequently be its approach.

(2) Establish time limits on grants of authority. Time limits would provide Congress an opportunity to restrict or not to renew authorities it felt the President was abusing. (E.g., Defense Production Act and Export Administration Act.)

(3) Prohibit certain activities, require congressional authorization for others, and establish specific and precise limits in legislation authorizing executive branch activities.

(4) Rely on appropriations legislation to establish congressional control.

In foreign policy many executive officials and others object to utilizing legislation more extensively on the grounds that it reduces necessary flexibility for the President, but some feel it is the most reliable way to get the President to listen to Congress.

I expect we will see . . . a period of intensive reevaluation and possible adjustment of statutes that now contain legislative veto provisions. In many instances, Congress will probably choose to leave broad Executive authority in place, despite the veto's demise. Sometimes, I would hope, Congress will respond by enacting new, carefully considered, substantive limitations on delegated authority, and it may even choose to revoke certain delegations. Occasionally, although often less helpfully, Congress may develop new procedural devices that will allow quick negation, by statute, of Executive or agency action deemed seriously deficient.

—Prof. David A. Martin, University of Virginia School of Law, statement before House Committee on Foreign Affairs, July 21, 1983.

The second major approach is to influence the executive branch in a less formal and less adversarial way. Even before the decision in *Chadha*, some had felt that the confrontation between the President and Congress inherent in the use of a legislative veto was inappropriate in the foreign affairs field. In that area, they contend, the United States should speak with one voice; the threat of a congressional reversal of a presidential action can make the United States appear divided and unreliable. Options by which Congress might exert its influence without the use of legislation include:

(1) Develop informal arrangements with the executive branch which in effect allow appropriate congressional committees or subcommittees to register approval or disapproval of administration proposals.

(2) Seek more effective consultation with the executive branch.

(3) Undertake vigorous oversight of the executive branch's conduct.

(4) Utilize report-and-wait requirements more effectively to develop information and examine decisions.

The administration has indicated that it would like Congress to take the second approach. Deputy Secretary of State Dam said in his testimony on July 21, "We have seen in the last 15 years that when Congress and the President are at loggerheads, the result can be stalemate and sometimes serious harm to our foreign policy. We now have an opportunity to put much of that past behind us, and to start afresh."

Many in Congress have also called for greater consultation between the President and Congress in foreign policy. They point out that Congress has often turned to restrictive legislation, as it did to the legislative veto, because administrations have not supplied information in a timely fashion or paid sufficient attention to congressional opinion. If the legislative veto is no longer an option, both branches may find it advantageous to consult and cooperate more effectively that they have in the past.

This article is based on Issue Brief 83123, Foreign Policy: Effect of the Supreme Court's Legislative Veto Decision [by Ellen C. Collier, Warren H. Donnelly, Richard F. Grimmett, Clyde R. Mark, Larry Q. Nowels, and Robert Shuey]. See also: Executive-legislative Consultation on Foreign Policy: Strengthening the Legislative Side. House Foreign Affairs Committee print, 1982 [by Ellen C. Collier]; Executive-legislative Consultation on U.S. Arms Sales. House Foreign Affairs Committee print, 1982 [by Richard F. Grimmett]; and the following Congressional Research Services issue briefs: Export Controls [by George Holliday and John P. Hardt] Issue Brief 75003. Foreign Aid Issues in the 98th Congress [by Larry Q. Nowels] Issue Brief 83084. U.S. Foreign Policy Export Controls [by Theodor W. Galdi] Issue Brief 83097. War Powers Resolution: Presidential Compliance [by Ellen C. Collier] Issue Brief 81050. Most-Favored-Nation Policy toward Communist Countries [by Vladimir N. Pregelj] Issue Brief 74139.

[1] Other legislative vetoes relating to the nonproliferation of nuclear weapons are contained in the Atomic Energy Act of 1954, as amended, and the Nuclear Non-Proliferation Act of 1978. See energy article in this issue.

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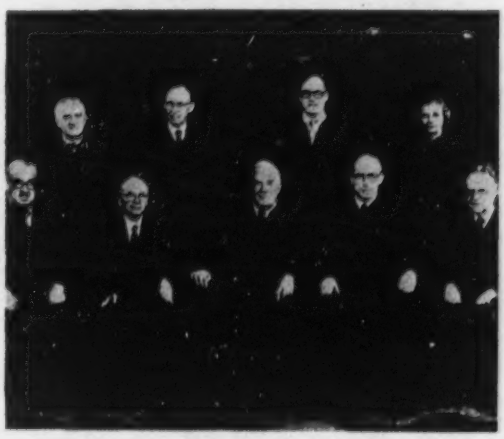

The Supreme Court Justices

CHADHA'S IMPACT ON THE BUDGET PROCESS

The Supreme Court's immediate focus in *INS* v. *Chadha* was a relatively obscure provision in an immigration statute. The full impact of the decision, however, will be felt broadly across the entire range of the budget process. The most visible and direct casualty is the one-House legislative veto in the Impoundment Control Act of 1974 (Title X of the Congressional Budget Act). In addition, *Chadha* has set in motion new forces that will alter the authorization and appropriation methods used by Congress to control the executive branch. Of special interest will be the degree to which Congress also adopts informal and nonstatutory techniques to monitor and direct agency actions.

Impoundment Control

Under legislation passed in 1974, Congress established procedures to subject impoundment to new controls. If the President wants to terminate funds for an agency or program, he must submit to Congress a "rescission" proposal. Unless both Houses of Congress within 45 days of continuous session pass a bill or joint resolution supporting the rescission, the funds have to be released for obligation. Since this part of the Impoundment Control Act requires action by both Houses and presentment of a bill or joint resolution to the President, it does not appear to be affected by the Court's decision.

But the Act also allowed the President, whenever he decided to delay the spending of funds, to submit to Congress a "deferral" message. Either House of Congress, by a simple resolution, could disapprove the deferral at any time. There seems to be little question that this one-House veto has been invalidated by *Chadha*.

Nevertheless, the President continues to submit deferrals to Congress (as on July 7, 1983) and the Comptroller General continues to review the deferral messages and make comments on them (report to Congress on August 2, 1983). Everything seems to be operating as before, but without the one-House veto.

To some extent this loss of the legislative veto has been minimized by the practice of Congress, long before *Chadha*, to reject deferrals through the regular legislative process. Increasingly, Congress has placed language in appropriations bills to disapprove deferrals submitted under the Impoundment Control Act. This option, of course, remains available to Congress. Moreover, Congressman Silvio Conte has proposed legislation to require a bill or joint resolution to disapprove deferrals (H.R. 3754, introduced on August 3, 1983).

While use of a bill or joint resolution no doubt satisfies the criteria established by the Supreme Court, the legislative and executive branches may want to reach an accommodation to permit more expeditious action. Whether Congress uses an appropriations bill as a vehicle for disapproving deferrals, or relies on a separate bill or joint resolution, months can go by before Congress effectively rejects a deferral. Many Members of Congress felt strongly in the early 1970s that they should not have to overturn impoundments by enacting another statute. They thought it was redundant and institutionally demeaning to pass a second statute to reiterate a budgetary decision already enacted into law. The believed that Congress should not have to pass two statutes to enforce its will. And in the event of a President's veto the second time, Congress would have to search for two-thirds majorities in each House to override the President and implement a legislative policy expressed twice before. The one-House veto for deferrals was tailored to meet this dilemma.

The compromise embodied in the deferral process also met the needs of executive officials. After many defeats in the federal courts, which repeatedly struck down impoundments by the Nixon administration, the executive branch very much wanted a clear legal basis for impounding funds. In any event, no one in the Nixon, Ford, Carter, or Reagan administration ever questioned the constitutionality of the legislative veto in the Impoundment Control Act.

Without recourse to a legislative veto, Members of Congress might be tempted to place language in appropriations bills to mandate that funds be spent. At present, appropriations combine mandatory spending (as with entitlements) and permissive grants of budget authority. Neither branch wants a system of laws that deprives administrators of flexibility and discretion, reducing them to the status of clerks. Still, the Court's decision may push in that direction unless Congress and the President can work out a new accommodation allowing Congress to overturn deferrals short of passing new legislation. Perhaps on an informal basis, in the spirit of mutual accommodation, administration officials may agree to release deferred funds if either House passes a "sense of the House" or "sense of the Senate" resolution of disapproval. Such an agreement would reestablish the status quo, although this time based on informal understandings rather than statute.

Appropriations Riders

Congress has always retained the power to place in an appropriations bill language to prohibit an objectionable agency rule or action. For example, the Transportation Appropriations Act for FY 1979 provided that "None of the funds appropriated under this Act shall be used to implement or enforce any standard or regulation which requires any motor vehicle to be equipped with an occupant restraint system (other than a seat belt)." Through such language Congress was able to prohibit a pending agency rule to require air bags.

Unless a limitation in an appropriations bills involves an unconstitutional condition, the prohibition is direct and final—although usually only for the duration of the fiscal year. Presidents are unlikely to veto an entire appropriations bill because of a limitation or rider. Since *Chadha* makes one-House and two-House vetoes unavailable for legislative control, Congress may resort even more to restrictive language in appropriations bills.

Members of both Houses have expressed uneasiness about "legislating" on appropriations measures. As a general principle, they prefer that questions of agency policy be considered by the authorizing committees acting through the regular process of hearings, report language, and authorization bills. The sentiment against legislating on appropriations bills became particularly strong over the past decade when appropriations were stalled in Congress time and again because of riders dealing with abortion, school prayers, school busing, and other contentious issues.

To avoid these delays, the House Democratic Caucus voted in December 1982 to amend House Rule XXI to make it more difficult on the floor to add limitations to general appropriations bills. This policy was incorporated in the rules adopted by the House on January 3, 1983 for the 98th Congress. Clause 2 of Rule XXI now permits the Appropriations Committee to include limitations at its own initiative or at the direction of a legislative committee having jurisdiction over the subject matter. After a general appropriations bill has been read for amendment, it is now in order to make a motion that the Committee of the Whole rise and report the bill to the House. Only if a majority votes down this motion may a Member offer a floor amendment to limit the use of appropriations for a specific agency program or action.

With the loss of the legislative veto, some Members of Congress are now questioning the Appropriations Committee's primary control over language that limits the use of appropriations. They believe that the power of the purse is the crucial legislative tool for controlling the executive branch and that any Member of Congress should be able to offer limitations at any time.[1] A major bill introduced by Representative Trent Lott on September 20, 1983, to exert additional legislative control over agency rulemaking, would amend House Rule XXI to permit limitation amendments during the initial amendment process with respect to agency regulations for which a resolution of disapproval has not been considered by the House, or has been passed but not enacted during a specified review period (H.R. 3939).

Budget Timetable

In *Chadha*, the Supreme Court advised Congress that if it disagrees with presidential or agency actions it can correct matters only by passing new legislation. Once it delegates authority, it must "enact a law" to overturn or modify an executive decision.

> *We are going to have to keep these agencies on short leash and under short rations as far as appropriations and concerned so if they get out of hand they cannot be out of hand for too long before they have to come back to Congress for their budgets.*
>
> —Rep. Elliott Levitas, June 29, 1983 statement on *Chadha* decision.

Congress adopted the legislative veto in part because it did not want to delegate authority by majority vote and then have to recapture it (in the face of a President's veto) by an extraordinary majority—a two-thirds majority in each House to override the President. This fact of life may encourage Congress to maintain its present reliance on annual appropriations and annual or short-term authorizations. The burden will then be on agencies to secure legislative support rather than on Congress to stop agency actions.

Some proponents of biennial budgeting argue that Congress cannot complete its budgetary decisions and end the reliance on continuing resolutions unless it moves to at least a two-year cycle of authorizations, appropriations, and budget resolutions. Because of *Chadha*, Members of Congress may prefer to keep agencies on a short leash, forcing them to come to Congress on a regular basis for program authority and funds. Congress can then control agencies by simple majority, not the two-thirds needed in each House to override a veto.

Periodic legislative action increases the workload of Congress somewhat, and yet if agencies maintain a record of good will and cooperation, reauthorization and funding can be done without a substantial burden on Congress. If agencies fail to act in good faith, Congress has all the more need for frequent reauthorizations. At least for the present time, Congress will be very cautious in delegating to agencies any additional latitude or discretion over the spending of public funds.

Internal Rules

House and Senate rules, especially those governing authorizations and appropriations, offer Congress an opportunity to exercise the functional equivalent of the legislative veto. *Chadha* may allow the use of internal rules for this purpose because the rules control action by Congress rather than by executive agencies. In footnote 20 of the decision, the Court recognizes that each House "has the power to act alone in determining specified internal matters," but that this exception to the principles of bicameralism and presentment "only empowers Congress to bind itself . . ."

> *One might also include another "exception" to the rule that Congressional action having the force of law be subject to the bicameral requirement and the Presentment Clauses. Each House has the power to act alone in determining specified internal matters . . . . However, this "exception" only empowers Congress to bind itself and is noteworthy only insofar as it further indicates the Framers' intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in specific and enumerated instances.*
>
> —INS v. Chadha, majority opinion.

During the 1950s, the Eisenhower administration challenged the constitutionality of "coming into agreement" provisions that Congress had added to statutes. Before taking certain actions on defense contracts, military real estate, and other matters, agencies were directed to seek the approval of specified committees. The Justice Department maintained that these provisions violated the principle of separation of powers by engrafting executive functions onto Members of Congress.[2]

In response to this legal challenge, Congress altered the statutory language to prohibit the appropriation of funds unless the authorizing committee of jurisdiction had adopted a committee resolution approving an agency proposal (such as a prospectus for a public building). Essentially this is a committee veto, giving Congress the same control that it had before. Nevertheless, the Justice Department acquiesced by reasoning that the committee resolution was part of internal congressional rulemaking and did not affect the executive branch.[3] Whether the administration will take a bolder stance, in light of *Chadha*, remains to be seen.

Over the past few years, Representative Elliott Levitas has sponsored several amendments that rely on the appropriations power to control agency actions. In a number of statutes he has added the following language: "No part of any appropriation contained in this Act shall be available to implement, administer, or enforce any regulation which has been disapproved pursuant to a resolution of disapproval duly adopted in accordance with the applicable laws of the United States."[4] This kind of language is more in the nature of limitation and raises the issue of an unconstitutional condition on delegated authority. The Justice Department regards the Levitas language as unconstitutional.[5]

Informal Accommodations

In the years following World War II, executive agencies and congressional committees entered into a number of informal agreements to balance the executive need for flexibility with the legislative need for control. Part of this accommodation concerned what has come to be known as "reprogramming": shifting funds within an appropriation account from one purpose to another. Depending on the nature and magnitude of the reprogramming, agencies had to notify and in some cases seek the prior approval of designated committees and subcommittees.

Since this type of understanding rarely found its way into statutes, no constitutional issue emerged. Agencies were legally free to ignore the committees and reprogram as they wished, but they chose to comply with the committee opinions because they feared retribution in the form of budget cutbacks, line-itemization, and other sanctions.

This type of legislative (or committee) veto operated early in 1983 when President Reagan wanted to reprogram $60 million to El Salvador. The administration honored the reprogramming procedure, touching base with the authorizing and appropriation committees to secure their support. At the same time, the administration accepted a number of limitations, terms and conditions added by the review committees. Whatever the particulars of the legal situation, agencies know that they ignore the sentiments of congressional committees at their own peril.

These understandings were part of the pre-Chadha world and will persist in the future. They are not legal in effect. They are, however, in effect legal. Agency directives and financial management manuals are quite precise in specifying the need for prior approval from designated committees and subcommittees before implementing certain administrative actions. Reprogramming is typically called an informal accommodation. In fact, the process is highly formalized, calling into play detailed instructions that are well known to participants in both branches.

Even after *Chadha*, Congress continues to place committee vetoes and reprogramming agreements into appropriations bills and these bills have been signed into law. The Supplemental Appropriations Act for fiscal 1983 became law on July 30, 1983—more than a month after the Court's decision—and yet it contains three committee vetoes. In a section covering the Corps of Engineers, the statute requires the prior approval of the Appropriations Committees for the reimbursement of funds for the Ventura Marina Project. Reprogramming of contract authority and budget authority for certain HUD programs also requires the approval of the Appropriations Committees. In the third committee veto, affecting the Interior Department, the termination of certain programs or facilities requires either enactment of the Interior Appropriations Act or "approved reprogramming procedures." Although reprogramming is usually an informal, nonstatutory process, this language appears to convert an informal prior-approval procedure into a legally binding committee veto to be exercised by the Appropriations Committees.[6] Agencies could argue that reprogramming procedures are not binding and no statute can make them so, but accommodations will most likely be made to avoid constant friction between agencies and their review committees. Rigid adherence to legal doctrine is often too costly in political terms.

The briefs filed in *Chadha* set the executive branch against Congress, putting the two political branches in what appears to be a collision course. And yet the history of the legislative veto has not been one of irreconcilable conflict between the two branches. For the most part, Congress recognized that executive officials need discretionary (legislative) authority; executive officials appreciated that Members of Congress need some form of oversight (administrative) control. The practical basis for this mutual understanding of shared roles has not been altered by the Court's decision. With or without the blessing of the judiciary, Congress will continue to control agency actions by means other than the full-fledged, regular legislative process.

[1] 129 Cong. Rec. H4504 (daily ed. June 28, 1983). Statement by Congressman Dan Glickman.

[2] 41 Op. A.G. 230 (1955); 41 Op. A.G. 300 (1957).

[3] For example, see the statement of President Nixon upon signing the Public Buildings Amendments of 1972; Public Papers of the Presidents, 1972, p. 687.

[4] For example, section 413 of the HUD appropriations bill for fiscal 1984, P.L. 98-45, 97 Stat. 219, 230 (July 12, 1983).

[5] Letter to Chairman Mark O. Hatfield, Senate Committee on Appropriations, from Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs, Department of Justice, regarding H.R. 4169 (October 27, 1981).

[6] For the "approved reprogramming procedures," see H. Rept. No. 97-942, pp. 8-9.

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LEGISLATIVE VETOES IN ENERGY LEGISLATION

Many of the energy-related bills passed since the Arab oil embargo were subject to intense debate and required a careful balancing of competing interests. As a result, the device of the legislative veto, which gave the Congress a second chance to approve or disapprove executive actions, was often included as an option in reaching a compromise. Such provisions appear in many of the major energy bills on the books today.

Despite widespread presence of the legislative veto option in energy legislation, its nullification will probably have little significance in many cases. A number of such provisions deal with relatively minor matters—such as the option by a committee or a single House to waive the waiting period in a "report-and-wait" requirement on an executive action. Others give Congress review of actions whose importance has waned as the energy crisis has become less acute. In fact, in only one energy area—nuclear non-proliferation legislation—does the legislative veto play a central role in energy issues that are of continuing concern to the Congress. (Federal lands management, which can affect energy and mineral resource development, is another legislative area greatly affected by the *Chadha* decision. See the article in this issue.)

Several other veto provisions, however, deal with issues that are currently the subject of pending legislation. These include the pricing and deregulation provisions in the Natural Gas Policy Act and the issue of exporting Alaskan oil. In other areas, such as the amendment of automobile fuel economy standards and the setting of fees for utilities to pay for nuclear waste management, actions by the executive may be controversial enough to have raised the possibility of a congressional veto if the device were still available. Whether they lead to legislative action will depend largely on the circumstances at the time the issue is raised. A further category of energy legislation deals with issues that are not currently of very great interest; however, these legislative vetoes could be significant if energy scarcity becomes a topic of concern again. The Synfuels Corporation falls into this category.

Nuclear Non-Proliferation

Legislation to avoid the further spread, or proliferation, of nuclear weapons authorizes many actions by the executive branch which must be submitted to Congress for a specified time and which do not take effect if disapproved by concurrent resolution. Most of these provisions appear in the Atomic Energy Act of 1954 as amended by the Nuclear Non-Proliferation Act of 1978; several others are in the Foreign Assistance Act of 1961, as amended most recently by the International Security and Development Cooperation Act of 1981. These acts contain 11 such legislative veto provisions.

Requirements that certain proposed executive actions be submitted to Congress for consideration and possible approval or disapproval are nothing new for atomic energy legislation. The Atomic Energy Act of 1946 prohibited U.S. exchange of nuclear information with other countries for industrial purposes until Congress had declared by joint resolution that effective and enforceable international safeguards had been established. Later when Congress rewrote the atomic energy legislation in the Atomic Energy Act of 1954, it provided for congressional disapproval by concurrent resolution of agreements for nuclear cooperation that were negotiated by the executive branch. The number of such veto provisions multiplied in the 1970s after India tested a nuclear explosive in 1974 and after reports that West German contracts with Brazil, and French contracts with Pakistan and South Korea, involved supply of sensitive nuclear technologies.

While none of these congressional veto powers has actually been exercised, their existence has enabled Congress to keep pressure upon the executive branch to go slowly on certain decisions of non-proliferation policy, or to avoid other actions that might trigger congressional disapproval. One veto provision that was partially exercised concerned President Carter's decision in 1980 to authorize a nuclear export to India. The House, after lengthy debate, voted for disapproval, but the concurrent resolution did not pass the Senate.

The Administration will probably see the *Chadha* decision as weakening congressional influence over the administration of U.S. non-proliferation policy, with a corresponding increase in flexibility for the executive branch in dealing with other countries on matters of nuclear trade and cooperation. The executive branch may also feel less constrained in its interpretations and administration of the statutory goals and policies in U.S. non-proliferation legislation. This will concern those Members of Congress who would prefer a strict interpretation of the atomic energy statutes.

Other governments and their electric power industries are likely to interpret the Supreme Court's decision in a way pleasing to the administration: as making U.S. nuclear supply agreements more predictable and reliable because there would be less risk of congressional disapprovals. They also may hope to get more favorable treatment from the United States in the administration of U.S. controls over nuclear exports and their subsequent uses.

The Reagan administration has said that it will continue to submit various non-proliferation matters to Congress as is now required, although for information rather than for disapproval through legislative veto. So Congress will still have an opportunity to intervene by joint resolution, although it may have to muster a two-third majority to override a presidential veto. Moreover, Congress retains substantial leverage through its power to attach riders to various appropriations or to amend the Atomic Energy Act of 1954 to place new limits upon executive branch discretion.

> *. . . no evidence exists that the administrative process is not working reasonably well, given the complexity of the task. But whatever problems there are, quick fixes like the legislative veto are not the answer. Nor is it sensible for Congress to put automatic delays onto all significant Executive Branch decisions to allow Congress time to pass overriding legislation. Nor is it wise for Congress to require positive legislation approving rules before they may go into effect. Congress must recognize that it can not hope to run the Executive Branch and that it must devote its attention to fundamental problems and not become immersed in individual decisions of individual agencies.*
>
> —Alan B. Morrison,
> Attorney for Rai Chadha, statement before
> the House Committee on the Judiciary,
> July 18, 1983.

The effect of the Court's decision will probably be discussed in hearings on non-proliferation policy and legislation scheduled by the Senate Committee on Governmental Affairs and Foreign Relations, and by the House Committee on Foreign Affairs. However, at the time of writing no legislation had been proposed to deal with the effects of the *Chadha* and related decisions upon U.S. non-proliferation policy.

Alaska Oil Exports

The Trans-Alaska Pipeline Authorization Act of 1973 amended Section 28(u) of the Mineral Leasing Act of 1920 to limit exports of crude oil transported by pipeline. The amendment responded to "concern that the companies that control the North Slope oil reserve [at Prudhoe Bay, Alaska] might decide, on the basis of private commercial advantage, to make export sales or exchanges that result in a net reduction of crude oil supplies available to the United States, or an increased dependence of the United States upon insecure foreign supplies."[3] The concern was based on real economic factors, since transportation, a major cost factor in Alaskan oil, would be much cheaper if the oil were shipped to Japan instead of the West Coast.

The amendment to Section 28(u) does not flatly prohibit the export of North Slope crude oil (or any U.S. domestically produced oil that at some point was carried in pipeline over federal rights-of-way), but it effectively limits such exports to two specified circumstances: an equal exchange of crude oil with an adjacent country, or a finding by the President that the exports of oil "will not diminish the total quantity of petroleum available to the United States and are in the accord with the Export Administration Act of 1967."[4] (That Act at that time empowered the President to "prohibit or curtail exports of any articles, materials or supplies, including petroleum when it becomes necessary to protect the domestic economy from excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand.") The finding is subject to congressional disapproval by concurrent resolution.

The limitations in Section 28(u) were supplemented by much more severe restrictions in 1977 and 1979 amendments to the Export Administration Act. These later amendments made it essentially impractical to export Alaskan oil at all. One requirement, for instance, was that 75 percent of the savings that would accrue to the oil company through shorter transportation costs and other factors be passed on to consumers: a determination impossible to make in advance. The amendments were due to expire by September 30, 1983, however. Without them the provisions of Section 28(u) were all that prevented exports, and now *Chadha* has invalidated the legislative veto provision over a finding that would allow them. While the Reagan administration did not immediately take advantage of the decision to make such a finding, it had argued before the decision that exports made economic sense.

Synthetic Fuels Corporation

A major provision of the Energy Security Act of 1980 was creation of the United States Synthetic Fuels Corporation (SFC), the largest publicly funded corporation in the United States. SFC was directed to accelerate the commercialization of an environmentally acceptable and economically feasible synfuels industry. The Corporation, which functions primarily as an investment bank, provides the private sector with financial assistance to reduce the risks of investing in commercial synfuel projects. Thus far, Congress has authorized up to $20 billion and appropriated about $14.8 billion for SFC to implement its program.

The Corporation's Board of Directors can decide which projects to fund and how to fund them, but some of those decisions are subject to a one-House legislation veto. Included are decisions to provide additional aid to projects that are more than 250 percent over original cost estimates, and to take control or lease back a project that was receiving SFC aid.

The Corporation currently plans to provide up to $13.2 billion of financial incentives through fiscal year 1984 to about 13 commercial-scale synfuels projects. SFC is likely to commit most, if not all, of the funds Congress appropriated for the first phase of its program if these plans are fully implemented. If this occurs, SFC would not have the funds needed to carry out other sections of the Energy Security Act, including those subject to legislative veto. Thus the veto provisions appear unlikely to become important during the next few years unless further funding for SFC is appropriated.

Another legislative veto applies to a request by SFC to delay up to one year a requirement that it submit a comprehensive strategy report by June 30, 1984. It appears likely that the SFC will ask for this extension.

Nuclear Waste Disposal

A major issue in the debate over the Nuclear Waste Policy Act of 1982 was the role of state and Indian authorities in the siting of repositories for high-level radioactive waste. As action on the bill approached an end, the issue narrowed to the question of whether to override a state or Indian veto of a site by a one-House vote or a two-House joint resolution. The final decision was to go for the *Chadha*-proof joint resolution, but the Congress arrived at that point by a curious route. In doing so, it gave an interesting insight on congressional views of the legislative veto prior to the *Chadha* decision.

The Senate version had a one-House provision; the bill taken up on the floor of the House provided a joint resolution, but that was amended to provide for a one-House vote. Because there was no time at the end of the session for a conference committee, proponents of the bill reached an informal compromise on a bill which was passed with little debate by the Senate, and by the House under a rule that allowed no amendments. One of the features of the compromise bill—a feature not in the versions passed by either House—was the joint resolution requirement to override state or Indian objections. The compromise bill passed, in the final hours of the 97th Congress.

In arguing against the amendment with the one-House veto provision, Representative Richard Ottinger cited the D.C. Court of Appeals decision of January 29, 1982, that such devices were unconstitutional.[3] The House did not accept that argument, and voted 190-184 to adopt the amendment. When the compromise version later came back from the Senate with the two-House provision in it, however, only a few House voices were raised against it.

The final version of the bill also contains a one-House veto over decisions by the Secretary of Energy to adjust the fee imposed on nuclear utilities to pay for waste disposal (Sec. 302). Either by chance or by design, the Congress guaranteed that a crucial provision of the Nuclear Waste bill—the role of the states—would be unaffected by *Chadha*, but left the less important fee-setting process to take its chances in the Supreme Court.

Automobile Fuel Economy Standards

The Energy Policy and Conservation Act allows the Secretary of Transportation to amend the certified average fuel economy (CAFE) standards after model year 1985. Amendments which increase the standard above 27.5 miles per gallon or below 26.0 miles per gallon, however, are subject to congressional veto. Currently, two major manufacturers are urging some relaxation of the standards because consumer preferences make it likely that the manufacturers will be in non-compliance with the standards for model year 1984 and 1985. Congressional hearings have been held. Should the administration choose to relax the standards below the 26.0 mpg limit, the Congress would have no authority under the legislative veto device to reverse the decision.

Natural Gas

The Natural Gas Policy Act of 1978 contains two legislative veto provisions of major significance. One concerns "incremental pricing" provisions, and the other ultimate price decontrol of gas in 1985.

NGPA required the Federal Energy Regulatory Commission (FERC) to promulgate "Phase-II" rules under which most gas consumed by the industrial sector would be "incrementally" priced based on the price of No. 2 heating oil. The Phase-II regulations were submitted to the Congress in 1980, by which time there was broad consensus that further implementation of incremental pricing was no longer advisable. FERC itself recommended that the regulations be rejected; the Congress agreed, with only 35 votes in favor of Phase II. FERC then attempted to revoke the regulations to make sure that they would not go into effect if the congressional action proved invalid.

Both the congressional veto of the Phase-II regulations, and the subsequent revocation of them by FERC, were challenged in court. In January 1982 the D.C. Circuit Court declared the veto unconstitutional,[4] and the Supreme Court, a few days after *Chadha*, affirmed the decision without opinion.[5] Once the case involving FERC's revocation of the Phase-II regulations is finalized by the Court of Appeals, FERC may have to take further action if it wants to prevent them from taking effect.

NGPA also provides that price controls on many types of "new" natural gas be lifted on January 1, 1985, but that six months after that date the President may reimpose controls, subject to disapproval by concurrent resolution. The Congress may itself reimpose controls by concurrent resolution, after the 6-month decontrol period.

The Supreme Court action eliminates the option of Congress either to veto a presidential decision to reimpose controls, or to reimpose them itself by concurrent resolution. The six-month hiatus during which neither the President nor the Congress can impose controls has been one factor in efforts to pass new legislation on natural gas, and the legislative veto decision may add further impetus in that direction. In any case, its elimination as a possible compromise device will probably affect the shape of any new legislation that is developed.

[1] S. Rept. No. 93-207, p. 27.
[2] P.L. 93-153, section 28(u).
[3] 128 Cong. Rec. H8546 (daily ed. November 28, 1982).
[4] Consumer Energy Council of America v. Federal Energy Regulatory Commission, 673 F.2d 425 (D.C. Cir. 1982).
[5] Process Gas Consumer Group v. Consumers Energy Council of America, 103 S.Ct. 3556 (1983).

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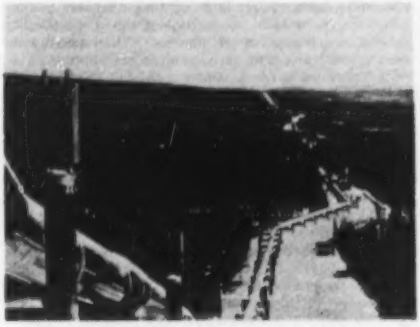

Alaska Pipeline photos, courtesy American Petroleum Institute

ADELA BACKIEL and PAMELA BALDWIN

WHO CONTROLS THE FEDERAL LANDS AFTER *CHADHA?*

The first major controversy since the Supreme Court's decision in *Chadha* has erupted between the House Interior and Insular Affairs Committee and the U.S. Department of the Interior (USDI). Secretary of the Interior James G. Watt conducted a coal lease issue in the Fort Union coal region despite the Committee's resolution notifying him to withdraw the lands involved from coal leasing. A lawsuit was filed that may test the authority to Congress to impose certain controls over executive branch actions in the context of federal land legislation.

Legislative veto provisions are found in many statutes pertaining to natural resources. However, the most immediate and greatest impact of *Chadha* in this area is likely to be on land laws, particularly the Federal Land Policy and Management Act of 1976 (FLPMA) which governs the management of most of the vast federal land holdings. Federal land (including submerged land) is the focus of this article. Federal and state coordination on uses of the coastal zone is also discussed.

The Coal Leasing Controversy

The House Interior Committee passed a resolution on August 3, 1983 notifying the Secretary of the Interior to withdraw certain lands from coal leasing. In doing so, the Committee invoked §204(e) of FLPMA, a seldom used section that applies when "an emergency situation exists and extraordinary measures must be taken to preserve values that would otherwise be lost . . ." The resolution alleges that USDI was receiving less than fair market value for the coal and also expresses concern about the effects of coal development on the environment. The House Committee approved the measure, voting along party lines, 27-14.

The House Interior Committee took similar action in 1981 when it directed the Secretary to withdraw the Bob Marshall and certain other wilderness lands from mineral leasing. Although the Secretary complied with the resolution, he also indicated that he questioned the constitutionality of the Committee's action and was complying in the interest of maintaining harmony between Congress and the executive branch. The Committee action was challenged in a court suit by public interest groups. In an ambiguous and controversial opinion, a federal district court avoided the constitutional issues by interpreting §204(e) as "requir[ing] the Executive branch to take affirmative action at the request of a single congressional committee. But since the Secretary is allowed to exercise his discretion in implementing that request, the Committee's authority is sufficiently similar to traditional committee powers . . . and to proper report and wait provisions to pass constitutional muster."[1]

Subsequently, the House made several attempts to restrain USDI efforts to increase coal leasing on federal lands, and a commission to study the Department's coal leasing program was established in the fiscal 1983 supplemental appropriations bill.

In the interest of harmony, Secretary Watt and the Chairman of the House Interior Committee, Representative Morris K. Udall, initially sought a compromise on the Fort Union lease sales, even though there was a possibility that a coal leasing moratorium might be in effect on October 1, 1983.[2] In an exchange of letters, Chairman Udall asked if the lease sales could be delayed until early October when the Committee could hold hearings. The Secretary agreed to defer the lease sales until the end of September, but no later. This was unacceptable to the Committee and it approved the controversial resolution August 3, 1983. Secretary Watt wrote to Chairman Udall that attorneys for USDI and the Department of Justice advised him that in the wake of *Chadha* any Committee resolution must be interpreted as a *request* for executive branch action.

> *. . . our Solicitor's Office and the Department of Justice have advised strongly that in the wake of the Supreme Court decision on the unconstitutionality of the legislative veto, any [committee] resolution must be interpreted as a request for Executive Branch action . . . . I am further advised that any attempted resolution purporting to direct a withdrawal of tracts from the Fort Union lease offering would be in direct conflict with the legislative process developed by the Framers of the Constitution as recently interpreted by the Supreme Court.*
>
> —Secretary of the Interior James G. Watt, letter of August 2, 1983, to Congressman Morris K. Udall, Chairman of the House Committee on Interior and Insular Affairs.

On September 8, 1983, the National Wildlife Federation and The Wilderness Society filed suit in a federal district court to secure an injunction against USDI to stop the lease sale. They were later joined by Chairman Udall who intervened as party-plaintiff. The plaintiffs charge that coal development in the proposed areas raises problems of air quality and wildlife habitat; that the Secretary acted illegally by proceeding with the coal lease sale in the face of the Committee resolution; and that USDI had failed to follow its own regulations governing the situation. A tempo-

rary restraining order was initially denied and the sale was held on September 14. The court subsequently issued a temporary restraining order barring further processing of leases when it appeared that leases might be issued before the hearing scheduled for September 27, and ordered reargument of the legal questions previously raised. The court also directed the parties to address the effect of the Article IV congressional power over public property in the matter.

> *BE IT FURTHER RESOLVED, That the Chair of this Committee be authorized and directed to notify the Secretary of the Interior that an emergency situation exists, and that, except for emergency leasing . . . and for lease modifications . . . certain lands within the Fort Union Coal Region . . . are to be immediately withdrawn by the Secretary of the Interior from coal leasing . . .*
>
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On September 28 the court issued a preliminary injunction on its finding that plaintiffs were likely to prevail with their contention that USDI unlawfully failed to follow its applicable regulations, irrespective of whether §204(e) is a valid exercise of the authority to regulate federal property given Congress under Article IV of the Constitution. A subsequent memorandum opinion issued October 6 reiterated its holding and elaborated upon its rationale.

On October 1, the President signed a continuing resolution that includes temporary funding for USDI programs until November 10, 1983, "to the extent and in the manner provided for in the conference report" on the fiscal 1984 Interior appropriations bill. The conference report established a moratorium on USDI coal leasing from October 1 until 90 days after the report of the coal leasing commission. The possible effects of this moratorium on the litigation of §204(e) are not yet known.

Other Vetoes in FLPMA

FLPMA also contains other congressional controls over significant land management actions. Sales of land involving tracts of 2,500 acres or more, use-restrictions on large tracts, and withdrawals and renewals of withdrawals involving 5,000 or more acres are subject to various "legislative vetoes". These provisions are listed in Table 1.

During the early history of federal land management, public lands were administered by the Bureau of Land Management (BLM) primarily in accordance with policies that emphasized their sale and disposal to settlers. Unlike the U.S. Forest Service or the National Park Service, BLM had no organic act that gave it management authority or policy guidance. Laws governing the public domain were fragmented because the federal government was considered a temporary custodian of the lands. During this time over 70 percent of the public domain in the contiguous 48 states was transferred to private or state ownership. But the remaining federally owned lands eventually came to be considered a national asset to be kept in the hands of the federal government. With the enactment of FLPMA in 1976, the mission of BLM was changed to one of retention of the lands and to multiple-use management.

As public use, rather than disposal, became an objective for public domain lands, withdrawals were increasingly used as a management tool. Withdrawals of the public domain were made by the Secretary of the Interior for Indian reservations and townsites as well as for other specific purposes. Although under the Constitution Congress has the power to manage and dispose of federal property, Congress had acquiesced in the increased exercise of this power by the executive branch, including the making of withdrawals. By enacting FLPMA, Congress provided a statutory base for the administration of the public domain, and also deliberately reasserted congressional control over these lands by providing that certain actions could only be taken by act of Congress and that major land management decisions are subject to control through veto mechanisms.

Some of these veto provisions are worded differently from the one before the Court in *Chadha* and all of them were enacted pursuant to Congress's power to manage federal property under Article IV of the Constitution, facts that give rise to certain supportive historical and textual arguments.[9] Nevertheless, given the breadth of the *Chadha* holding and other recent related cases, the provisions are of questionable constitutionality.

If a court finds a provision unconstitutional, it then must decide whether Congress intended the rest of the statute or related part of the statute to remain in effect. FLPMA contains a "severability" section that is evidence of congressional intent that at least some of the statute should stand even if some of the provisions are found invalid. But the legislative history indicates there is serious question whether Congress would have passed the withdrawal and sales provisions without the legislative veto controls. In addition, FLPMA contains sections that repeal many previous statutes including those related to executive withdrawal authority, and furthermore expressly nullifies any previous implied authority of the executive to make withdrawals. This fact further complicates analysis of the severability of the veto provisions. It is impossible to predict how a court would resolve these severability problems, but the outcome might be that the executive branch would be able to exercise important land management authorities free of the veto controls.

The intricate severability problems coupled with the profound effects of possible loss of congressional control over major land management decisions make FLPMA a crucial candidate for congressional consideration of alternatives to the legislative veto.

rary restraining order was initially denied and the sale was held on September 14. The court subsequently issued a temporary restraining order barring further processing of leases when it appeared that leases might be issued before the hearing scheduled for September 27, and ordered reargument of the legal questions previously raised. The court also directed the parties to address the effect of the Article IV congressional power over public property in the matter.

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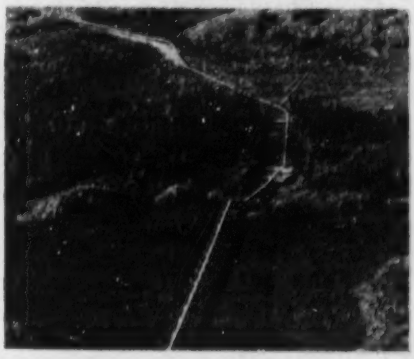

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TABLE 1

Legislative Veto Provisions of the Federal Land Policy and Management Act of 1976

§202(e)(2)	Congress may disapprove by concurrent resolution management decisions that eliminate one or more major land uses for two or more years on land of 100,000 acres or more.
§203(c)	Land sales of 2,500 acres or more may only be made if Congress does not disapprove by concurrent resolution.
§204(c)	Withdrawals of 5,000 acres or more may be disapproved by concurrent resolution of Congress.
§204(e)	Emergency withdrawals shall be made by the Secretary upon notification by the House Interior and Insular Affairs Committee or Senate Energy and Natural Resources Committee. This provision is not structured as a veto, but may function as a veto in practice.
§204(f)	Extensions of withdrawals are subject to disapproval by concurrent resolution of Congress under §204(c).
§204(1)	Within 15 years of passage of FLPMA, USDI must complete a study of certain withdrawals including most lands closed to claims under the Mining Law of 1872 and leasing under the Mineral Leasing Act of 1920. Existing withdrawals may then be terminated by the Secretary unless Congress disapproves by concurrent resolution.
§204(b)	Congress may suspend disposal of certain lands by concurrent resolution. There are only a few parcels of land to which this section still may apply.

Alaska National Interest Lands Conservation Act

The Alaska National Interest Lands Conservation Act of 1980 (ANILCA) makes most public lands that are outside conservation system units, and not withdrawn for special purposes, available for selection by the State of Alaska under the Alaska Statehood Act. (The Statehood Act allows the State to select approximately 104 million acres from federal lands.) Under §906(j)(5), even most withdrawn lands are available for State selection *except* withdrawn areas greater than 5,000 acres that are specifically approved by concurrent resolution, a mechanism that is of questionable constitutionality under *Chadha*. Although the concurrent resolution has never been used to preclude Alaska from selecting certain lands, Congress will no longer have this protective option if §906(j)(5) is invalid. Alaska has already selected its full entitlement of lands, but may now be able to change some land selections that are not yet final.

Forest and Rangeland Renewable Resources Planning Act

The Forest and Rangeland Renewable Resources Planning Act of 1974 (RPA) provides for long-range management and budget planning for the lands and resources under the jurisdiction of the U.S. Department of Agriculture, Forest Service. Every five years the President transmits to Congress a Renewable Resources Program and a Statement of Policy to be used in framing budget requests. The President is mandated to carry out programs already established by law in accordance with the Statement of Policy, "or any subsequent amendment thereof approved by Congress . . . unless either House adopts a resolution reported by the appropriate Committee of jurisdiction disapproving the Statement of Policy." Because this one-House resolution of disapproval of the Statement of Policy may affect further actions by the President, the Department of Justice considers this provision unconstitutional under *Chadha*.

In 1980 Congress modified the RPA Statement of Policy in an appropriations act. It may not always be politically possible to enact a modification to the Statement of Policy, but clearly no constitutional issues arise if Congress modifies the Statement of Policy through legislation.

Coastal Zone Management Act

The Coastal Zone Management Act of 1972 (CZMA) provides incentives for federal/state cooperation in the management of defined coastal areas. Federal grants to participating states assist in the development of federally approved state management programs. Also, federal actions directly affecting the coastal zones of participating states must be consistent, to the maximum extent practicable, with the respective federally approved state program.

The reauthorization of CZMA in 1980 allowed Congress to veto federal coastal zone regulations by concurrent resolution. Although never used, this veto was the congressional response to state concerns that federal activities, such as the outer continental shelf oil and gas leasing program, might be inconsistent with state coastal zone programs. This veto provision appears unconstitutional under *Chadha* and subsequent holdings. Now that Congress has apparently lost this tool for oversight of the executive branch, rules may be promulgated that weaken the federal consistency requirement or have other impacts on the state coastal programs.

National Parks and Recreation Act

The *Chadha* decision affects a few laws with more regional than national interest. For example, under §1301 of the National Parks and Recreation Act of 1978, the Secretary of Agriculture may only make certain land exchanges involving more than 6,400 acres of land if the exchanges are approved by concurrent resolution of Congress. This appears impermissible under *Chadha*. The purpose of this exchange authority is to consolidate ownership of a checkerboard land pattern that resulted from land grants to railroads. Other statutory authorities that do not contain veto provisions may permit these exchanges.

Marine Protection, Research, and Sanctuaries Act

The Marine Protection, Research and Sanctuaries Act of 1980 deals, in part, with protection of submerged lands. Sanctuaries designated by the Secretary of Commerce can be vetoed by a concurrent resolution. The law is currently up for reauthorization and Congress had been contemplating enactment of more control over the executive branch via new legislative vetoes. The requirement for new legislation may prompt Congress to explore alternatives to the legislative veto.

Summary

Although the *Chadha* decision did not address congressional power to regulate federal property, it does compel a reassessment of the role of Congress in the management of public lands and natural resources. This fact is clearly demonstrated by the current coal leasing controversy. While arguments can be made in defense of the vetoes in the land laws, to the extent that any of the provisions set out above

are invalid, Congress may lose much of its control over land use and resource management decisions. Therefore, Congress may wish to consider alternatives to the legislative veto that provide congressional control through more clearly valid means.

[1] *Pacific Legal Foundation* v. *Watt*, 529 F.Supp. 982, 1004 (D.C. Mont. 1982); clarified and motion for reconsideration denied at 539 F.Supp. 1194 (D.C. Mont. 1982).

[2] A coal leasing moratorium was included in the House version of the fiscal 1983 Interior appropriations bill. The moratorium provision passed the House but lost by one vote in the Senate. The fiscal 1983 supplemental appropriations bill also contained a moratorium that passed the House, but not the Senate. However, this legislation established a commission to study coal leasing. The commission has already begun review of the federal coal leasing program. The House again included a leasing moratorium in the fiscal 1984 Interior appropriations bill. Although the Senate Appropriations Committee rejected the moratorium, the full Senate passed a moratorium that would be in effect until 90 days after the coal leasing review commission completes its report. The Senate version of the moratorium is included in the conference report on the fiscal 1984 Interior appropriations bill and is incorporated into the continuing resolution signed October 1.

[3] For a discussion of these arguments, see Baldwin, "The Effects of *Immigration and Naturalization Service* v. *Chadha* on Certain Provisions in the Federal Land Policy and Management Act" (CRS, September 14, 1983).

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BRUCE K. MULOCK

Legislative Vetoes and The Independent Regulatory Agencies: Whose Powers Are Being Balanced and Why?

In light of the Supreme Court's decisions this summer declaring the legislative veto unconstitutional, the distribution of power among various interests and institutions is being seriously reevaluated in the search for appropriate, workable alternatives. It has been apparent over the course of the past several years that widely divergent views exist in the Congress and elsewhere about what problems vetoes are intended to address, which laws should include such mechanisms, and how they should operate. With regard to the particular subject of congressional delegations of power to independent regulatory agencies or commissions, the issues are especially complex. In examining these issues, this article discusses some of the controversies associated with these unique governmental bodies, with particular focus on the Federal Trade Commission (FTC), considered by many to be the most important federal agency responsible for safeguarding the interests of American consumers.

INDEPENDENT REGULATORY AGENCIES

While delegations of rulemaking authority have been a normal feature of the federal government since its inception, it is only during the present century that agencies empowered to write rules and regulations having the force and effect of law have played such a profound role in lawmaking. Why this shift in the balance of legislative power? As one commentator noted,

> We did this because there was a lot more governing to be done than the Founders had anticipated. There were whole industries to regulate, consumers and investors to be protected, government benefits to be distributed, and so on, and no way all these things could be done if every regulation had to pass both Houses of Congress and be signed by the President, civics-class style.[1]

Perhaps nowhere has the discretion delegated by Congress been more broad than in the regulatory arena, where agencies attempt to carry out mandates embodied in their enabling legislation such as the prevention of "unreason-

able risks to consumers" (Consumer Product Safety Commission, or CPSC) and "unfair and deceptive acts and practices in commerce" (FTC), or to control assorted industries on behalf of the "public convenience, interest, and necessity" (Interstate Commerce Commission). When Congress has established independent regulatory agencies, bodies that are neither solely legislative, executive, nor judicial, but that incorporate some of each of the three kinds of power, it has done so in the belief that they will provide expertise, continuity, and flexibility, independent of partisan control and influence, to deal with complex and highly technical issues that the Congress itself has been able to identify only in general terms.

A task force of the Hoover Commission, in its comprehensive study of government organization (1949), concluded that the structure of the independent commissions, unlike that of executive branch regulatory agencies, provided a means of "insulating regulation from partisan influence or favoritism, for obtaining deliberation, expertness and continuity of attention, and for combining adaptability of regulation with consistency of policy so far as practical." That appraisal has been echoed by other study groups and by a host of individuals over the course of time. More recently (1977-78), the Senate Governmental Affairs Committee, in a massive six-volume "Study on Federal Regulation," strongly endorsed the concept of independent regulatory agencies and, in general, extolled the virtues of the collegial approach to administering them.

By the same token, independent commissions have certainly not been without their detractors. Many of the same attributes which some have deemed praiseworthy are precisely those that others have found to be undesirable.

> *. . . political accountability is much less easy to maintain where there is little or no responsibility and power to maintain it, which brings me to the subject of the so-called independent regulatory commissions . . . . I believe the legislative veto decisions mark an appropriate point in our history for serious reexamination of the wisdom of the creation of this "fourth branch of the government . . ."*
>
> —Edward C. Schmults, Deputy Attorney General statement before the House Committee on the Judiciary, July 18, 1983.

The fact is that with regard to the independent regulatory agencies, inevitable and perpetual tensions exist. One tension is between a President's need for "authority to hold the government to a unified policy line," and the fact that "certain functions of government have long been thought inappropriate for centralized direction . . . "[3] Another is between Congress' need to delegate rulemaking authority to administrative agencies for the smooth functioning of government in the modern state, and the need to assure accountability and preserve control over lawmaking for the Nation's elected representatives.

APPLICATION OF THE VETO TO REGULATORY AGENCIES

Despite the widespread use of the legislative veto over a time-frame of several decades, its application in connection with the delegation of powers to the independent regulatory agencies is a very recent phenomenon; more significantly, the reasons for its use have been in many important respects markedly different than the reasons underlying the use of this type of mechanism in other instances.

For the most part, the veto provisions attached to the authorizing legislation of agencies such as the FTC and CPSC have been an outgrowth of congressional concern over what has been characterized as a runaway bureaucracy, and a general perception, beginning in the latter part of the 1970s, that the American public's anti-Washington/anti-regulation sentiment had grown dramatically. More specifically, factors often cited include:

- increasing opposition—especially by business—to the proliferation of Federal rules and record-keeping requirements which many allege contributed substantially to a host of economic problems such as reduced productivity, inflation, and disadvantages in competing in international markets.
- an enhanced congressional interest in oversight responsibilities due to, among other things, the growth of congressional staffs and the relative decline in the power of congressional leaders and committee chairmen.
- recognition by the business community, following the defeat in the 95th Congress of legislation to create an independent Consumer Protection Agency, that their lobbying strength was sufficient to enable them to convince the Congress to reduce the powers of regulatory agencies, particularly those of the FTC.

Indeed, it is the history of the FTC and its relationship with the Congress which perhaps most clearly illuminates the problems associated with the delegation of legislative authority and the current effort to find an alternative to the type of oversight mechanism recently made unavailable by the Court's ruling in *Chadha*.

THE FEDERAL TRADE COMMISSION: ON COURSE OR OUT OF CONTROL?

When businesses attempt to comply with Federal laws, when courts adjudicate, and when Representatives and Senators contemplate amending legislation, they invariably talk about "congressional intent." For good reasons, few things are accorded greater importance; this is so despite the fact that congressional intent is frequently subject to widely differing interpretations. When, however, congressional intent is quite clear at one point in time, yet clearly changes in dramatic fashion over a period of less than a decade, we are reminded that the Congress of the United States is an institution capable of adjusting with remarkable rapidity. One need look no further than the FTC's relationship with the Congress during the last ten years to find an example.

The Congress Giveth and the Congress May Taketh Away

The first several years of the 1970s were a time when the FTC and the Congress spent a considerable amount of energy searching for answers to the many questions raised by two highly critical reports, both released in 1969, on the agency's performance. The first, researched by seven law students under the direction of Ralph Nader, charged that the Commission had failed to detect violations systematically, failed to establish enforcement priorities, failed to enforce its existing power "with energy and speed," and *failed to seek sufficient statutory authority to make its work effective.* The second, conducted by a 16-member American Bar Association study group of lawyers and economists, paralleled many of the Nader report findings and reached the following conclusion:

> Notwithstanding the great potential of the FTC in the field of antitrust and consumer protection, if change does not occur, there will be no substantial purpose served by its continued existence; the essential work to be done must then be carried on by other governmental institutions.

This and other assessments contained in the two reports helped fuel the drive to expand the FTC's statutory authority. Numerous oversight, appropriations, and authorization hearings which followed were filled with calls for the FTC to assume a more activist role in safeguarding consumer interests and various approaches were explored for giving the agency additional power to carry out its mandate. The culmination of these efforts was the enactment in 1975 of the Federal Trade Commission Improvement Act (P.L. 93-637). This Act (called Magnuson-Moss) expanded the FTC's jurisdiction and conferred upon it broad new powers, especially in the rulemaking area.

Armed with its new powers to write Trade Regulation Rules (TRRs), the Commission quickly initiated more than a dozen rulemaking proceedings aimed at various industries whose trade practices it deemed unfair and deceptive. By the time of the 95th Congress (1977-78), many of these proposed rules were nearing fruition and thus on the verge of upsetting business practices for thousands of influential businesses, small and large, as well as several powerful professional groups. In addition to some 15 industrywide TRRs (including ones directed at funeral homes and used cars sales practices), a host of controversial adjudicative proceedings directed at anti-competitive practices and other FTC non-regulatory undertakings, such as life insurance cost disclosure and generic drug substitution studies and model state laws, threatened to disturb some well-entrenched marketing practices.

At the same time the FTC was following the admonitions of the 93rd and 94th Congresses to act vigorously and make use of the broad delegation of legislative power entrusted to it, several important changes transpired, including: the Congress perceived a significant decline in the public's support for federal regulatory activity; public interest fervor and citizen enthusiasm for the consumer movement diminished; powerful business groups, epitomized by the Business Roundtable, mobilized well-orchestrated attacks on the FTC's forays into hither to unexplored territory in both the consumer protection and antitrust fields; and congressional support for FTC activism waned as the make-up of several key committees, most notably the Senate Commerce Committee, changed greatly.

The end result of these and other factors was that support increased during the latter part of the 1970s for appending legislative veto provisions to the FTC's and other regulatory agencies' statutes. In effect, Congress was saying to the agencies, "While we understand the necessity of delegating broad grants of authority to you, we believe that traditional methods of congressional oversight are insufficient to provide the necessary equilibrium in a system of checks and balances; therefore, you can go ahead and make rules, but the Congress is going to reserve the right to disapprove them."

A consensus on the necessity and desirability of amending the FTC Act with a legislative veto provision did not materialize overnight. The issue was so contentious that from 1977 to May 1980, the agency was without legislative authorization because the House and Senate failed to reach agreement on a veto proposal and it operated under authority conveyed in appropriations bills and continuing resolutions. Finally, however, the two Chambers passed the FTC Improvements Act of 1980, which contained a legislative veto provision under which an FTC rule could be killed by a concurrent resolution of disapproval.

FTC's Used Car Rule: Birth, Death, and Resurrection

In 1975, Congress not only gave the FTC broad powers to make rules, it also (as part of the Act dealing with warranties) directed the agency to:

> initiate . . . a rulemaking proceeding dealing with warranties and warranty practices in connection with the sale of used motor vehicles; and, to the extent necessary to supplement the protections offered the consumer, by prescribing rules dealing with warranty practices.

In August 1981, after years of hearings, debate, and deliberation, the FTC completed development of such a rule. In accordance with the veto provision in the 1980 FTC Improvements Act, the Commission submitted the rule to the House and Senate Commerce committees.

Although the rule received a temporary reprieve when parliamentary maneuvers sidetracked the concurrent resolutions as the 1st session of the 97th Congress drew to a close, it was short-lived. A concurrent resolution disapproving the rule passed both Houses in May 1982 by wide margins. The occasion marked the first and only use by Congress of the veto power it had given itself when it reauthorized the FTC in 1980. The Supreme Court, less than 14 months later, affirmed a lower court decision that the veto was unconstitutional.

Despite the rule's apparent new life, its fate is still very much in doubt. The agency, by a 3-to-2 vote, has reopened the rulemaking. That action is likely to produce one of three results: a delay in implementing the rule, a modified rule concerned only with warranty information (as has been proposed by FTC Chairman Miller), or killing the rule altogether.

WHAT, IF ANY, ALTERNATIVE TO THE VETO IS NEEDED?

As the Court was quick to point out in *INS* v. *Chadha*, it was not concerned with the wisdom of the legislative veto. "The fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." Unlike the Justices, however, many others, most notably the Congress, are concerned about the wisdom of the legislative veto. Were the veto mechanisms which the high court struck down "wise?" Did they work as anticipated? If constitutionally acceptable alternatives that serve the same purposes are available, should they be employed? How should the debate now proceed? One author on the subject of the legislative veto and rulemaking offered the following guidance:

> What effect does the addition of a legislative veto procedure have on the distribution of power within the interre-

lationships that exist among the various actors in the regulatory process? . . . These are questions that must be addressed before determining whether the legislative veto can cure the problem of duplication, conflict, and overlap among federal regulations and of excessive or abusive regulation by agencies exceeding their legislative mandates.[3]

The Distribution of Power

For the many uses of the veto outside the regulatory arena, the question of power is principally one of the President vs. the Congress. Inside the regulatory arena, however, different power balances are at stake. How they are defined depends on who is asked, but two views have dominated the debate over the last half dozen years.

One is that the legislative veto, as Representative Levitas states, "is necessary in order to shift the real power of Government away from the bureaucracy and back to the elected Congress." The issue here is regulatory agencies vs. the Legislative branch. Veto proponents tend to see the agencies as major contributors to the problem of "rampant government." As Levitas says:

> It is a problem of cynicism of Americans about government because that type of unaccountable, unresponsive and unelected government gets ensnarled in red tape. . . . [A]gencies have often promulgated rules that are oppressive, arbitrary, or go clearly beyond the intent of Congress in passing the enabling act.[4]

The other viewpoint is that the legislative veto is to be avoided because it will shift the balance of power away from regulatory agencies to lobbyists and political action committees representing business, labor, or other influential groups. Here the contest is public interest vs. private interests. Veto opponents tend to see the agencies as basically fair and impartial bodies, staffed by experts (public servants, not bureaucrats) working to safeguard the health, safety, and economic interests of the citizenry.

> Congress will be responsible for the purity of our air and water and the safety of our workplaces, automobiles, and consumer products. No matter that it has no technical expertise to make health and safety rules. Legislative veto gives Congress the power to scrap in one quick stroke regulations it may have taken years to write. Facts, cost-benefit analyses, and other information won't count if a powerful industry, labor union, or consumer group can convince Congress to do away with a regulation.[5]

Two Veto Alternatives Proposed For Product Safety Agency

As with the FTC, the Congress gave the Consumer Product Safety Commission the authority to write rules and regulations in order to pursue a broad mandate to protect consumers. And, as with the FTC, when the CPSC came up for reauthorization in 1980, Congress attached a legislative veto provision. Thus, when the CPSC reauthorization bill came to the House floor less than a week after the Supreme Court's *INS* v. *Chadha* decision, the stage was set for the first skirmish in the battle to replace the legislative veto with a constitutionally acceptable alternative. House Members approved two mutually exclusive proposals, both of which include the President in their procedures, leaving it to a conference committee to make a choice. The proposals, offered as perfecting amendments by Representatives Waxman and Levitas, differ markedly in their approaches.

Waxman's alternative to the veto would establish a "report and wait" system of review whereby CPSC rules could be disapproved by the enactment of a joint resolution—a resolution of disapproval passed by both Houses of Congress and signed by the President—within 90 days following referral of the rule by the agency to the Congress. Variations of this approach, with provisions for expedited congressional consideration, have also been proposed or advocated by Senator Kasten and by FTC Chairman James C. Miller, III, to name just two. Levitas' proposal provides that appropriated funds could not be used to place into effect any product safety rule developed by the CPSC unless a joint resolution of approval was passed by both Houses of Congress and signed by the President.

Because the Congress would have to affirmatively adopt any agency rule, the effect of the Levitas proposal, according to Waxman, would be to turn the "CPSC into little more than a study commission." Levitas says Waxman's proposal is "simply a good first step" and does not go far enough in placing a check on the broad grant of authority Congress gave the CPSC to make rules.

In the short run, ways should be found to control the possible excesses of agency behavior, a point made more critical by the Supreme Court's recent decision holding the legislative veto unconstitutional. Such legislation is far more appropriate for so-called independent agencies than it is for those which are formally a part of the executive branch of government.

—James C. Miller III, FTC Chairman, statement before the House Committee on the Judiciary, July 13, 1983.

Other Alternatives Suggested

While space does not permit a discussion of the numerous other alternatives suggested, they include negating the Supreme Court decisions on the veto by means of a constitutional amendment, applying some type of "report and wait" provision to all agencies by including it in a broad-based regulatory reform bill (giving Congress an opportunity by joint resolution to disapprove rules or perhaps approve major rules), and a proposal whereby Members of Congress would be able to file appeals in federal courts alleging that an agency had acted beyond its authority, using the congressional disapproval of a rule as evidence. Finally, there are "alternatives" consisting of not replacing the legislative veto, but rather strengthening other forms of congressional oversight, attempting to narrow and more precisely define the authority delegated to the agencies, or replacing the independent regulatory agencies with units wholly within the executive branch.

Notwithstanding the Supreme Court's decisions on the legislative veto, Justice White's dissent in *Chadha* quoted from another landmark case (the 1819 *McCulloch* v. *Maryland* decision) that "[i]t is long-settled that Congress may 'exercise its best judgment in the selection of measures, to carry into execution the constitutional powers of the government,' and 'avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.'" That is a task that history seems to have signally assigned to the 98th Congress.

For additional information see: IB83127, Federal Trade Commission: Reauthorization Issues; IB81159, The FTC's Used Car Rule; IB83040, The FTC's Funeral Rule; and IB83092, U.S. Consumer Product Safety Commission.

[1] Kaus, Robert M. "Vetoed Veto," New Republic, August 8, 1983, p. 10.
[2] Brownstein, Ronald. "Above Politics?," National Journal, June 18, 1983, p. 1291.
[3] Craig, Barbara Hinkson. "The Congressional Veto and Rulemaking," Public Administration Quarterly, V. 7, No. 1, Spring 1983, p. 24.
[4] Levitas, Elliott H. "Legislative Veto: Pro/Con," At Home With Consumers (Direct Selling Education Foundation), V. 1, No. 2, November, 1979, p. 2.
[5] Hayward, John O. "The Legislative Veto: The Lobbyist Dream," Business and Society Review, No. 43, Fall 1982, p. 68.

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The Legislative Veto in Federal Education Legislation: Provisions, Applications, and Alternatives

For federal education programs, Congress has used the legislative veto to retain a right of review, and possible rejection, over actions taken by the Department of Education, and the Secretary of Education, in implementing legislation through promulgation of regulations. In contrast to other areas, the concept of the legislative veto is more comprehensive in education because of the applicability of the General Education Provisions Act (GEPA) to regulations for all programs administered by the Department of Education. Originally enacted in Section 431 of GEPA, this general applicability of congressional review was extended to all education programs by Section 414(b) of the Department of Education Organization Act (P.L. 96-88).

Statutory Controls

The legislative veto provisions related to federal education law were first enacted as part of the Education Amendments of 1972 (P.L. 92-318). The first of these is part of the process for determining student eligibility under the Basic Educational Opportunity Grant (BEOG—now the Pell Grant) program. A key part of this process is the determination of the "expected family contribution" toward a student's educational expenses, depending on the family's income, assets, and related factors. In determining the "contribution schedule," the intent was for the schedule to be current (i.e., regularly updated to account for inflation, etc.) and for the Office (now Department) of Education to have a degree of flexibility in determining the factors to include and the rates at which income and assets should be assessed. The initial legislation establishing this program provided that the Office of Education would annually publish a "family contribution schedule" in the form of proposed program regulations, and that the Congress would be allowed a limited period of time to disapprove these regulations (via a one-House resolution) if it so chose. If the proposed regulations were disapproved, the administration would be required to propose new regulations, until such time as the Congress no longer disapproved. Thus, administrative flexibility was combined with ultimate congressional control on a subject of substantial complexity and detail.

The second, and less program-specific, source of education legislative veto provisions was a concern over the possible diversion of appropriated funds to programs not authorized by the Congress. In 1972, Senator Cranston became concerned that funds for Upward Bound were being "siphoned off" for the "Right to Read" program. This latter program had been established by the Office of Education without specific legislative authorization. The Office of Education also tried to establish educational renewal centers without specific statutory authorization. Some Members of Congress objected that the executive branch was attempting to secure congressional approval for programs through the appropriation process rather than through the authorization route as intended in the procedures of the Congress. They also believed that the Office of Education was ignoring scheduling requirements concerning the period of time that was to elapse between publication of regulations and submission dates for applications. Senator Pell reviewed the situation and concluded with a statement in support of Senator Cranston's amendment (to S. 659, 92nd Congress) to prohibit diversion of funds appropriated for other programs, or to operate programs without specific legislative authorization. The House version of the Education Amendments of 1972 did not contain a similar provision, but the Senate version was accepted by the conference committee, with amendments. However, this initial legislation was a prohibition against specific actions by the Office of Education, not a legislative veto authorization.

Following this action in the Education Amendments of

1972, the Committee on Education and Labor held several days of hearings in 1973 to obtain additional background on various programs and actions being taken by the administration. The testimony obtained in these hearings confirmed the concerns that had been expressed during the Senate floor debate preceding the enactment of the Education Amendments of 1972. As a result, the Education Amendments of 1974 amended GEPA to provide for a procedure by which all "standards, rules, regulations or requirements of general applicability" for all programs administered by the U.S. Office of Education, issued by the Secretary of the Department of Health, Education, and Welfare or the Commissioner of Education (and subsequently the Secretary of Education with the formation of the Department of Education), could be disapproved by concurrent resolution during a 45-day review period. In taking this action the stated intent of the Congress was to "curb" the tendency of the executive branch to use the rulemaking authority to "correct" what it viewed as errors or ambiguities in the statute.

The statute required the Congress to make an explicit finding that the proposed rule was not consistent with the statutory authority, and to set forth that finding in detail in the concurrent resolution, or in the report accompanying it. The procedure assumed a certain degree of good-will and a mutual understanding between the branches.

Through this and later action, the power of the Congress to review federal education legislation has been included in education legislation in the following specific forms:

1. *General provisions concerning waiver of comment period in issuance of regulations.* Under Section 431 of GEPA, when the Secretary of Education determines that the 30-day comment period for public review of proposed regulations would cause undue delay, the Secretary is authorized to announce the intent to waive the comment period. The Secretary must notify the House Education and Labor Committee and the Senate Labor and Human Resources Committee. If either committee disapproves within 10 days, the 30-day comment period may not be waived.
2. *General provisions concerning disapproval of published regulations.* Section 431 also provides that final regulations are subject to a two-House veto during a 45-day waiting period. If a final regulation is disapproved in this fashion, modified regulations may be issued, and they shall be accompanied by a statement that indicates the response made to the findings of the Congress in the resolution to disapprove. (The modified regulation would also be subject to the veto provision.)
3. *Submission of procedures to be followed in implementing legislation.* Under Section 482 of the Higher Education Act, the Department of Education is required to notify, by June 1 of each calendar year, the Speaker of the House of Representatives and the President of the Senate concerning implementation of the Pell Grant legislation, specifically, the annual schedule of expected family contribution toward the student's educational expenses. This is a key part of the process of determining student eligibility for a Pell Grant. On or before July 15, either House may take action to disapprove the procedures. If the procedures are disapproved, then the process of submission is to be continued until no such congressional disapproval occurs.
4. *Waiver of specific legislative provision.* Section 516(d)(1)(B) of the Omnibus Budget Reconciliation Act of 1981 establishes a procedure under which the Secretary of Education may seek a waiver of a specific legislative provision so that outlays will stay within the appropriations ceilings. The Secretary is required to notify both the House Education and Labor Committee and the Senate Labor and Human Resources Committee. The proposed waiver takes effect only if both committees approve the request for the waiver within 30 days after notification by the Secretary. The Congress has never implemented this provision.

In considering the potential impact of the *Chadha* decision on current legislation, the statutory provisions may be divided into two categories. First, it is likely that *Chadha* will negate the power of Congress to exercise disapproval of published regulations, including regulations intended to implement specific program provisions (categories 2 and 3 above). Whether the waiver authorities (categories 1 and 4 above) are negated by its association with the committee action provision is unclear at this time. The invalidation of such waiver authority would certainly reduce the flexibility of the executive branch in administering federal education legislation.

Congressional Action

For several years following the Education Amendments of 1974, points of difference typically were settled informally, but the "threat" of the possibility of a legislative veto may have served as an impetus for informal resolution of problems, especially in the case of proposed family contribution schedule regulations for the Pell Grant program.

The power of the Congress to disapprove regulations became a point of controversy during the Carter administration. In the first actual application of the GEPA provision for legislative vetoes, the Congress adopted four sets of disapproval resolutions in May 1980. The Secretary of Education contended that such action by the Congress was not binding on the Department. The Attorney General advised the Secretary of Education that acceptance of the resolutions as binding would constitute an abdication of the responsibility of the executive branch.

Congress maintained that the executive branch had included requirements in the regulations that were contrary to the legislative intent. Even though the Secretary of Education did not directly or explicitly recognize the congressional power to exercise a two-House legislative veto in this instance, the pertinent issues were resolved informally via promulgation of revised program regulations, thereby avoiding a crisis of the type that led to *Chadha*.

A second instance of congressional implementation of the GEPA legislative veto provision occurred in 1982, after the Department of Education published "final" regulations for two new programs authorized in the Education Consolidation and Improvement Act of 1981 (ECIA, P.L. 97-35). In these regulations, it was stated that most provisions of the GEPA, including Section 431 regarding program regulations and the legislative veto, would not apply to these new programs. The stated basis for this was a provision of the ECIA which specifically applied certain GEPA sections to the new programs; however, the ECIA was silent regarding the applicability of GEPA sections not specifically mentioned. The Secretary of Education determined that this silence, combined with an overall intent

of the ECIA to reduce regulatory "burdens" on State and local educational agencies, implied that GEPA sections not mentioned explicitly should not apply to the ECIA.

Several Members of Congress disagreed with this interpretation of the intent of the ECIA, and resolutions to disapprove these regulations were considered in both the House of Representatives and Senate (H. Con. Res. 388, S. Con. Res. 115). Debate on these resolutions focused almost exclusively on the legislative veto issue and the applicability of Section 431. The House adopted H. Con. Res. 388 by a vote of 363 to 0, while the Senate adopted the resolution by voice vote on August 10, 1982.

> *Mr. Speaker, disapproval of regulations is not an action to be taken lightly, but we in Congress cannot condone a situation where a Federal Department ignores the law when it writes regulations.*
>
> *. . . this body would not be doing its job if we did not exercise our disapproval authority when confronted with this sort of disregard for the statute and congressional intent.*
>
> —Rep. Carl Perkins, statement on August 10, 1982, during debate on two-House legislative veto of regulations issued by the Department of Education.

The Department of Education did not immediately respond to this resolution, arguing against the constitutionality of the legislative veto process, in general, as well as its applicability in this specific case. However, as was the case in 1980, this dispute was resolved informally when the Department published new final program regulations on November 19, 1982. These were virtually identical to the earlier regulations, but made most GEPA sections (including Section 431) applicable to the ECIA programs.

In another instance, the Congress disapproved the procedures for implementing the family contribution schedule for Pell Grants and campus based programs in 1981. The Secretary published the proposed family contribution schedule on October 16, 1981, and the Senate rejected the proposed schedule in a resolution of disapproval. This potential conflict was resolved when the Congress included a family contribution schedule in the third continuing appropriations resolution for FY 1982 (P.L. 97-92).

Thus, in the history of actual implementation of the legislative veto provisions of federal education legislation, three basic conclusions may be reached. First, the provisions have not frequently been implemented in the form of congressional adoption of resolutions of disapproval. Second, the officers of the Office/Department of Education have never agreed to the propriety of the legislative veto process, although legislation authorizing the legislative veto process did receive presidential approval. Third, in spite of legislative/executive branch disagreement over the constitutionality of the legislative veto process, the specific issues were resolved either through publication of amended program regulations or enactment of legislation that supplanted the previous regulations.

Alternatives to the Legislative Veto[1]

Congress has the option of pursuing various alternatives in response to *Chadha*. Several statutory responses may be used, or nonstatutory approaches may serve as informal vehicles to resolve potential points of disagreement between the Congress and the executive branch. Possible statutory responses include the following:

1. *Direct override or preemption.* Congress can enact a statute that explicitly revokes the action of the executive branch, but such action would be required to meet the bicameral and presentation criteria.
2. *Modification of agency jurisdiction.* The statutory route may also be used to modify the authority of the agency in order to halt an objectionable action.
3. *Limitations in appropriations legislation.* Agencies may be prohibited from using funds for a specific purpose as a means of preventing the implementation of a specific regulation.
4. *Reduction of executive discretion.* The discretion of the executive branch in administering programs can be limited in the original authorizing legislation or through subsequent amendments.
5. *Prior notification and consultation.* Congress may require that the executive branch notify the Congress in advance of taking an action and also may require that officials from the executive branch consult with specified committees of the Congress. This "report and wait" requirement provides Congress with an opportunity to present comments, and possibly enact legislation, before the proposed action takes effect.
6. *Inter-agency consultation and review.* The responsible administering agency may be required to consult with another executive agency before taking the action; however, this requirement will not nullify the original action unless the agencies disagree when specific statutory language provides that both agencies must concur. Also, the Congress is not provided with the power of review.

Examples of past statutory actions to limit or control a "regulatory" process regarding federal education programs have included (1) legislative provisions intended to limit the scope or jurisdiction of regulations, or (2) legislation that fulfills a purpose previously left to the regulatory process. An example of the first category above is the provision in Section 591 of ECIA (1981) that authorizes the Secretary of Education to issue regulations only on certain limited topics related to these programs, and that "[I]n all other matters . . . the Secretary shall not issue regulations, but may . . . , upon request, provide technical assistance, information, and suggested guidelines . . . ." In the second category are several recent cases in which the "family contribution schedule" for the Pell Grant program has been established via enactment of specific legislation for this purpose, rather than via publication of regulations by the Secretary of Education (see, for example, the Student Loan Consolidation and Technical Amendments of 1983, P.L. 98-79).

Nonstatutory options include explicit as well as informal options. For example, one explicit action would be to include requirements in the report language accompanying the legislation. Even though such provisions do not have the status of enacted legislation, they do represent the majority of the committee of the conference and do provide some direction for future executive actions.

Hearings or investigations may also be used to enhance the level of communication between the Congress and the executive branch. Hearings provide an opportunity for the executive branch to present its position on an issue, but concerns with education issues typically are based on differences in interpretation of legislative intent, rather than being based on conduct that merits an investigation.

Confirmation hearings may also be used to secure pledges of efforts to cooperate with and communicate to the Congress. During the hearings, the committee may require the nominated person to indicate a willingness to

notify appropriate committees before taking specific action or to consult with them prior to taking action. As with some of the earlier examples, of course, this commitment is not legally binding, only a statement of intent.

Informal communications between committee members or staff and representatives from the executive branch may also be used to reduce the possibility of confrontation, but such actions assume a mutual willingness to meet and discuss. If the differences in positions are not resolvable, or a spirit of willingness to negotiate does not exist, the efforts may be fruitless.

Finally, an alternative to the regulation-based process may be said to have already been established in practice. Beginning with P.L. 97-92, which set the schedule for the 1982-83 academic year, the Pell Grant schedule has been established via legislation enacted by Congress (and signed by the President), rather than via regulations published by the Department of Education and not disapproved by the Congress. The *Chadha* decision increases the importance of this process.

[1] Portions of the following discussion have been summarized from "Congressional Control of Executive Action: Alternatives to the Legislative Veto," by Frederick M. Kaiser (CRS paper, July 12, 1983).

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THE LEGAL LANDSCAPE AFTER *INS* v. *CHADHA*: SOME LITIGATION POSSIBILITIES

The Supreme Court's decision in *INS* v. *Chadha* has sent shock waves through Congress. The numerous laws containing legislative vetoes are being analysed to determine their continued validity, while Congress is seeking institutional means to confront the uncertainties raised by the decision. The Court's decision has also opened up new avenues for legal challenge to actions taken under authority of laws that contain legislative vetoes. In one recently filed case a federal employees union seeks to invalidate the statutory process by which pay raises had been granted in the past on the ground that a now invalid veto provision tainted that process. If successful, it could secure billions of dollars in back pay for federal workers according to some estimates.[1] This article will briefly discuss litigation scenarios under three statutes—the Reorganization Act, the District of Columbia Home Rule Act, and the Impoundment Control Act—and possible judicial responses.[2]

The Reorganization Act

The President's authority to reorganize departments and agencies expired in April, 1981. Previously the President could submit reorganization plans to Congress that would become effective if neither House of Congress passed a resolution of disapproval. Despite the expiration of reorganization authority, the likely unconstitutionality of the legislative veto contained in the Act may have repercussions that will afford courts the opportunity to decide the retroactive application of *Chadha*.

Defendants in equal pay and age discrimination act suits have challenged the authority of the Equal Employment Opportunity Commission to bring suit because the authority to initiate such suits had been transferred from the Labor Department to the EEOC by a 1978 reorganization plan. The argument, which has also been made in several other cases, is that the entire Reorganization Act is invalid because the legislative veto was an integral and inseparable part of the Act without which the Act would not have been passed.[3] Thus, the argument goes, reorganization plans issued under the Act are invalid and the authorities transferred or created by such plans may not be exercised by the recipient agencies.[4]

The Court's treatment of severability in *Chadha* and the traditional practice of courts to save as much of a statute as possible indicate that most invalid legislative vetoes are likely to be severed from the underlying statutory provisions to which they are attached. As a result, in the typical veto situation, the delegation of authority to the executive will remain available without the check of the legislative veto. However, the Reorganization Act veto may be one of those likely few cases where the argument for inseverability is strong.

The 1977 Reorganization Act did not contain a severability clause. Therefore, the presumption of severability that such clauses create is not available. Furthermore, the legis-

lative record and the history of reorganization authority point to the importance, if not indispensability, of the veto in the reorganization process. In fact, with respect to the 1977 Reorganization Act, Congress was specifically made aware of constitutional problems with the veto and the possible consequences for plans issued under the Act of judicial invalidation of the veto. Congress, nevertheless, rejected a proposal to replace the veto with approval of reorganization plans by statute, and explicitly opted to take the risk and enact the legislation with the one-House veto.

If the veto is unconstitutional and inseverable from the rest of the Reorganization Act, what about the validity of the plans issued under the Act and the continued legitimacy of authorities exercised by agencies under such plans? While the questions of constitutionality and severability may be relatively straightforward in the abstract, courts are not likely to wreak the havoc that wholesale invalidation of reorganization plans would entail. For example, agencies such as the Environmental Protection Agency and the Office of Management and Budget were created by reorganization plans and major shifts in the enforcement of civil rights laws and the Employee Retirement Income Security Act (ERISA) were effected by reorganization plans.

Initially, a court may be reluctant to decide a case where no legislative veto was exercised. Prior to *Chadha*, these questions of ripeness for decision and other prudential concerns prompted at least one court to withhold a decision on the merits of a constitutional challenge to a veto which had yet to be exercised.[5] The Supreme Court, however, has now rendered what appears to be the final word on the invalidity of legislative vetoes. The definitive nature of the Court's ruling may override some of the earlier judicial reluctance to render a judgment on the veto in the abstract. In the wake of *Chadha*, challenges to veto provisions may thus be more readily mounted.

Challengers to agency exercises of authority pursuant to reorganization plans must also confront the fact that Congress over the years has appropriated money for the activity involved and probably indicated in other statutes its acquiescence in the particular transfer of authority. Congressional acquiescence in presidential or agency action has been sufficient in other contexts to clothe such action with legitimacy. Given the ramifications and potential disruption of an adverse contrary judicial ruling, ratification through acquiescence manifested by continued funding or indirect statutory authority may provide the courts with a solution to a difficult problem. This solution is probably more palatable for reorganization issues because the expiration of the act precludes future submissions of plans and exercises of the veto.

In addition to the ratification option is the court's ability to accord de facto validity to past actions of officials, despite its holding that such actions are unconstitutional. In such cases the courts legitimate all past officials acts even though in theory they were never lawful. The Supreme Court did this in the case of the Commissioners of the Federal Election Commission, held to be unconstitutionally holding office.[6] It also applied its 1982 ruling striking down the bankruptcy court system prospectively, so as not to jeopardize bankruptcy adjudications that had preceded the decision.[7] The Court in both cases stayed its judgment for a period of time (in the bankruptcy court case, for six months) to give Congress an opportunity to correct the invalidated laws. Both the FEC Commissioners and bankruptcy judges performed their duties during the period of the stay.

Finally, reorganization act litigation presents another possible remedy. The allegedly invalid reorganization plans in many cases replaced prior delegations of authority. Therefore, upon the invalidation of the plan, the prior authorities can arguably be revived. In the case of the reorganization plan realigning ERISA authority, for example, the authorities could be returned to the respective agencies as originally designated in the statute. Courts have held that prior statutes which were replaced by statutes subsequently held to be invalid can be revived in order to avoid a hiatus in the law.[8] This rationale might be applicable where reorganization plans merely realigned existing functions among established agencies. The option is probably unavailable in situations where the reorganization created new entities and/or old ones were abolished.

The District of Columbia Home Rule Act

Unlike the provision in the Reorganization Act, the legislative veto in the District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act) has not expired. While seldom exercised, the concurrent resolution of disapproval over actions by the D.C. City Council has had substantial political force and was one of the key instruments of control over the home rule Congress delegated to the District of Columbia in 1973.[9]

The Home Rule Act veto raises interesting questions on the application of *Chadha*. The Act is an exercise of Congress' unique powers over the District of Columbia, powers likened to that of a state government over its sub-units and citizens. Furthermore, the delegation of authority in the Act is not to an executive branch agency or officer but to a congressionally-created local legislative body. Thus, the Home Rule Act veto provides possible grounds to distinguish *Chadha* and uphold the device in this narrow context.

However, the breadth of the Court's rationale in *Chadha* would seem to preclude carving out an exception for the veto in the Home Rule Act. Congress' power over the District of Columbia is not differentiated from its other delegated powers in Art. 1 of the Constitution; the power is phrased in terms of "exclusive *Legislation* in all cases whatsoever, over" the District of Columbia (Art. 1, §8, cl. 17) (emphasis added); and the Court in *Chadha* did not include the District of Columbia clause among those specified in the Constitution as creating exceptions to bicameralism and presentation. Congress may create unique entities for the governance of the District and vest in local officials authority that is unusual when compared with federal agencies and officials.[10] However, there is nothing in the cases upholding these arrangements suggesting that Congress may establish them by means other than legislation. The fact that the veto in the Home Rule Act constitutes an exercise of Congress' power over the District of Columbia does not seem sufficient to take it outside the far-reaching embrace of *Chadha*.

It therefore falls to congressional counsel in this brave new legal world established by Chadha *to sally forth and meet the aggrieved adversary parties in the district and appellate courts. Ironically, by doing so, the Congress transforms a "friendly nonadversary proceeding," otherwise nonjusticiable, into a live suit the courts can decide.*

—Stanley M. Brand, General Counsel to the Clerk, House of Representatives, statement before the House Committee on Foreign Affairs, July 19, 1983.

The question of severability of the veto has significant repercussions for the Home Rule Act. If the veto is not severable, the authority of the D.C. City Council to enact legislation is in jeopardy. The severability inquiry forces the question of whether Congress would have delegated the authority it did to the City Council if it could not check that authority by the veto. A negative answer raises the specter of legal challenges to past and future actions of the Council. With respect to past actions, principles of retroactive application of judicial decisions and de facto authority, discussed above, would possibly insulate past acts of the Council. Persons aggrieved by contemporaneous actions of the Council, however, could argue that the presence of the unconstitutional veto and its inseverability from the underlying delegation of authority to the Council render void the particular challenged action.

The Home Rule Act contains no severability provision. The question of whether Congress would have delegated legislative authority to the D.C. government without the check of a legislative veto is a close one. The veto was viewed by proponents as a means to protect the federal interest in District affairs and reserve congressional authority over the delegated legislative power. Opponents of the veto saw sufficient reservation of authority in Congress' ability to pass repealing legislation as well as numerous other controls and substantive limitations on the Council in the Act. The two-House veto emerged from the conference on the Home Rule bill as a compromise. The House-passed bill contained no veto; recent Senate bills had contained the veto, although the provision had not been in the bills which had passed the Senate (only to be stalled in the House) in the 20-year period prior to enactment of the Home Rule Act.

Finally, the time seemed to be right for passage of home rule legislation. To argue that inability to include a legislative veto over Council actions would have scuttled the entire legislation might be overstating the perceived potency of that device. The history of use of the veto mechanism in home rule proposals, the presence of other limitations in the Act, and the political climate at the time of congressional consideration of the Act would seem to make it far from evident that Congress would have refused to delegate legislative powers to a District of Columbia legislature if told at the time it could not include the legislative veto. Under such circumstances, a court, faced with a lawsuit challenging the veto in the Home Rule Act, arguably would sever the invalid veto provision from the underlying delegation of authority to the City Council.

On October 4, 1983, the House passed amendments to the Home Rule Act replacing the legislative vetoes with provisions for joint resolutions. The bill would also ratify all laws passed by the Council prior to the date of the amendments' enactment. The Senate is expected to act on the bill when it returns from its October recess.

Impoundment Control Act

The Impoundment Control Act of 1974 permits one House of Congress to disapprove temporary deferrals of budget authority proposed by the President or executive officials. *Chadha* would seem to render suspect this effort by Congress to control executive actions by means short of legislation. An assessment of the ramifications of the invalidity of the legislative veto is complicated, however, by the initial question of whether the Impoundment Control Act constitutes any delegation of authority.

One way to view the Act is that of a procedural overlay on impoundment authority existing prior to 1974. The language and structure of the Act, including the absence of typical delegation language and the presence of provisions disclaiming any intent to delineate respective congressional and presidential powers, seem to point to a procedural focus only. On the other hand, the General Accounting Office, after surveying the ambiguous legislative record, concluded that the Act is an independent source of authority to impound. Court decisions have gone both ways on the question of the Act as a source of impoundment authority.

If the Act is not a delegation of impoundment authority, the question of severability is conceptually different than that present in the typical legislative veto case. The basic question underlying severability analysis—whether Congress would have enacted the valid portions of the statute independent of those held to be invalid—is most crucial when Congress delegates authority but reserves to itself a check on that delegation by means of the veto. A finding of severability in such circumstances would materially enhance executive authority, possibly forcing Congress through the regular legislative process to muster a supermajority to override a presidential veto.

> *. . . Putting these decisions together, there is hardly a case in which the courts will rule that delegated executive power is completely bound up with the veto that had superintended it. The result is that the executive emerges after these long years with the better part of a fifty-year bargain. The burden will be on Congress to recapture any power it believes it has lost.*
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> —Michael Davidson
> article in *Regulation*,
> July/August 1983.

Of course, severability questions arise in statutes that do not involve delegations of authority (i.e., criminal statutes with invalid penalties). The Impoundment Control Act deferral provision contains reporting requirements and a prohibition on reporting rescissions under the deferral procedures. It would seem that these provisions would survive the severability test. The reporting requirements essentially duplicate prior law and both of the remaining sections of the deferral provision involve not delegations of authority but descriptions of obligations. Severance of the veto from these provisions, therefore, results in no enhancement of authority. It thus appears far from evident that Congress would not have enacted these provisions if it were told it could not enact the veto.

If the Impoundment Control Act is viewed as a delegation of impoundment authority, it would seem difficult to argue that such authority would have been granted without the legislative veto check. The legislative veto was the essential feature of the impoundment control design (in addition to the requirement that rescissions be approved by law). It seems highly unlikely that Congress, on the heels of nearly unanimous judicial rejection of presidential impoundment authority and as part of comprehensive legislation designed to wrest control of the budget process from the President, would have delegated such an impoundment authority without the veto.

The Impoundment Control Act probably holds the most potential for early confrontation between the executive and Congress over the veto. Deferral messages are relatively commonplace. The executive could argue that the entire deferral procedure falls with the veto, but the Reagan administration has continued to report deferrals pursuant to the Impoundment Control Act and the Comptroller Gen-

eral has continued to review and comment on the deferrals. In practice, then, the deferral process seems to be operating as before but without the legislative veto.

The invalidity of the one-House veto of deferrals may also spawn private litigation. Private parties adversely affected by an executive impoundment decision can presently sue and some successful suits have been brought since enactment of the Impoundment Control Act challenging the authority to defer or rescind budget authority.[11] If the invalid veto takes with it whatever authority to impound was delegated by the Act, additional grounds to challenge impoundment actions may exist.

The Comptroller General also has authority under the Act to sue to force release of improperly impounded funds. However, that authority appears to be premised on executive noncompliance with either the failure of Congress to approve a rescission by law or a one-House disapproval of a proposed deferral. Whether that deferral litigation authority survives in the face of the invalidity of the veto is uncertain.

CONCLUSION

Litigation possibilities abound in the wake of *INS* v. *Chadha*. The foregoing has focused on three statutes: the Reorganization Act, the District of Columbia Home Rule Act, and the Impoundment Control Act. Each presents unique problems of interpretation. Judicial responses to legal challenges brought under each of the statutes may vary. Nevertheless, the courts possess remedial options to blunt the impact of unfavorable rulings.

[1] *AFGE, AFL-CIO* v. *Reagan*, Civ. No. 83-1914 (D.D.C.)

[2] For discussion in greater detail of these and other issues see the following CRS reports by the author: "The Prospective and Retroactive Application of *INS* v. *Chadha* in the Context of the Reorganization Act" (July 18, 1983); "The Legislative Veto Provisions of the District of Columbia Home Rule Act in the Wake of *INS* v. *Chadha*" (July 5, 1983); "*INS* v. *Chadha* and Legislative Veto Devices in the Appropriations Process—Impoundment, Reprogramming and Transfers" (August 16, 1983).

[3] The District Court in *EEOC* v. *Allstate Insurance Co.*, 52 U.S.L.W. 2152 (S.D. Miss. 1983), recently held that the transfer of Equal Pay Act authority was unconstitutional. An appeal of that decision is likely. See also, *EEOC* v. *Merrill Lynch & Co.*, No. 82C2922 (N.D. Ill.); *EEOC* v. *Kettering School District*, No. C-3-82-043 (S.D. Ohio).

[4] The argument is premised on the inseverability of the invalid veto provision from the rest of the statute in which appears. Finding a provision of a law unconstitutional requires further inquiry into the ability of the remainder of the law to operate without the provision which has been invalidated. An invalid provision will be excised if what remains is an operable mechanism and unless "it is evident that the legislature would not have enacted those provisions which are within its power, independent of that which is not." *Chadha*, 103 S.Ct. at 2774, quoting *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932).

[5] *Clark* v. *Valeo*, 559 F.2d 642 (D.C. Cir.), aff'd sub nom., *Clark* v. *Kimmit*, 431 U.S. 950 (1977).

[6] *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

[7] *Northern Pipeline Co.* v. *Marathon Pipe Line*, 457 U.S. ____; 102 S. Ct. 2858 (1982).

[8] See, *White Motor Corp.* v. *Citibank, N.A.*, 704 F.2d 254 (6th Cir. 1983) (prior bankruptcy jurisdictional provision revived upon *Northern Pipeline's* invalidation of Bankruptcy Reform Act provision).

[9] Congress has disapproved two Acts of the D.C. City Council—the Location of Chanceries Amendment Act of 1979 and the 1981 Sexual Assault Reform Act. Over two dozen disapproval resolutions directed at City Council Acts have been introduced since 1975. See, McMurtry, "Congressional Oversight of D.C. Council Acts, 1975-1982" (April 29, 1983) (Congressional Research Service). The Home Rule Act also contains legislative veto provisions with respect to amendments to the D.C. Charter and the criminal code.

[10] See e.g., *Borders* v. *Reagan*, 518 F.Supp. 250 (D.D.C. 1981) (upholding insulation from presidential removal of member of District of Columbia Judicial Nomination Commission); *Hallock* v. *Berliner*, 427 F.Supp. 1225 (D.D.C. 1977) (upholding Commission's powers with respect to reappointment of judges); *Hobson* v. *Hansen*, 265 F.Supp. 902 (D.D.C. 1967) (upholding congressional vesting of power to appoint D.C. Board of Education members in United States District Court for the District of Columbia).

[11] See, *State of Maine* v. *Goldschmidt*, 494 F. Supp. 93 (D. Me. 1980); *State of Ark. ex rel. Ark. St. Highway* v. *Goldschmidt*, 492 F.Supp. 621 (E.D. Ark.), vacated as moot, 627 F.2d 839 (8th Cir. 1980). Compare, *West Central Missouri Development Corp.* v. *Donovan*, 659 F.2d 199 (D.C. Cir. 1981).

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LOUIS FISHER

POST-*CHADHA* DEVELOPMENTS

APPENDIX A, *BILLS INTRODUCED IN RESPONSE TO* CHADHA:

Trade Act

S. 1545 (June 27, 1983). Senator John Heinz. To require the President to either impiement the recommendation of the International Trade Commission or submit to Congress legislation for an alternative. Under existing law, the President's alternative would take effect unless vetoed by a concurrent resolution. See floor statement on June 27, 1983, pp. S9071-72 (daily ed.). Referred to Senate Judiciary.

Study Commission

S. 1591 (June 29, 1983). Senator Daniel Patrick Moynihan. To create a Commission on an alternative to the legislative veto. See floor statement on July 12, 1983, pp. S9741-42 (daily ed.). Referred to Senate Governmental Affairs.

Constitutional Amendment

H.J. Res. 313 (June 30, 1983). Congressman Andrew Jacobs, Jr. To amend the Constitution to provide for one-House vetoes of rules and regulations issued by the Executive Department pursuant to laws passed by the Congress. Referred to House Judiciary.

Agency Rulemaking

S. 1650 (July 20, 1983). Senators Levin, Boren, Grassley, Kasten, and Deconcini. To provide for a joint resolution of disapproval over agency rules. See floor statement on July 20, 1983, pp. S10473-77 (daily ed.). Referred to Senate Governmental Affairs.

Constitutional Amendment

S.J. Res. 135 (July 27, 1983). Senator Dennis Deconcini. To amend

the Constitution to provide that executive action under legislatively delegated authority may be subject to one-House or two-House approval, without presentment to the President, if the legislation that authorizes the executive action so provides. Referred to Senate Judiciary.

Impoundment Control

H.R. 3754 (August 3, 1983). Congressman Silvio Conte. To amend the Impoundment Control Act of 1974 to provide for the disapproval of deferrals by bill or joint resolution. (The 1974 statute provides for a one-House legislative veto over deferrals.) Referred jointly to the Committees on Rules and Government Operations.

Judicial Review

S. 1766 (August 4, 1983). Senator Dale Bumpers. To require federal courts to independently decide questions of law regarding agency regulations (would remove any current presumption in favor of the agency). In his floor statement, Senator Bumpers maintained that in the light of *Chadha* his bill was "especially appropriate" since it would reinforce congressional control over delegated authority (p. S11583, daily ed.). Referred to Senate Judiciary.

Agency Rulemaking

H.R. 3939 (September 20, 1983). Representative Trent Lott. To amend the Administrative Procedure Act and congressional procedures to effect a number of changes in the rulemaking process, including a joint resolution of approval for major rules, a joint resolution of disapproval for minor rules, and a change in House floor procedures to facilitate the offering of amendments to limit appropriations for specific rules. See floor statement on September 20, 1983, pp. H7166-69 (daily ed.). Referred jointly to the Committees on the Judiciary and Rules.

D.C. Home Rule

S. 1858 and H.R. 3932 (September 20, 1983). Companion bills introduced by Senator Charles McC. Mathias, Jr. and Rep. Walter Fauntroy. To bring the D.C. Home Rule Act into compliance with *Chadha* by substituting joint resolutions for the present one-House and two-House legislative vetoes. See floor statement on pp. S12545-46 (daily ed.) and entry under Appendix B ("Floor Action"). The bills were referred to Senate Governmental Affairs and House District of Columbia.

Agency Rulemaking

H.R. 4119 (October 6, 1983). Representative Ken Kramer. To amend the Administrative Procedure Act to subject agency rules to a joint resolution of disapproval during a 90-day report and wait period. Referred jointly to the Committees on Judiciary and Rules.

APPENDIX B,

CONGRESSIONAL ACTION IN COMMITTEE:

July 12, 1983

House Rules Committee declines to grant a rule on the Export Administration Amendments Act of 1983 (H.R. 3231) and the foreign aid authorization bill (H.R. 2992), as reported by the Foreign Affairs Committee, because the bills contained legislative vetoes. See discussion by the Chairman of House Rules, Congressman Pepper, in the Record of July 13, 1983, p. H5098 (daily ed.). The Foreign Affairs Committee subsequently reported amendments to these bills to eliminate the legislative vetoes. It now required a joint resolution to suspend military aid to El Salvador (H.R. 2992) and joint resolutions of approval for presidential requests to impose foreign policy export controls, to export Alaskan North Slope Crude Oil, to curtail exports of agricultural products, and to implement certain U.S. policies in South Africa (H.R. 3231). For changes to the latter bill, see H. Rept. No. 98-257 (Part 3), pp. 1-10, as reported by House Rules.

July 26, 1983

House Rules Committee adopts a resolution stating its "general policy" to act on no request for a special order on any bill or resolution that contains a legislative veto and is reported after *Chadha*.

August 3, 1983

House Interior and Insular Affairs Committee, by a 27-to-14 vote, forbids Interior Secretary Watt from carrying out his plan to sell coal reserves in Montana and North Dakota in September. Watt indicated that the sale would proceed anyway on the ground that the committee's action was invalid under *Chadha*. See Congressional Quarterly Weekly Report, August 13, 1983, p. 1663, and further details later in Appendix B and in Appendix D.

September 21, 1983

House Committee on Energy and Commerce reports the Amtrak Improvement Act of 1983 (H.R. 3648), deleting one-House legislative vetoes and replacing them with a "report and wait" provision, requiring 120 days of continuous session before an amendment submitted by Amtrak can take effect. Instead of allowing the Secretary of Transportation to sell Conrail assets subject to a one-House veto, or to sell Conrail stock subject to a two-House veto, the reported bill would require specific congressional approval by a bill or joint resolution to support a sale of Conrail. See H. Rept. No. 98-371 and entry in Appendix B under "Floor Action."

FLOOR ACTION:

Consumer Product Safety Commission

During consideration of the Consumer Product Safety Amendments of 1983 (H.R. 2669), on June 29, 1983, the House of Representatives by voice vote adopted the Waxman amendment permitting Congress to *disapprove* certain rules promulgated by the Consumer Product Safety Commission. Disapproval would be by joint resolution within 90 days of continuous session after the date of promulgation. The House also adopted by voice vote the Levitas amendment requiring Congress to *approve* CPSC rules by joint resolution. This amendment prohibits the use of any appropriated funds to implement a rule unless a joint resolution of approval has been adopted. 129 Cong. Rec. H4771-81 (daily ed. (June 29, 1983).

Military Pay Levels

The Omnibus Defense Authorizations, 1984 (S. 675), as reported from the Senate Armed Services Committee, eliminated presidential discretion that had been associated with the legislative veto. Legislation in 1967 required the President to seek a report from a designated pay agent who would recommend military pay levels after reviewing comparable pay levels in the private sector. If the President took no further action on the recommendation after reporting it to Congress, the pay adjustment would become effective on the first day of the fiscal year. The President could also submit an alternative pay plan subject to a one-House veto. In the event of a legislative veto, the pay agent's original recommendation would take effect.

Prior to the *Chadha* decision, the Armed Services Committee was planning to break the statutory link between military and civilian pay raises by creating a separate procedure for the Secretary of Defense to serve as pay agent. The reported bill does that. The Committee had also planned to allow the President to offer an alternative pay plan subject to a one-House veto. But with the legislative veto struck down by the Supreme Court, the Committee decided to

remove the President's discretionary authority as well. The Senate adopted the Committee's proposal. 129 Cong. Rec. S9831-32 (daily ed. July 13, 1983). See also S. Rept. No. 98-174, pp. 215-16. The House did not take this action and in conference the Senate receded; see H. Rept. No. 98-352, pp. 226-27.

Caribbean Basin Initiative

The Caribbean Basin Economic Recovery Act (H.R. 2769), as reported by the House Ways and Means Committee, depended in part on the President's authority under the Trade Act of 1974 to suspend duty-free treatment subject to a two-House legislative veto. In contrast to two bills that the Rules Committee had returned because they contained a legislative veto (see July 12, 1983 entry under "Committee Action"), the Rules Committee allowed the Caribbean bill to come to the floor because its rule (H. Res. 246) had been reported prior to *Chadha*. The Rules Committee was assured by the Chairman of Ways and Means that the two-House veto was severable from the remainder of the bill. See statement by Congressman Pepper, 129 Cong. Rec. H5096 (daily ed. July 13, 1983). The President's authority, with the two-House veto, was enacted on August 5, 1983, as part of the Caribbean Basin Economic Recovery Act, P.L. 98-67, 97 Stat. 384, 391.

Most-Favored Nation Status

On August 1, 1983, the House voted to indefinitely postpone three House resolutions which would have disapproved the President's recommendation to extend certain waiver authority under the Trade Act of 1974. See debate on pp. H6034-37 and the roll-call vote (279-to-126) on p. H6164 (daily ed.). The one-House legislative vetoes had been reported unfavorably by the Ways and Means Committee (H. Repts. No. 315, 316, and 317). Neither the reports nor the floor debate mention the Chadha decision; committee staff indicate that since the floor action was anticipated, no reference was necessary.

Coal Leasing

On September 20, 1983, the Senate adopted by a vote of 63-to-33 an amendment to the Interior Appropriations Bill for fiscal 1984, establishing a commission to evaluate the Interior Department's coal leasing procedures and to postpone new leasing during that period. 129 Cong. Rec. S12486-94 (daily ed.). The purpose was to counteract the decision of Secretary Watt to proceed with coal leasing in the face of a House Interior Committee resolution that directed him to withdraw the disputed lands. See August 3, 1983, entry under Appendix B ("In Committee") and also Appendix D. The moratorium was included in the conference report on the Interior Appropriations Bill (H. Rept. No. 98-399, p. 32) and enacted into law, by way of cross-reference, in the continuing resolution signed by the President on October 1. See the conference report on the continuing resolution, H. Rept. No. 98-397, p. 5.

Land Acquisition (Interior)

During a floor colloquy on September 10, 1983, Senators Johnston and McClure responded to Interior Department's constitutional objection to a committee-approval procedure by considering a "lay and wait" option. 129 Cong. Rec. S12526-27 (daily ed. September 20, 1983).

D.C. Home Rule

The House of Representatives passed amendments to the D.C. Home Rule Act (H.R. 3932) on October 4, 1983, to replace legislative vetoes with joint resolutions. 129 Cong. Rec. H7903-07 (daily ed.).

Amtrak Improvement Act of 1983

The House on October 6, 1983, completed all general debate and began reading for amendment on H.R. 3648 to improve the cost effectiveness of the National Railroad Passenger Corporation. The bill responds to *Chadha* by replacing legislative vetoes with congressional action through regular legislation. See debate at 129 Cong. Rec. H8122-23, H8169 (daily ed.) and September 21, 1983, entry under Appendix B ("In Committee").

APPENDIX C,

LEGISLATIVE VETOES ENACTED AFTER CHADHA *(THROUGH P.L. 98-89):*

Department of Housing and Urban Development—Independent Agencies Appropriations Act, 1984, P. L. 98-45, 97 Stat. 219 (July 12, 1983):

1. Construction grants by the Environmental Protection Agency are subject to approval by the Appropriations Committees. 97 Stat. 226.
2. Not to exceed certain dollar amounts are to be available from the National Flood Insurance Fund (administered by the Federal Emergency Management Agency) without the approval of the Appropriations Committees. 97 Stat. 228.
3. Appropriations for research and development activities of the National Aeronautics and Space Administration may not be used beyond specified amounts without the approval of the Appropriations Committees. 97 Stat. 228.
4. Up to five percent may be transferred between specified NASA accounts with the approval of the Appropriations Committees. 97 Stat. 229.
5. Appropriations for space flight, control and data communications of NASA may not be used beyond specified amounts without the approval of the Appropriations Committees. 97 Stat. 229.
6. NASA Administrator may authorize lease or construction of facilities with approval of the Appropriations Committees. 97 Stat. 229.
7. Up to ten percent of Federal Home Loan Bank Board earmarked expenses may be transferred with the prior approval of the Appropriations Committees. 97 Stat. 236.
8. No part of appropriation for personnel compensation and benefits shall be reprogrammed without approval of the Appropriations Committees. 97 Stat. 239.

National Aeronautics and Space Administration Authorization Act, 1984, P. L. 98-52, 97 Stat. 281 (July 15, 1983):

9. Authorizing committees may waive requirement that 30 days elapse before NASA Administrator takes certain actions after reporting to Congress. 97 Stat. 283-84, sec. 103.
10. Authorizing committees may waive requirement that 30 days elapse before NASA Administrator takes certain actions after reporting to Congress. 97 Stat. 284, sec. 104.
11. Authorizing committees may waive requirement that 30 days elapse before NASA Administrator takes certain actions after reporting to Congress. 97 Stat. 285, sec. 110.

Supplemental Appropriations Act, 1983, P. L. 98-63, 97 Stat. 301 (July 30, 1983):

12. Reimbursement of certain funds for the Ventura Marina project, administered by the Corps of Engineers, requires prior approval of the Appropriations Committees. 97 Stat. 312.
13. Reprogramming of contract authority and budget authority

for certain HUD programs requires approval of the Appropriations Committees. 97 Stat. 319.

14. Terminating certain Interior Department programs or closing certain Interior facilities requires either enactment of the Interior Appropriations Bill or "approved reprogramming procedures." 97 Stat. 328. As defined in H. Rept. No. 97-942, reprogramming includes a prior-approval procedure by the Appropriations Committee.

Caribbean Basin Economic Recovery Act, P. L. 98-67, 97 Stat. 384 (August 5, 1983):

15. President may suspend duty-free treatment and proclaim a duty rate subject to section 203 of the Trade Act of 1974 (which provides for a concurrent resolution of disapproval). 97 Stat. 391. See comment by Congressman Pepper at 129 Cong. Rec. H5098 (daily ed. July 13, 1983).

Department of Transportation and Related Agencies Appropriations Act, 1983, P. L. 98-78, 97 Stat. 453 (August 15, 1983):

16. Appropriated funds in the Act may not be available for the acquisition, sale or transference of Washington Union Station without the prior approval of the Appropriations Committees. 97 Stat. 462.
17. Federal Aviation Administration closures or consolidations may be delayed from December 1, 1983, to April 15, 1984, if questioned in writing by either Appropriations Committee. 97 Stat. 473.

APPENDIX D, *LITIGATION:*

Federal Pay

AFGE, AFL-CIO v. Reagan, Civ. No. 83-1914 (D.D.C.). Federal employee unions filed suit on July 1, 1983. They argue that since the one-House veto provision in the federal salary act is unconstitutional under *Chadha*, the alternative pay plans submitted by the President in 1979, 1980 and 1982 are also invalid because of nonseverability. Therefore, full "comparability" raises are now due (approximately a 22 percent raise). AFGE filed an amended complaint on September 2 to include President Reagan's alternative pay plan submitted to Congress on August 31. The government filed its answer on September 6.

Exxon Judgment

United States v. Exxon Corp., Civ. No. 78-1035 (D.D.C.). On July 5, 1983, Exxon Corporation filed a motion to be relieved from a $1.6 billion judgment entered by the D.C. District Court on June 7, 1983. Exxon argues that the statutes under which the judgment was obtained (the Emergency Petroleum Allocation Act and the Energy Policy and Conservation Act) are invalid because they contain legislative vetoes that are inseverable from the remainder of those statutes.

Reorganization Statute (EEOC)

EEOC v. Merrill Lynch, No. 82-C-2922 (N.D., Ill.). In May 1982, Merrill Lynch challenged the authority of the Equal Employment Opportunity Commission to proceed in an equal pay suit. Merrill Lynch maintained that the transfer of the Equal Pay Act and Age Discrimination Act authority to EEOC from the Labor Department was invalid because it was accomplished in 1978 by way of reorganization plan (subject to a one-House veto). A district court in Illinois stayed action until *Chadha* and then ordered supplemental briefing. Merrill Lynch submitted its supplemental brief on July 11, 1983; EEOC filed on August 29. The deadline for Merrill Lynch's reply is September 19. See 113 LRR [Labor Relations Reporter] 191-192 (July 4, 1983).

In EEOC v. Allstate Insurance Co., Civ. No. J82-0186(B), District Judge Barbour (S.D. Miss.) ruled August 19, 1983, that the transfer of Equal Pay statutory authority from the Labor Department to EEOC was tainted by the presence of a legislative veto in the reorganization statute, even though neither House disapproved the reorganization plan in 1978. In a decision issued on September 9, he concluded that the Reorganization Act of 1977 and the Labor-EEOC reorganization plan of 1978 were both unconstitutional, depriving EEOC of its authority to enforce the Equal Pay Act. 52 U.S.L.W. 2152. See Legal Times, September 5, 1983, p. 4. A third case, EEOC v. Kettering School District, No. C-3-82-043 (S.D. Ohio), presents a similar issue.

FERC Incremental Pricing Rule

Three groups of industrial gas users asked the Supreme Court on August 1, 1983, to reconsider its decision on FERC's incremental pricing rule. They contend that the entire provision for the process of making the rule should be eliminated along with the legislative veto. The petition was filed by Sutherland, Asbill and Brennan on behalf of the Process Gas Consumers Group, the American Iron and Steel Institute, and the Georgia Industrial Gas Group. See Energy Users Report, August 11, 1983, pp. 799-800.

Coal Leases (Interior Department)

On August 3, 1983, by a 27-to-14 vote, the House Interior Committee directed Interior Secretary Watt not to sell any more government coal leases during fiscal 1983. When Watt announced that the committee action was unconstitutional under *Chadha* and that he would proceed with the sale on September 14, the National Wildlife Federation and The Wilderness Society filed suit on September 8 to ask the D.C. District Court to block the sale (National Wildlife Federation v. Watt, Civ. No. 83-2648, D.D.C.). On September 11, District Judge Oberdorfer stated that he would hear arguments on the environmentalists' lawsuit on October 21. Advised by the government that the leases would not be issued for another 45 to 60 days (placing them after October 21), he declined to block the sale.

After the September 14 sale of five coal leases, the government estimated that the leases might be issued within 15 days, placing them within fiscal 1983, prior to the October 21 scheduled argument, and out of danger of any restrictions that Congress might enact for fiscal 1984. On September 16, responding to the accelerated pace of issuing the leases, Judge Oberdorfer barred the Interior Department from issuing the five disputed leases until September 29 and indicated that he would hear arguments on the constitutional issue before then. If the restraining order were extended beyond October 1, the Interior Department might be prevented from issuing leases because of a moratorium under consideration by Congress.

On September 28, Judge Oberdorfer issued a preliminary injunction to prevent Secretary Watt from issuing any rights to coal leases in the Fort Union Coal Region. Oberdorfer held that the National Wildlife Federation and The Wilderness Society (plaintiffs) and Chairman Udall of the House Interior Committee (intervening as plaintiff) were likely to prevail on the merits because Watt was obligated to follow his own regulations on coal leasing, until he rescinded them, and the Committee's directive to Watt might be authorized under Article IV, Section 3, of the Constitution, which empowers Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . " The subject of *Chadha* was Congress' power under Article I. On October 6 the court narrowed its ruling, restricting its finding of likelihood of success to USDI's failure to follow its own regulation on coal leasing.

APPENDIX E, *MAJOR CRS STUDIES:*

General:

Rosenberg, Morton. Specialist in American Public Law, American Law Division. "Summary and Preliminary Analysis of the Ramifications of INS v. Chadha, the Legislative Veto Case." June 28, 1983, updated July 7, 1983. 18 p. plus Appendix I ("Statutes Which Contain Legislative Veto Provisions in Effect in June,

1983") and Appendix II ("Legislative Histories of the War Powers Resolution and the Impoundment Control Act").
Shapiro, Sherry.B. Senior Bibliographer, Government and Law, Library Services Division. "Congressional Veto: Selected References, 1975-1983." June 29, 1983. 4 p.
Kaiser, Frederick M. Specialist in American National Government, Government Division. "Congressional Control of Executive Action: Alternatives to the Legislative Veto." July 12, 1983. 19 p.
Fisher, Louis. Specialist in American National Government, Government Division. "The Supreme Court's Decision in INS v. Chadha." Statement before the Subcommittee on Administrative Practice and Procedure, Senate Committee on the Judiciary. Dated July 18, 1983; delivered July 20, 1983. 14 p. plus attachments.
Garcia, Rogelio and Clark Norton. Government Division. "Congressional Veto Legislation in the 98th Congress." Issue Brief No. IB83073, updated September 26, 1983. 18 p.

Foreign Affairs and National Defense:

Donnelly, Warren H. Senior Specialist in Conservation and Energy. "A Preliminary Analysis of the Implications of the Supreme Court Decision in the Chadha Case for U.S. Non-Proliferation Policy." July 1983. 13 p.
Jagelski, Jeanne. Legislative Attorney, American Law Division. "The Effect of Immigration and Naturalization Service v. Chadha on Sections 402(c) and (d) of the Trade Act of 1974." July 12, 1983. 19 p.
Collier, Ellen C. et al. Foreign Affairs and National Defense Division. "Foreign Policy: Effect of the Supreme Court's Legislative Veto Decision." Issue Brief No. IB83123, updated, September 6, 1983. 20 p.
Celada, Raymond J. Senior Specialist in American Public Law. "Effect of the Legislative Veto Decision on the Two-House Disapproval Mechanism Applicable to the Sale, Transfer and Lease or Loan of Arms." August 5, 1983. 30 p.
Celada, Raymond J. Senior Specialist in American Public Law. "Effect of the Legislative Veto Decision on the Two-House Disapproval Mechanism to Terminate U.S. Involvement in Hostilities Pursuant to Unilateral Presidential Action." August 24, 1983. 31 p.
----------. "Effect of the Legislative Veto Decision on the Two-House Disapproval Mechanism to Terminate a Presidential Declaration of National Emergency." September 9, 1983. 16 p.

Domestic:

Natter, Raymond. Legislative Attorney, American Law Division. "Impact of Chadha Case on Federal Reserve Board Monetary Policy Decisions." July 1, 1983. 7 p.
Ehlke, Richard C. Specialist in American Public Law, American Law Division. "The Legislative Veto Provisions of the District of Columbia Home Rule Act in the Wake of INS v. Chadha." July 5, 1983. 16 p.
----------. "The Prospective and Retroactive Application of INS v. Chadha in the Context of the Reorganization Act of 1977." July 18, 1983. 16 p.
----------. "The Impact of INS v. Chadha on Congressional Approval of the Insurance Premium Rate Setting Activities of the Pension Benefit Guaranty Corporation (ERISA)." July 26, 1983. 7 p.
----------. "INS v. Chadha and Legislative Veto Devices in the Appropriations Process—Impoundment, Reprogramming and Transfers." August 16, 1983. 31 p.
Baldwin, Pamela. Legislative Attorney, American Law Division. "The Effects of Immigration and Naturalization Service v. Chadha on Certain Provisions in the Federal Land Policy and Management Act." September 14, 1983. 42 p.
Jordan, K. Forbis, Senior Specialist in Education, and Wayne C. Riddle, Specialist in Education, Education and Public Welfare Division. "The Legislative Veto in Federal Education Legislation: Provisions, Their Application, and Alternatives." August 30, 1983, 14 p.

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STATEMENT OF CHARLES O. JONES, UNIVERSITY OF VIRGINIA

Mr. JONES. Mr. Chairman, my written statement reflects my mixed feelings about the Court decision in the *Chadha* case.

Frankly, I have never much liked the idea of nine unelected persons, even less seven, telling the Congress what it can and cannot do. There is a clash of democratic principles involved in that situation that has never been fully resolved, for me at least.

Yet, I have to say that I judge it beneficial for Congress to take a good look at itself on occasion. Being decentralized and bicameral, Congress is unlikely to stand back and evaluate its purpose without the stimulus of a dramatic event.

It is in this context that I conclude my written statement by suggesting that the Court may have done Congress a favor. We do need to think about what we want Congress to do in the policy process on occasion.

The challenge faced by Congress at this point is threefold, in my view: First of all, to insure that Executive policymaking suits congressional intent; second, to reestablish the threat of congressional reentry into policymaking where the Executive has broad discretion to act; and third, to reenter where it is judged that Congress has something to say, either by way of clarification or by way of preventing or rescinding Executive action.

The first goal represents the greatest challenge to Congress, as it always has. Granting discretion probably encourages less clarity in intent. Congress can pass through the responsibility to act to the executive, and with it the conflicts associated with the issue at hand. And the Members can even feel good about it if reentry through the legislative veto is assured.

I understand there is no magical solution by which these two complex legislative bodies will now clarify their intentions in legislation. That is, there is no single method by which that will be accomplished. On the other hand, I am willing to predict when we look back at this period in congressional history we will be able to observe a phase change in that regard, one in which Members were more attentive than before to careful construction of the law.

What this says, in summary, is that I am less pessimistic than others about the ultimate effects of the *Chadha* decision. In fact, we may already have been entering into an era in which the increased policy analytical capabilities up here on Capitol Hill, through staff, research units, OTA, CBO, GAO, CRS, were already equipping Congress to participate more actively on the front side of policymaking, and to monitor policy implementation more effectively. A decade from now, we may view the legislative veto as no more than a blunt instrument that was useful during a significant transition period in the continuous modernization of this great legislative body.

Others of my colleagues have specific recommendations, and I will comment on those in the discussion.

[Mr. Jones' prepared statement follows:]

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Statement of Charles O. Jones, Robert Kent Gooch Professor of Government and Senior Scholar, Miller Center of Public Affairs, University of Virginia, before U. S. House of Representatives, Committee on Rules, November 10, 1983.

The legislative veto by simple or concurrent resolution is dead--struck down by a Court presuming to understand the application of constitutional principles to contemporary political needs. As Justice White observed in his dissent (Immigration and Naturalization Service v. Chadha): "Today's decision strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history."

The problem that the veto was designed to relieve remains, however. The United States Congress is now, and has been for some time, struggling to maintain a potential for control of executive and bureaucratic decision making--a control somewhat nearer to the actual decision than reauthorization or appropriation. An increasing number of policy areas appear to require that discretionary authority be provided to agencies and the White House. In certain areas of foreign and defense policy, regulation, energy policy, and technology, whole independent policy systems have been created outside the legislative process. Problems are defined, proposals developed and approved, decisions implemented and evaluated--all with congressional authorization but without further congressional involvement (i.e., when decision makers get down to work). And it is argued by many that the times demand these extra-legislative policy networks. It is said that Congress is too parochial, amateurish, partisan, and decentralized to do the job--this despite the greatest increase in staff and analytical capability ever known to a legislative body (occurring during the 1970s).

It is in this context of the demands for greater flexibility in the exercise of executive authority that the use of the legislative veto flourished. The veto offered Congress a chance for a second look. It provided a means for re-entry by the House and/or Senate into those near-autonomous policy systems described above. It was a new wrinkle in the famed checks and balances and therefore it is by no means certain that James Madison (and others in Philadelphia in 1787 who feared independent authority) would have disapproved.

Thus it can be argued that the legislative veto came to offer the means by which Congress could authorize its exclusion from certain major decisions without, at the same time, losing total control. It was, therefore, almost classic separation of power politics, as accommodated to contemporary policy needs.

But there were other reasons too for the expanded use of the legislative veto--reasons also associated with the natural suspicions and jealousies that Madison sought to preserve in his balanced government. In part, Members of Congress were understandably hesitant about authorizing independent policy systems for which they were ultimately responsible. Including a chance for re-entry both eased their minds and served as a warning to the executive that decisions could be reversed--a saluatory psychological check not unlike the threat of presidential veto within Congress. In addition, however, there were political and partisan suspicions that developed during an extraordinary period in which Republican presidents faced Democratic congresses. As Joseph Cooper and Patricia Hurley show (Congress & The Presidency, Spring, 1983, pp. 3-4), the 1970s witnessed an explosion of legislative veto provisions (nearly 58 percent of all provisions since the 1920s occurred during 1970-1976). Thus the natural distrust that Madison and his colleagues had capitalized on in constructing the government was amplified by the partisan splits between Congress and the presidency.

However much we may justify its development and use as a modern expression of Madison's theory of good government, we are forced by the reality of the Court's pronouncement to forget the legislative veto in its common form. This excursion into interpretive history has performed the good service of spotting the problem to be solved, however. Congress is, indeed, left with having to refine other means by which it can accomplish the following:

1. Insuring that executive policy making suits congressional intent.
2. Reestablishing the threat of re-entry in regard to specific decisions made by the executive.
3. Re-entering where required.

I don't have any magic solutions by which these goals can be achieved. But some comments on each may be helpful in stimulating

discussion and ideas. The first goal is crucial and, in a sense, encompasses the others. It directs attention to the real issue--that of executive implementation of congressional intent. Of course, it is difficult to judge suitability if intent is not clear to begin with. Some may justifiably argue that the legislative veto has been relied on as a clean-up act for sloppy legislation. In such cases, the resolution of the problem is clear--much more attentiveness on the part of Congress to its traditional function of law-making in the purest sense. Congressional intent should be clear enough so that ordinary mortals reading a law can agree on what it is. If such laws cannot be written, they should not be passed. I am not naive enough to think that clarity and specificity are easily achieved in the contemporary law making of our complex technological society. But I do judge that there is a greater capacity for achieving these goals than ever before. The members are as talented as ever and they have legions of staff. Any such development requires leadership. Perhaps the demise of the legislative veto will encourage its exercise.

In regard to this first goal, I find myself in partial aggreement with a point made by John R. Bolton. No friend of the veto, Bolton argues that:

> ...the goals of the veto --greater agency accountability and less arbitrary governmental interference in people's lives--might be harder to reach with the legislative veto than without it because it tends to give the false impression that the agencies are under control. In order for those worthy goals to be achieved, Congress must be willing (or be forced) to make difficult political choices. Statutory grants of discretion must be more carefully structured and periodically reviewed. More attention must be paid to specifics, closer scrutiny must be given to presidential nominees, and there needs to be greater

> resistance to calls for "immediate legislative action" from interested pressure groups. (The Legislative Veto: Unseparating the Powers, 1977, p. 49).

Bolton understates the effectiveness of the veto, oversimplifies the options open to Congress, and totally ignores the politics of his subject. But he has correctly spotted the field of play in the post-veto era. Legislation must be more carefully developed, with more closure on intent.

Regarding the second goal, it should be said that the actual exercise of the legislative veto, like that of the presidential veto, typically represents a failure of the normal political process to work effectively. Most politicians prefer a compromise that will continue the action to having to stop an action altogether. Thus the legislative veto may properly be viewed as a means for facilitating not interrupting, problem solving. It permitted Congress to move ahead on an issue despite misgivings, by insuring re-entry if necessary. The members could then use this authority to demand a place at the table in executive decision making (i.e., within those independent policy systems cited earlier). The question now is: What can members of Congress substitute for the threat of a veto? It may be that nothing else will work so well in both retaining congressional influence and permitting executive discretion. But Congress is far from impotent. James L. Sundquist is surely correct when he notes that:

> Besides simply refusing to grant discretion in the first place, Congress has many other means of forcing the executive branch to behave as the legislators wish. Executive actions now subject to legislative vetoes can be barred through riders on appropriations and authorization bills. Those procedures are, compared to the legislative

veto, clumsy and cumbersome--but they have been, and can be, totally effective. (The Washington Post, 6/26/83, p. D8). I have no doubt that we have not seen the last variation in authorization and appropriation politics. I can imagine any number of actions being taken through the traditional legislative process to get the attention of the executive. Investigations, GAO studies, staff reports, more intensive monitoring of the regulatory process, highly specific and detailed agency reports--these methods can be used to pose a threat of re-entry by Congress (as they have in the past). Computer-based information systems make it possible for members and staff to engage in more effective monitoring exercises than ever before. Of course, the true effectiveness of any such efforts depends upon the success Congress has in clarifying legislative intent--as discussed earlier.

Finally, there are, no doubt, instances when the threat of re-entry is not sufficient to meet the need. In such cases the joint resolution veto is an obvious solution. It is understood, of course, that a presidential signature is required and may not be forthcoming. Where there is sufficient support, however, a presidential veto may be overridden. But there may be effects even if the veto is not overridden--particularly if the joint resolution procedure is not overdone. Certainly congressional passage of a joint resolution itself carries a message to those whose legislative authority will soon expire. Thus change may be effected without having to get presidential cooperation.

Whether justified or not, the Court has declared that the legislative veto without presidential concurrence is unconstitutional. That debate, therefore, is at an end. The present challenge to Congress is to treat the issues raised by their earlier solution (the veto) and the Court's decision--to enforce their intent

within a complex system of executive and bureaucratic implementation. In his letter to the panelists, Chairman Pepper quoted Thomas Jefferson in regard to political reform: "The patch should be commensurate with the hole." Perhaps the Court has done Congress a favor by forcing it to estimate the size of the holes and its own capacities for knitting commensurate patches.

Mr. MOAKLEY. Mr. Fisher.

STATEMENT OF LOUIS FISHER, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS

Mr. FISHER. Mr. Chairman, you have asked us to look at the legislative veto in very broad terms to see about the institutional interest of Congress. What I have done is, first of all, suggest that the legislative veto originally was a condition on delegated power. What we might want to do now is look about the need to delegate certain powers.

One example I gave is the forerunner of all legislative vetoes, the Executive reorganization authority. This goes back 50 years. The assumption at that time is that you would have to delegate authority; otherwise you cannot accomplish reorganization through the regular legislative process.

The process is supposedly too cumbersome; there are too many delays. But, in fact, what we have seen, since we have no authority for the President since April 1981, to reorganize, we have seen that the President is able to send up the bill such as in 1981, to take the Maritime Administration out of Commerce and put it into Transportation.

It came up as a regular bill, under regular procedures. Both Houses passed it in the same month, and it was signed into law. So you may not want to go through every law that has a legislative veto, one-House and two-House, and simply automatically put in a joint resolution. You may want to rethink the need to delegate in the first place and let things come up on a regular schedule.

I also talk about reorganization authority's original purpose. What was the point of a legislative veto? If you go back to reorganization in the 1930's, the legislative record is very clear. No one trusted Congress to do what was right and what was cost effective. So the motivation was to skirt Congress, to circumvent it, to get around it, and to save money. And, in fact, the reorganization authority has not been used for the original purpose we thought 50 years ago. If you want to save money, you have to cut out programs.

So, again, go back on some of these statutes and find out what the purpose was, and if it still holds today. You may want to rethink that.

The third point I make is about the use of fast-track mechanisms, because the bargain we have going back 50 years was to

give the President some extraordinary tools. Say you will send up a proposal; it will automatically become law. And to make sure of that, we can discharge it out of committee if it gets stuck there; we will give very limited time on debate; and we won't let Members amend it. They will have to vote up or down.

That was extraordinary power for the President, something that people who support Presidential power have wanted for a long time, some fast track. So they got all of that.

What did Congress get on its side? It got the legislative veto. Now, the legislative veto is gone. Curiously, we are still thinking of continuing these fast-track mechanisms, only this time in the company of a joint resolution. I think that balance between Congress and the executive branch has been fundamentally changed by the Court's ruling. What may be necessary to protect the institutional prerogatives of Congress is to ask whether one should get on these fast-track mechanisms and be forced to follow the legislative agenda of the President. Once he sends up the bills with all of these devices, you will have to give priority to those rather than some bills that are on your own agenda.

The fourth point I make is simply to underscore that although Congress is urged to act in a comprehensive manner, in fact what it often does best is what goes under the term piecemeal. You do quite well looking at very selected items that you have expertise in, in your committee-subcommittee system. That has been the major strength of Congress over the years. And I think it should be protected in the future after *Chadha.* The concern I have is to go away from the committee system and try to do things on the full floor in plenary session.

The last point is about informal methods that the committees and agencies have relied on. Even though the court has struck down the legislative veto, we will continue to have legislative vetoes, committee vetoes, subcommittee vetoes, because that is necessary for both branches. If both branches want to work for the benefit of the public, you need these accommodations, you need these understandings; you will have them either on a nonstatutory basis or some public laws will add them. I am just looking at the Military Construction Appropriation Act that was signed on October 11. It has in here various provisions requiring, before the Executive acts, notification to Congress and to committees. These notifications, I think, if you realize how agencies and committees have to operate—these notifications will operate principally as committee vetoes.

Very few agencies will want to notify a committee, get a negative report, and then proceed. So we will have this accommodation between the branches. It has worked well over the course of the institution's life. And even with *Chadha,* you will have agreements and tradeoffs and quid pro quos.

Unfortunately, the ironic part is that in the past with the legislative veto, it was aboveboard. On the floor, everyone could watch and it was visible. Now it will be done in informal ways.

[Mr. Fisher's prepared statement follows:]

Congressional Research Service
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STATEMENT OF LOUIS FISHER

CONGRESSIONAL RESEARCH SERVICE

BEFORE THE

HOUSE COMMITTEE ON RULES

November 10, 1983

Chairman Pepper and Members of the Committee:

Thank you for the opportunity to appear today to discuss the legislative veto. The Supreme Court's decision in INS v. Chadha has left Members of Congress somewhat off balance. They are now in the process of rethinking what alternatives should be used to control the executive branch.

Hearings have already been held to explore Chadha's effect on foreign affairs, rulemaking, foreign trade, and other issues. Many actions have been taken in committee and on the floor to create substitutes for the legislative veto. Your hearings are important because they examine the Court's decision and these initial legislative actions in a broader context, studying them in terms of the institutional responsibilities of Congress.

You have placed the issue of the legislative veto in the broadest possible framework. You ask not merely for alternatives to the legislative veto, but alternatives best suited to fulfill the purpose of Congress and to satisfy its constitutional duties.

I think it is to credit of Congress that its reaction to Chadha has been measured and thoughtful. The Court rejected an accommodation that had met the needs of the political branches for almost half a century. It will take time to fill this vacuum. In the search for substitutes, Congress needs to keep a clear focus on its institutional objectives and the relationship it should maintain with the executive and judicial branches.

First, it seems inadvisable to "doctor" existing laws simply by deleting one-House and two-House vetoes and inserting joint resolutions in their place. This approach will be necessary in some cases. It is not a cure-all, however, and can create difficulties for Congress if overused.

For example, it is possible to replace the one-House veto in executive reorganization statutes with a joint resolution to take care of constitutional defects. But why delegate this power in the first place? Why not let the President submit reorganization proposals in bill form, subject to the normal legislative process? This was the practice before 1932 and has been the only only option since April 1981 when the President's reorganization authority expired.

In other words, it may not be necessary to continue delegating some functions and then search for legislative veto substitutes. If a President's reorganization proposal is noncontroversial, why not assume that Congress will consider it promptly? That was the experience in 1981 when the Reagan

administration proposed to transfer the Maritime Administration from the Commerce Department to the Transportation Department. A reorganization bill was introduced on July 6, passed both Houses that month, and was signed by the President on August 6. The regular process worked.

In some cases Congress may want to take the Supreme Court's decision a step further and insist on the full legislative process: not just action by both Houses and presentation to the President, but placing upon the President the burden of presenting a bill and developing a consensus in each House for its passage. I am not proposing that every executive action survive this process, but it could be relied on more frequently in the future.

Second, before Congress automatically inserts joint resolutions in place of one-House and two-House vetoes, it should review the original reasons for the delegation. As you know, reorganization authority was the forerunner for hundreds of other legislative vetoes. When it was first proposed in 1932, the supporters of this process had an essentially negative view of Congress. The legislative history strongly suggests that Members of Congress were viewed as irresponsible and would not support sensible cost-cutting proposals submitted by the executive branch. The fast-track mechanism would circumvent congressional delays, allowing plans to take effect unless one House vetoed them. Members were restricted to a Yes-or-No vote, without opportunity for amendment. Alteration of executive proposals, it was assumed, would inevitably frustrate retrenchment efforts.

Despite these arguments for "economy and efficiency," reorganization plans have been used only rarely to cut costs. Economy usually results when government functions are eliminated, not when they are reorganized. As I have noted, noncontroversial reorganizations can be enacted through the regular process. If they are controversial — raising important questions of legislative policy — it would seem even more prudent to use the regular process to consider and amend administration proposals.

Third, there is something ironic about combining joint resolutions with fast-track mechanisms. The legislative veto accommodation gave the President a fast track: expedited procedures for bringing resolutions out of committee, time limits for floor debate, and prohibitions on amendments. This was something that all proponents of executive power had longed for. Proposals by the President or executive agencies gained priority over other bills, becoming law unless one or both Houses mobilized the necessary opposition within a specific number of days.

In return for this extraordinary grant of power, Congress retained for itself a legislative veto, allowing it to disapprove presidential initiatives by simple majority vote of both Houses or a single House. The legislative veto avoided the problem of a presidential veto and the need for an override vote by Congress. Even so, advocates of presidential power were pleased by the quid pro quo. The forces of inertia and indecision clearly favored the President. Congress, in effect, let the President set the legislative agenda.

Without access to the legislative veto, why should Members of Congress want to grant a fast-track process to the President? Why should Congress, as a legislative and policymaking body, have to vote up or down on an agency proposal without opportunity for full deliberation and amendment? There are times when Congress is ill-served by forcing measures from committee and giving them expedited treatment on the floor. Slowness, even inaction, can be a virtue in any branch of government. As Justice Brandeis once remarked about the work of the Supreme Court, "The most important thing we do is not doing." A main trend over the past half century has been to make the Court's caseload less mandatory and more discretionary.

Congress appears to be going in the opposite direction. Fast-track mechanisms distort its system for setting priorities. Measures with expedited treatment come to the floor; those without such features may not. The temptation, of course, will be to give more and more bills expedited handling. This tendency is even somewhat evident today. The danger is we may eliminate the discretion, deliberation, selectivity, and judgment that are the qualities of a healthy legislative body.

Fourth, there is substantial risk when Congress tries to be excessively "systematic" and "comprehensive" without the hierarchical structure of an executive agency or a corporation. It is difficult to defend a process that is decentralized and "piecemeal," but the strength of Congress lies very much with the incremental development of law and policy and with the expertise and experience of its standing committees.

Congressional committees have developed working understandings with the agencies they review. Much of the effective work of Congress is done at this level, where problems are manageable and tractable. Of course there are dangers of subgovernments and "iron triangles," but it is impracticable to treat everything at the top level. At some point the quest for being

comprehensive makes everything incomprehensible. Congress must delegate to its committees and subcommittees, just as Presidents must delegate to their departments and agencies. Congress needs methods of coordinating and controlling the activities of committees, but that is different from acting comprehensively.

Widespread use of the joint resolution may needlessly delay many routine agency regulations. If an agency steps out of line, annual review of its rules may be appropriate. But why demand the same treatment — across-the-board — for every regulation of every agency? Most agencies maintain good relations with their oversight committees and adhere relatively closely to congressional intent. Exceptions exist, but they can be treated as exceptions.

Fifth, Congress will use informal methods of exercising control over executive agencies. With or without the blessing of the Supreme Court, congressional committees and subcommittees will insist on a veto power over some agency actions. And agencies will be willing to comply because in return for this level of congressional control they receive important discretionary power and flexibility.

It may come as a surprise to some observers in town that Congress has continued to enact legislative vetoes after the Chadha decision. Are they unconstitutional? By the Court's definition they are. Will this change the behavior between committees and agencies? Probably not. An agency may say to the committee: "As you know, the requirement in this law for committee prior-approval is unconstitutional under the Court's test." Perhaps agency and committee staff will nod their heads in agreement, after which the agency will seek the prior approval of the committee.

Statutes in the future may rely more heavily on "notification" to committees before an agency acts. Here notification does not raise a constitutional issue, since it falls within the report-and-wait category already sanctioned by prior court rulings, but notifications can become a code word for committee prior-approval. Agencies know that harsh penalities can await them if they ignore committee preferences.

Certainly we see this pattern over the last three to four decades with regard to reprogramming. As an informal accommodation between the branches, agencies receive a certain latitude to move funds within an appropriation account, provided they secure committee approval on major shifts. Initially the review was by the Appropriations Subcommittees,

but in recent years the authorizing committees have joined the review process. Since this agreement is informal and nonstatutory, agencies are at liberty to spend the funds as they wish. The cost of offending committees, however, is severe: line-itemization the next year, program cutbacks, and withdrawal of discretionary authority. Chadha does not touch these nonstatutory legislative vetoes. They existed in the past and will persist in the future, perhaps in even greater number because of what the Court decided.

The Court treated a complex issue in simple terms. The unfortunate effect is to convey to the country an impression of government that does not exist in practice. The Court propounded a theory substantially at variance with the operations worked out over decades by both branches of government. As a consequence, we must now look at government at two levels: the way the Court said it is supposed to work, and the way we know it operates to function effectively.

All of this is to say that we should not be too surprised or disconcerted if, after the Court closed the door to the legislative veto, we hear a number of windows being raised and perhaps new doors being constructed, making the executive-legislative structure as accommodating as before for shared power. It may not be a house of aesthetic quality, and certainly does not resemble the model envisioned by the Supreme Court, but is will go a long way in meeting the basic needs of executive agencies and congressional committees. For government to operate smoothly, it requires at least a minimum level of comity and cooperation between the branches. Part of this will depend on "legislative vetoes" in one form or another.

Mr. MOAKLEY. Thank you.

STATEMENT OF MORRIS S. OGUL, CHAIRMAN, DEPARTMENT OF POLITICAL SCIENCE, UNIVERSITY OF PITTSBURGH

Mr. OGUL. Mr. Chairman, I was asked to prepare a statement on the impact of *Chadha* generally on legislative oversight. I am pleased to do that.

I think to assess the impact on legislative oversight of the bureaucracy of the Supreme Court decision in *Immigration and Naturalization Service* v. *Chadha*, we need to consider first why we have the patterns of legislative oversight that we do. Only then can we place the Court decision in perspective.

Present patterns of legislative oversight are a function of legal authority and resources on one hand—these provide the opportunity to oversee—and the interests of strategically placed Members of the Congress on the other. Member motivation is a function of a perceived obligation to act usually combined with the prospect of policy, institutional, or electoral gain.

The *Chadha* decision is relevant to the first of these factors. Legislative authority remains what it has always been. Resources available to the Congress in support of oversight efforts are as substantial as they always have been, and Member motivation remains largely the same, that is, mixed. In particular cases, Members wish to oversee productively. In other cases, they find other things more important.

Basically, we have never had, to my knowledge, systematic oversight in the legislative process. I don't see any reason why that situation has changed. The legislative veto did not produce it. Its demise will not eliminate it, therefore.

I want to emphasize that the legislative veto is only one of many devices that the Congress has at its disposal and that all of the rest are still in place. And because of the *Chadha* case new devices will undoubtedly be created.

I want to emphasize further that the legislative veto has been used in Congress for a variety of reasons, ranging from a generalized fear of Executive power to policy interests, party interests, constituent interests, and as a function of experience.

Just about everyone in Congress, staff and Members, and in the bureaucracies, believes one way or another in the law of anticipated reactions; that having something like the legislative veto in place makes bureaucrats a little more sensitive to what Congress wants, knowing that down the road they may have to face that hurdle directly.

The law of anticipated reactions presumably works even if none of us has very hard evidence on it. In that sense, the legislative veto is a very practical, useful device. Despite that fact one should not exaggerate its importance.

The legislative veto has received a lot of publicity. If we look at the record, it has not been qualitatively nor quantitatively central to legislative oversight efforts. What the *Chadha* decision means precisely is hard for any of us to figure out, though many of us have ideas about it. This is partly because it is difficult for mere mortals to contemplate some 200 statutes being declared unconsti-

tutional with one stroke of Justice Burger's pen. Most of us have trouble with that.

For immediate purposes, however, we have to assume the legislative veto is legally dead, at least in the short run and ask what we are going to do about it. My argument is that since most of the other tools of Congress remain, Congress can proceed in its oversight efforts largely as before.

Oversight effort can remain roughly what it is now. Congress continues to have the authority, continues to have the resources, and the techniques available to do so. In the light of this sketch, what is it that the Congress can do?

I want to focus initially on some things that the Congress can do, and that I would suggest it not do. One of the obvious things that Congress can do is attempt to challenge the *Chadha* decision in the courts.

That may be productive for some reasons. It is a time consuming process that at least in the short run is not likely to be highly productive. Politics teaches the virtues of patience. In borderline situations new judges sometimes make new law.

The Congress can propose a constitutional amendment to override the Court decision. In fact, that has worked six times in our history, but is probably too complicated for this situation.

In reference to the time delay requirement, I think that is a useful, practical, short range device. But we need to be wary of the pressure to put fast-track solutions on the board along with those. The effort to flood the congressional timetable with procedures to bypass the normal deliberative process could surely warp the congressional agenda. If everything is important, then nothing is important. Congress can continue, then, to use legislative oversight techniques.

I want to argue in conclusion that the demise of the legislative veto is just another complicating factor in an exceedingly complicated task. In the overall picture of legislative oversight, some would characterize the decision as potentially catastrophic. I would characterize it as having moderate practical consequences.

[Mr. Ogul's prepared statement follows:]

"Legislative Oversight and the Legislative Veto: The Impact of Immigration and Naturalization Service v. Chadha"

Testimony prepared for the Committee on Rules, United States House of Representatives, November 10, 1983.

Morris S. Ogul

To assess the impact on legislative oversight of the bureaucracy of the Supreme Court decision in Immigration and Naturalization Service v. Chadha, we need to consider first why we have the patterns of legislative oversight that we do. Only then can we place the Court decision in perspective. Present patterns of legislative oversight are a function of legal authority and resources on one hand (These provide the opportunity to oversee.) and the interests of strategically placed members of the Congress on the other. Member motivation is a function of a perceived obligation to act usually combined with the prospect of policy, institutional, or electoral gain.

The Congress has massive legal authority to oversee the bureaucracy. This authority is derived both from the Constitution and statutes. Its scope is broad and inclusive. In overseeing the bureaucracy the Congress suffers no shortage of authority.

The resources for oversight are impressive as well. Committee staffs, the Congressional Research Service, the Congressional Budget Office and the General Accounting Office among others provide the Congress with substantial expertise to support specific oversight efforts. Congressional support services are not, nor can they ever be, sufficient for systematic comprehensive oversight. But the Congress has never done that and is unlikely to start soon. In general the resources available to the Congress seem ample to further most oversight efforts.

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An analysis of how these factors have worked in the past suggests that legislative oversight of the bureaucracy has never been the systematic product that the law seems to require. In my book entitled, Congress Oversees the Bureaucracy, I have argued that the gap between expectations about what the Congress should be doing and what actually is done is largely explainable. The reasons familiar possibly to everyone in this room range from unreal expectations about what can be accomplished to the priorities of members of the Congress. Most members believe in the necessity of living up to all of their obligations, but few of them have the time, energy and will to actually do so. I do not blame them for this situation. Members faced with an imposing array of legitimate choices need to pick and choose. I work on the assumption that members are capable of making reasonable choices about what deserves their primary attention and that most of them do make choices that are explainable in these terms.

Within this framework of analysis we can now address the issue of the legislative veto. The legislative veto is only one of the many devices that the Congress is entitled to use, has used, and will use in its efforts to monitor behavior within the bureaucracy. The list of available techniques ranges from the manifest and familiar, investigations, required reports and audits of expenditure, to the latent and the hence less obvious such as legislative casework, authorizations and appropriations.

The legislative veto is a relative newcomer. Heavy use of this device is a product of the 1970's.

Central to efforts at oversight is member motivation. What do they wish to do? I would like to suggest that not all legislative veto provisions are written into law because members have made a thorough study of its use and consequences. Some members are motivated to use it by a generalized fear concerning extensive delegation of authority by the Congress to the executive branch over the last fifty years. In many instances such delegations have been necessary and useful; they have resulted in the reasonable exercise of executive discretion.

But a vague fear hovers over such delegations. Will power delegated be power abused? We may trust our children, but when they first begin to use the family car and stay out late at night, most parents feel twinges of doubt and perhaps even some anxiety.

Beyond the generalized fear of executive abuse, the application of the legislative veto has been related to policy and politics. A member's special concern with a particular policy problem may produce a desire to monitor bureaucratic activity with unusual dedication. In such cases, it is assumed that an unwatched bureaucrat is a potentially dangerous one.

The protection of constituent interests, one may suspect, has led members of the Congress at times to special concern about such matters as the closing of military installations. Protecting constituent interests all members agree is a legitimate, important role for them to play. Some use the legislative veto to promote this end.

In addition, the legislative veto has come to be used as extensively as it has because it is relatively easy to adopt and seems a direct way to achieve a given purpose. Its use also reflects wisdom accumulated from previous congressional efforts to oversee the bureaucracy: the anticipation of control can be as useful as its actual exercise. The legislative veto provides a clear potential boundary to administration discretion. Administrators know that down the road their decisions will receive congressional scrutiny. Perhaps because of that they become a bit more careful in defining and implementing policy. I say "perhaps" because the research on "the law of anticipated reactions" is scarce. Many members of the Congress, their staffs, and most bureaucrats assume that the law of anticipated reactions exists and that it works. In government and politics as well as in human affairs more generally the perception that something is real may be as meaningful as the reality itself.

Overall then the legislative veto is seen by many members of the Congress as a convenient, useful device. Its attractiveness lies in the fact that it is relatively easy to use. There

is little time and energy required to achieve a result. The rewards from its use can be quick. Its use can be instrumental in affecting policy and behavior.

One should not exaggerate the importance of the legislative veto. Despite its appearance in some two hundred pieces of legislation, the legislative veto provision has been used relatively rarely. It appears in a very small fraction of the bills passed by the Congress. Once enacted, the actual applications of legislative veto authority to restrain bureaucratic activity are few. Yet the legislative veto is used frequently enough that one can say that many members of the Congress see the veto as a way of fulfilling their needs. Amidst all the publicity and fuss about the legislative veto and the court decisions concerning it, one needs to bear in mind that the legislative veto while important in particular instances is not quantitatively and probably not qualitatively central to legislative efforts to oversee the bureaucracy.

The decision in INS v. Chadha has been characterized in many ways, some of which are not repeatable in polite society. I wish to comment on the scope of the decision, on the reasoning in the decision, and on some possible consequences of this decision. While seemingly sweeping in scope, the meaning of the Chadha decision remains somewhat obscure partly because it is difficult for mere mortals to contemplate some two hundred statutes, or parts of them, being declared unconstitutional with one stroke of Justice Burger's pen. The question of whether each use needs to be tested in the courts lingers in the minds of some.

The quality of Burger's reasoning raises questions as well. When he posits an absolute wall of separation between principle and expediency he is dealing with fictions that ignore the realities of American history. Justice O. W. Holmes put it well when he suggested that general principles do not always decide concrete cases. The gap between the highly abstract and the concrete mundane event is great. Several specific courses of action can follow from the same principle. It is human ingenuity that weds principle with events. It would have been closer to

reality if Justice Burger had stated that the meaning of principles is frequently established through actions many of which will be expedient. In practice we try to read appropriate meanings into general phrases as necessity demands.

Moreover, the Constitution generally divides executive and legislative power. What the Constitution separates generally - the Supreme Court in this case seems to make separate absolutely. Neither logic nor experience demands such a result. Some regard the Chadha decision as indicating a return to basic constitutional principle. Others who view the decision as excessively broad and probably wrong-headed should be cautious about the extent of their despair. First, as courts change so do their decisions. Secondly, we should never underestimate the ingenuity of the courts in subsequently modifying the impact of broadly stated decisions. Third, we need to be wary of positing consequences as certain that are far from self-evident -- the legislative veto has been a useful and convenient tool, but it is not identical to the overall congressional oversight effort. There have always been alternatives to it. New ones will probably now develop. The loss of the legislative veto may be uncomfortable, but it is probably not disabling to congressional efforts at oversight.

For immediate working purposes, however, we have to assume that the legislative veto is legally dead, at least for the short run. What then can the Congress do, as the legislative veto lies mortally wounded, to effectively oversee the bureaucracy. Essentially since most of its tools remain, the Congress can proceed largely as before. Oversight activity can easily remain roughly what it is now. If more oversight and more effective oversight is desired the Congress has the tools to do it. In general it has all inclusive authority and a host of resources and techniques remain available. Basically the reasons - for the absence of systematic oversight remain as they always have. In that sense the Chadha decision is merely a blip on the screen of history.

To date, at least, one can wonder at the relevance of this decision to some concrete events in the Congress. Debates that have been raging over the applicability of the War Powers Resolution to United States involvement in Lebanon and Grenada have been conducted sometimes in an atmosphere seemingly oblivious to the Chadha decision. Moreover, the Congress since the Chadha decision has continued in some instances to enact legislation containing legislative veto provisions.

In light of the above analysis, what can the Congress do? Some of the possibilities are:

1) The Congress can attempt to challenge the Chadha decision in the courts. This is a time consuming procedure that is not likely to be productive in the short run. Politics teaches the virtues of patience. In borderline situations new judges sometimes make new law.

2) The Congress can propose a constitutional amendment to override this Court decision. While constitutional amendments have successfully overridden Supreme Court decisions some six times, the present issue lacks the glamour and excitement to readily arouse public support or enough favorable votes in state legislatures.

3) The Congress can substitute a straight time delay requirement for the present veto provisions. Stipulate, for example, that certain administrative actions must sit for sixty days in the Congress before being implemented. This action is relatively easy for the Congress to take and surely does not challenge constitutional doctrine. It is a useful interim measure because the Congress, if sufficiently upset with proposed administrative actions would have a period of time to provide an appropriate response.

At this point, a caution seems appropriate. Pressure may errupt from some members of the Congress to react strongly to the Chadha decision by writing delay provisions into many pieces of legislation. Some of these inserts

will be accompanied by specific timetables for consideration of the issue involved. The effort to flood the congressional timetable with procedures to bypass the normal deliberative process could conceivably warp the congressional agenda. Creative energy needs to be brought to bear to prevent this warping of the legislative process. If everything is important, then nothing is important.

4) The Congress can write more precise and detailed legislation so as to reduce administrative discretion. The Congress, of course, has always had the authority to do this. That it has not done so more frequently tells us a great deal about the complexity of the legislative process. An option so largely unused is an option that should not be recommended lightly.

5) The Congress can refuse to delegate substantial discretion to the bureaucracy. This position involves a certain amount of posturing because it ignores the fact that delegation is not an inherent evil, but is a necessity given the complexity of modern life and the futility of attempts to write precise rules that will fit all situations. The problem is not the fact of delegation, but how to monitor delegation effectively.

6) The Congress can use the traditional tools of legislative oversight more effectively. These tools have been available for many years. Their application has been highly selective. This partial usage has not occurred for frivolous reasons. I work on the assumption that members of the Congress generally know what they are doing. The absence of systematic legislative oversight is deeply rooted in the essence of legislative life. If conditions are right in particular circumstances, more and more effective oversight can indeed result. This correct combination of circumstances is not found normally throughout the Congress on a comprehensive range of issues. In other words, what the Congress or significant parts of it really want to get done can probably move forward.

Whatever responses the Congress provides are most likely to be piecemeal. The Congress is not an institution that readily finds comprehensive responses to be palatable.

What then is the present status of legislative oversight of bureaucracy after Chadha? The Chadha decision is not a death sentence. Nor does it provide necessarily a usable opportunity. The authority of the Congress surely has been altered, but the lack of authority has seldom been a basic problem in understanding legislative oversight. In addition, many tools for oversight remain. Their use depends on the members. The motivation of members will continue to vary with specific circumstances. Perhaps the central problem is that the legislative veto, because it is such a relatively low cost device, has made it possible for the Congress to oversee or to provide for potential oversight in situations where no action would have followed if additional time, energy, or motivation had been required.

All situations can be seen as providing an opportunity for innovation. If one wishes to adopt a Polyanna-like view, the demise of the legislative veto will force the Congress to reassess its behavior and to break considerable new ground in legislative oversight. I doubt it. The offering of an opportunity is not the key factor. The opportunity for more effective legislative oversight has always been there. The demise of the legislative veto makes oversight somewhat more difficult.

The decision surely did deprive the Congress of a tool which many of its members felt had proved to be useful and convenient in particular cases.

The demise of the legislative veto does not eliminate or sharply diminish legislative oversight. It just adds to the complexity of what is already an overwhelming task. So how one views the Chadha decision is a matter of perspective. It is not a death sentence to legislative oversight as some have alleged. The opportunity it presents for creativity is an abstract one; only experience will tell whether that opportunity is taken. Many observers have viewed the Chadha decision as potentially catastrophic. In the overall picture of legislative oversight, I would characterize it as a potentially catastrophic decision of only moderately overwhelming practical consequence.

Mr. MOAKLEY. Dean Cooper.

STATEMENT OF JOSEPH COOPER, DEAN OF SOCIAL SCIENCES, RICE UNIVERSITY

Mr. COOPER. Mr. Chairman, I find myself somewhat in disagreement both with what the Members have said and what my colleagues have said, although I am sure the differences are matters of degree.

I am a defender of the veto. I am not going to go over my statement. I would ask permission to have it included in the record.

I also have a paper to support that statement.

Mr. MOAKLEY. Without objection.

Mr. COOPER. I was struck by what Congressman Udall said in terms of tailoring the veto. Just as the older, more traditional form of veto developed over many years with many refinements, this is a problem of looking at what remains to the Congress after the Court has acted and tailoring the way those forms can be fine-tuned in various types of situations.

I want to go over the basic mechanisms that exist and the various ways in which they can be fine-tuned.

I think it is necessary, first, to defend the veto. I want to say I am highly skeptical that Congress can legislate in any significantly greater detail than it does now, for various reasons. And this leads me to believe, not that you want to use the veto to control all rules, but that the veto is an essential mechanism in many, if not most, of the areas in which it has already been applied.

The logic of the veto, I think, really reflects the problems and the conditions of modern government. In many areas, Congress simply cannot legislate in detail either because it cannot anticipate what is going to happen or the political conditions for passing detailed legislation don't exist.

So in many instances the delegation, if there is going to be a delegation, is going to have to be very broad or you will have action which will be self-defeating for the purposes of the Congress.

Second, even in a number of situations where Congress can legislate in detail, that kind of legislation may hamstring the Executive in ways you don't want to accomplish the purposes that Congress desires to accomplish.

So even in instances in which you wish to legislate in detail, you may want to give the Executive for purposes of accomplishing Congress' broader goals some flexibility. And that means broader discretion and not so much detail in legislation.

Third, if you think that the legislative veto is a problem in terms of time, any suggestion that legislating in detail is the answer to the veto doesn't make much sense to me. Congress already has enough trouble legislating to the degree it is legislating in detail now. To ask it not to use the veto and just to legislate in detail in all of these veto areas would tie the Congress up in knots even in those areas in which it could do it.

I think the veto is essential. I don't believe the Congress can get along without it, without some serious loss of power, without some serious loss of influence in the system. Since I believe that Con-

gress should be the prime policymaker in the system, I think it is important for it to preserve its influence.

Again, that doesn't mean there is one generic solution to this problem or that you should subject all rules to vetoes. But the problem needs to be thought out, according to, No. 1, the importance of the control; No. 2, the availability of other mechanisms; and No. 3, the amount of time it is going to take Congress to control it.

Let me review some of the available mechanisms.

There is the joint approval mechanism, which has a lot of control in it, but is highly disadvantageous in terms of the amount of time it takes. That is the kind of mechanism best suited for a rifle shot kind of approach, like the war powers kind of problem, where a few very important issues will come up that you will want to subject to a stringent kind of control.

Then you have some other forms that are also left standing by the *Chadha* decision, aside from approval by joint resolution. You have negation by joint resolution, and you have the waiting period forms. These are less effective in terms of congressional control, because ultimately the President has the veto power and Congress will, in the last resort, need a two-thirds majority.

But nonetheless, these forms can be fine tuned in various ways. They have the advantage of flexibility. There are things that can be done in terms of the quickness of access to the floor, the amount of amendability in them, the degree to which debate is limited or not limited, and the lengh of the time period.

The truth is that the weakest form, which is the waiting period, can be the toughest form if you put a long time period on it. In fact, of all the many hundreds of pieces of veto legislation there are very few veto actions by the Congress.

What the veto does is get the Executive's attention. If you put a year waiting period on a waiting period form with the provision that Congress could waive the waiting period, the Executive then would negotiate with the Congress with regard to the way in which it exercised that discretion. The limit of that is, of course, you have to be concerned about how much power the committees get vis-a-vis the whole. And that is a limitation of the waiting period form.

Nonetheless, you have these three forms that work through presentment to the President that can be applied and adjusted in various ways. And I suspect that Congress reaction as it goes and sees what the effect of the *Chadha* decision has been in a variety of areas from trade to arms sales to war powers to the economy, will be, in fact, to work out the most appropriate form of control for particular areas.

I think the Rules Committee has to be concerned about something that my colleague, Mr. Ogul, said earlier. Everyone has to have some sense of how important his area is vis-a-vis everybody else's area.

Everybody cannot have a joint resolution of approval. In any event, however, I would also add as a final conclusion that I believe that Congress should do something more than just playing with the forms that are left untouched by the *Chadha* decision, such as the forms that work by joint resolution or by law.

I believe the logic of the *Chadha* decision leaves open tying the veto to the appropriations process. The logic of the *Chadha* decision does not proceed in terms of an inherent function approach, whereby some things are legislative and some executive.

The logic is rather that Congress can do whatever it wants within its powers as long as it doesn't violate power expressly granted to the President in the Constitution. But the claim is that once Congress has acted, it cannot then control an Executive action in some binding way except through regular law.

In terms of that logic, the decision leaves open a change in House rules that would tie certain kinds of vetoes to the appropriations process. There are some categories of rules that should be controlled. Controlling these rules through the appropriations process by changing House rules in certain ways—they are outlined in my paper—would be an internal process to the Congress. That would be the most effective way legally to reach some very important things that still involve a large body of matters that you would want to pick and choose among and not necessarily be required to approve individually.

The older form of veto which the court disallowed had the advantage of both flexibility and control. And the appropriations form of veto would preserve that advantage—there would be both flexibility and control while under these joint resolution forms you have to chose either control or flexibility.

If you can tie the veto to the appropriations process, I think you could get both. For appropriate purposes, and with a sense of limit, you could get the advantages of both flexibility and control.

[Mr. Cooper's prepared statement, with additional material referred to, follow:]

Testimony Of Joseph Cooper, Dean of Social Sciences, Rice University,
On The Legislative Veto Before U.S. House of Representatives
Committee on Rules, November 10, 1983

The testimony I wish to present today regarding how Congress should react to the Chadha decision is premised on four propositions. Several of these propositions are examined in detail in a paper I have prepared for the Center for Strategic and International Studies at Georgetown and I request permission to submit this paper for the record. What I wish to do here is to present these propositions briefly and then proceed to an examination of the options and strategies Congress should pursue to preserve the veto mechanism.

I. Four Basic Propositions

First, joint resolution and waiting period forms of the veto are clearly constitutional in terms of the logic of the Chadha decision. These forms, which for purposes of analysis I will call "law forms", obviously do not violate Sections 1 and 7 of Article I since they involve bicameral approval and presentment to the President for his signature. Nor can they be seen to infringe duties and functions that the Constitution reserves to executive officers. These forms of the veto operate by controlling the effectuation date of delegated authority and such decisions are difficult to separate from legislative power whether it is approached in terms of its logical or inherent nature or procedurally as Chief Justice Burger does in Chadha.

Second, the rationale the Court relies on in Chadha to outlaw forms of the veto which do not involve bicameral approval and presentment to the President is deeply flawed. Briefly put, Chief Justice Burger's argument against what I will call "congressional forms" of the veto is as follows. Congress cannot affect or limit the implementation of delegated authority in a controlling or binding fashion except through the regular legislative process because such actions alter the law and thus require bicameral approval and presentment to the President to be constitutionally valid. However, to maintain the coherence and power of this argument Burger must somehow also deal with and distinguish the discretionary decision making power exercised by officers in executive agencies and independent commissions. For these officials also alter the law without bicameral approval and presentment to the President. He does so by adopting a procedural or sequential approach to legislative power. In terms of this approach executive power begins when action in the regular legislative process is completed. There are no logical or substantive criteria to classify decisions as properly or inherently executive or legislative. Burger therefore does not challenge congressional authority or discretion in the legislative process; but he argues that, once Congress

has defined the terms of delegated authority by law, the discretionary decision making involved in implementing such authority is presumptively executive and Congress cannot act to alter or limit it in a controlling or binding fashion except by passing another law.

However, Burger's dramatic escape from the perils an inherent function approach poses for invalidating the veto in highly discretionary areas of policy is itself a trap. For under a procedural approach to legislative power the argument that congressional forms of the veto violate Article I really boils down to a presumption that Congress is invalidly interferring with execution. But what supports this presumption. It is the fact that Congress is acting in a binding or controlling manner outside the regular legislative process. Yet, this is the matter at issue in the first place. In short, the whole argument is circular and assumes what it needs to prove. As a result, Burger cannot counter the arguments of the veto's proponents. He merely overrides them by presumption. Denied his presumptions, he has no effective reply to the argument that one or two house veto resolutions are distinguishable from statutes because they derive their legal force from a prior enabling act or the argument that the necessary and proper clause provides Congress with broad discretion regarding the means it may adopt in implementing its legislative powers.

Third, the veto mechanism is not evil or venal in terms of its policy impacts. In recent years critics of congressional forms of the veto have attacked veto review bitterly with reference to its rule making applications and claimed that it results in delay, arbitrary actions, and unrepresentative decisions that reward special interests. The logic of these claims applies to law forms of the veto as well, but whether applied to law forms or congressional forms it is a logic which greatly exaggerates the wisdom and impartiality of the administrative process while failing to appreciate the advantages elected bodies possess in making discretionary policy decisions or the virtues of politics. This, of course, is not to say that the veto cannot be misused or misstructured. But to admit the possibility of error is quite different from claiming that the veto is generically sinful. Indeed, such claims are disturbing not only because their truth is highly problematic, but also because the veto's critics treat them as absolute certainties and hallmarks of political insight. Indeed, among lawyers one strongly suspects that the ready ability of the veto's critics to find it illegal is closely tied to their strong conviction that it is "bad".

Fourth and last, the veto mechanism is not a manifestation of congressional responsibility and laziness in lawmaking, as its critics claim, but rather an indispensible means of maintaining the rigorous balance between consent and action that our constitutional order intends. The simple truth is that in an age in which

major policy problems, both foreign and domestic, are complex and turbulent, Congress' constitutional role will be imperiled if it is denied the latitude in adapting to the 20th century that has been so freely and lavishly granted to the executive. In the 1980's substantive and political uncertainties often either render Congress incapable of writing detailed legislation or force it to do so in ways that impair the executive's ability to act effectively. Denied access to some form of veto device in such instances, Congress must choose among self-defeating alternatives. It can make broad delegations without adequate control; it can simply obstruct; or it can pepper authorization and appropriation measures with detailed provisos which hamstring the executive without doing much to promote the attainment of Congress' larger purposes.

The great advantage of the veto mechanism is thus that in a variety of important policy areas it permits modern American government to escape the dilemma of choosing between executive leadership and congressional control. Its fate is accordingly closely tied to the future of Congress and through Congress to the future of a constitutional order premised, not on rule by bureaucrats or judges, but by the elected representatives of the people.

II. Options And Strategies

If I may conclude that law forms of the veto are constitutional, that the Chadha decision is defective, and that the veto mechanism is neither bad nor unnecessary, then both incentives and opportunities exist for preserving the mechanism. In seeking to do so Congress should pursue both immediate and longer term objectives.

Since Congress has no choice but to operate within parameters set by the Court, its immediate response to Chadha should be to substitute law forms of the veto for congressional forms. In so doing it should be attentive to the costs and benefits of different types of law forms of the veto.

Negation by joint resolution or by bill under waiting period requirements provides greater opportunities for the conservation of time and effort, two very scarce resources in a late 20th century Congress of only 535 members. Issues can be selected in terms of their political importance and only cursory attention need be devoted to matters that are non-controversial. The cost, of course, is the need for a two-thirds majority if the President and Congress disagree, which reduces the power of the mechanism and Congress' leverage in applying it. Approval by joint resolution provides for greater legislative control. However, it requires Congress to pass on each and every matter subject to veto review. The results are likely to be quite costly in terms of floor time, even if special calendars or procedures are invented to expedite consideration.

In addition, different types of law forms impact executive leverage for reasons beyond the size of the majority required to exercise control through veto review. Under negative law forms proposed decisions or actions go into effect unless opponents can organize a majority on the floor to strike them down. Under affirmative law forms proponents of executive action have to organize the floor majorities. Negative law forms thus provide the President and other officials with greater leverage. Moreover, the leverage is usually even greater under waiting period forms than joint resolution forms since in the former case common practice has been to provide only for a waiting period and not to include provisions for discharge and limited debate with respect to the bill in contrast to frequent practice with respect to veto resolutions.

In sum, then, for a variety of reasons negative law forms provide the President and other officials with far greater political leverage than affirmative forms. However, in terms of sheer organizational efficiency negative forms are superior in their flexibility and range of application. Congress therefore should design and apply law forms of the veto by balancing time constraints against the degree of control that would abstractly be desirable. Given the press of other business and the variety of special calendars that already exist, wholesale or even widespread use of approval by joint resolution would be a mistake. Selective use to control especially important matters of policy, combined with greater reliance on various negative law forms, is the more viable approach. In other words, a rifle rather than a shotgun approach is generally preferable for approval forms. In addition, Congress should also apply negative forms with concern for their impact on floor business. Hence, simple waiting period forms without expedited procedures must continue to be heavily relied upon and negative joint resolution forms with expedited procedures not applied where the likely result is to produce hundreds of issues annually to vote up or down on the floor. However, the sting of relying primarily on negative law forms may also be attenuated by several expedients: changing House rules to make it easier to amend appropriations bills on the floor in cases where waiting period forms of the veto are in place and inventing different types of expedited procedures for negative joint resolution forms which may vary in their effectiveness.

Reliance on law forms of the veto, however, should not be Congress' only response to Chadha. For the reasons indicated in this essay good and substantial grounds exist for disagreeing with the Chadha decision. Nor are the points at issue merely academic. In fact, negative one and two house forms combine the power or leverage advantages of affirmative law forms and the efficiency or flexibility advantages of negative law forms. It is not surprising that these forms were the most heavily used congressional forms before Chadha. Hence, though law

forms have some advantages that congressional forms lack, on balance they do not provide an adequate substitute for one and two house vetoes. Congress thus ought not simply to give us what are overall the most effective and desirable forms of the veto because of an opinion as weak and as flawed as the Chadha opinion. The rub, of course, is how to contest the Court while observing legal proprieties and staying safely within constitutional boundaries.

Two possibilities may be suggested. First, the Congress should seek to mobilize and apply support that exists for congressional forms of the veto in the academic and legal communities. There are a wide number of highly respected scholars who have defended the constitutionality of the veto and are likely to believe that the Chadha decision is "bad law". Congress thus should keep the issue alive through hearings, committee-sponsored studies in particular areas, CRS reports, and even special conferences involving members, academics, lawyers, and respected columnists.

Second, Congress should test the Chadha decision in the Courts. The issue needs to be brought forward again and the Court required to rethink it in a context far less narrow and prejudicial to the veto than private immigration bills. Perhaps, the best way to accomplish this end is to carefully construct a usage in which the veto is tied to the appropriations process and applied to rule making.

The procedural or sequential approach to legislative power, adopted in Chadha, is particularly vulnerable to a veto usage tied to the appropriations process. If legislative power is equivalent to decision making within legislative processes and procedures and executive power commences when legislative decision making is completed, then it is exceedingly difficult to object constitutionally to the manner in which Congress structures its processes for making appropriations. Indeed, when the issue arose in the Eisenhower Administration, President Eisenhower on the advice of his Attorney-General conceded the constitutionality of vetoes tied to the appropriations process, though he objected to other forms of the veto. Similarly, usage with respect to rule making is desirable because its highlights the highly discretionary nature of the subject matter being controlled and limits the possibility for critics of the veto to fall back on an inherent function approach, even though such an approach clashes with other positions they take and is not compatible with the rationale used in Chadha. Last, but not least, judging from past experience, a rule making usage is very likely to incite a law suit in the federal courts.

The precise manner in which an appropriations veto over rule making should be constructed needs to be carefully examined by persons expert in House and Senate rules. One way that may be considered for purposes of stimulating discussion is as follows. First, pass a waiting period requirement for a specified

category of administrative rules. Second, change House and Senate rule so as to permit agency rules subject to the waiting period requirement to be disapproved as contrary to congressional intent by simple resolution. Third, include, as a feature of the above change in House and Senate rules, instructions to the Appropriations Committees to add provisos, barring the expenditure of funds for implementing rules so disapproved, in any and all future funding measures. Fourth, permit any member to raise a point of order against a funding bill that is not in accord with this new rule.

III. Conclusion

The Supreme Court is a powerful institution, but it is not powerful enough to alter the underlying realities that have led to the invention and growth of the veto mechanism over the past half-century. Nor is the ruling of the Court in the Chadha case so powerful in its logic that it cannot be challenged or so comprehensive in its reach that it outlaws all forms of the veto. Indeed, the irony of Chadha is that it is likely to have highly counterproductive effects for the very preferences and goals that have led critics of the veto to attack it. Even a selective increase in joint resolutions of approval will increase problems of delay and the informal negotiating power of committees. So too in many instances will increases in the use of waiting period forms. At the same time the power of the Presidency will be no better protected than is possible under congressional forms when submission by or through the President is required and conflict between the legislative and executive branches over both important and unimportant matters is likely to increase. Partisans of the Presidency thus show more prescience than they realize in resurrecting the proposal for an item veto and launching a new campaign on its behalf.

The last point, in turn, reminds us that the veto mechanism is critically important to the Congress not only to maintain its influence and control in particular policy areas, but to maintain its institutional prerogatives generally. It is thus no accident that the veto figures so prominently in congressional efforts to maintain its constitutional role with respect to impoundment and war. The struggle to preserve the veto is therefore a struggle Congress must not avoid. Rather, it should take maximum advantage of the leeway the Court has left it and seek to reverse or at least modify the position of the Court. In so doing it need not believe that its views of the essentials of our constitutional order are preeminent, but only that they are correct and that a decision as willfully blind to history and context as Chadha betrays the broad separation of power principles it purports to serve.

(The paper referred to by Mr. Cooper follows:)

CONGRESS AND THE LEGISLATIVE VETO:

OPTIONS AND STRATEGIES AFTER CHADHA

Joseph Cooper
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Working Paper in Executive-Legislative Project,
Center for Strategic and International Studies, Georgetown University,
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One of the primary institutional developments in twentieth century American politics has been the emergence and growth of the legislative veto. Admittedly, the process of growth has often been marked by conflict over the legality of the veto, the consequences of its use, or both. Nonetheless, from the 1930's through the 1970's the history of the veto successfully combined both continuing controversy and expanding use.[1]

This conflict-ridden, but expansionary, era of the veto's history has now been punctuated by two Supreme Court decisions. In late June of 1983 the Court ruled that one-house or simple resolution forms of the veto were unconstitutional.[2] Two weeks later it affirmed without comment two Appeals Court rulings against the veto, one of which outlawed two-house or concurrent resolution forms of the mechanism.[3]

As important as these decisions are, they have not foreclosed the need to examine the veto's constitutional merits and standing. Congress, to be sure, must obey the Supreme Court. Nonetheless, Congress needs to understand how much leeway the Court has left it and whether it has any sound basis for seeking to induce the Court to reverse or modify its position. The objectives of this essay are thus two-fold: to answer the questions posed and on the basis of these answers to suggest some strategies for Congress to follow as it seeks to cope with the actions of the Court.

In so doing we shall rely on a distinction between two basic forms of legislative veto. Generically, the legistative veto may be defined as a statutory mechanism which renders the implementation or the continuing implementation of decisions or actions, proposed or taken in pursuance of the statute, subject for a specified time period to some further form of legislative consideration and control.[4] This definition permits and encompasses a variety of options in structuring particular veto mechanisms.[5] The congressional unit or units which exercise the veto may vary: one house, both houses, committees, or some combination of these units. The manner in which the decision making process operates may vary: affirmation or negation, submission by or through the President or some other official, provisions for discharge, reliance or appropriations rather than authorization, etc.[6] The formal mechanisms or instruments through which veto action is implemented may vary: simple resolution, concurrent resolution, committee resolution, joint resolution, or bills. For our purposes in this essay the last dimension of structure is of special importance.

(See footnotes at end of article.)

We shall thus distinguish between congressional and law forms of the veto. Congressional forms are those in which veto action is not subject to the President's veto power and may be taken by portions of the Congress as well as by both houses. Examples are the one house form that operates through simple resolution; the two house form that operates through concurrent resolution; and the committee form that operates through committee resolution. Law forms are those in which veto action follows regular legislative procedures and involves both bicameral agreement and submission to the President for his approval. There are two primary forms: approval or negation by joint resolution and the waiting period form. Under the waiting period form the original enabling act only requires that the actions or decisions authorized by the act not go into effect until they have lain before Congress for a certain number of days. Congressional action to negate the proposed action or decision accordingly must occur through a regular bill. In effect, this makes the waiting period form similar to the negative joint resolution form, though the latter may be easier to operate if the original enabling act provides for cloture and discharge when it provides for action by joint resolution.

In concluding this introduction, we should also note that over time congressional forms of the device have been heavily relied upon as have waiting period forms. Of some four hundred and fifty veto provisions passed between 1932 and 1978, two hundred and five were congressional forms of various kinds and two hundred and thirty-eight were waiting period forms.[7] In recent years there has been an increase in the percentage of joint resolution forms. Still, of some ninety veto provisions passed between 1979 and 1982, excluding waiting period vetoes, all but eleven were congressional forms of one kind or another.[8]

I. The Chadha Decision

The only case in which the Supreme Court has issued an opinion on the legality of the veto is Immigration and Naturalization Service v. Chadha, 51 United States Law Week 4907 (1983). In addition, detailed opinions on the legality of the veto have been issued by lower federal courts in two other cases: Consumer Energy Council of America v. Federal Energy Regulatory Commission, 673 F. 2d 425 (D.C. Cir., 1982) and Atkins v. United States,

(See footnotes at end of article.)

556 F. 2d 1028 (Ct.Cl., 1977). In examining the veto's legality let us focus on these cases and particularly on Chadha.

In Chadha the Court outlawed the one house form of the veto on the basis of Sections 1 and 7 of Article I. These provisions require that laws be passed by both houses and be presented to the President for his approval or veto.

For purposes of analysis Chief Justice Burger's majority opinion in the Chadha case can be divided into three parts. The first part of his argument concerns the inherent nature of legislative power. Burger admits at the start that not all acts of one or both houses constitute exercises of legislative power in the sense understood and controlled by Article I. He states that the test of whether an action amounts to lawmaking rests not on form, but on whether it contains "matter which is properly to be regarded as legislative in character and effect."[9] Applying this test to the House's veto of an order of the Attorney General suspending Chadha's deportation, he concludes that the House's action "was essentially legislative" because it "had the purpose and effect of altering the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch."[10] Similarly, in the FERC case D.C. Circuit Judge Wilkey argued that a House veto of an incremental gas pricing rule constituted an act of legislative power because it was a discretionary policy decision which changed the law by negating an otherwise valid regulation and reducing the scope of FERC's authority.[11]

Nonetheless, critics of the legality of congressional forms of the veto cannot base their case simply on the claim that these forms of the veto constitute acts of lawmaking or legislating because they are discretionary decisions which alter the law. Officials in executive or independent agencies also make discretionary decisions which alter the law. Such discretion must thus somehow be distinguished from lawmaking or legislating. In addition, critics of the veto's legality must deal more adequately with the argument that veto resolutions are distinguishable from statutes in that they are based on and derive their authority from prior enabling legislation. In short, the contention that veto action is an act of legislative power even when it merely negates or prevents implementation does not fully meet the broader claim that veto review is a condition imposed by Congress on the very exercise of delegated authority.

(See footnotes at end of article.)

To handle these issues critics of the constitutionality of congressional forms of veto amplify and extend their case against them. A second and more fundamental part of their argument emerges in which what initially appeared to be an inherent function approach to legislative power becomes a procedural approach. Now character or substance is downplayed as a test of legislative power and binding or controlling effect is highlighted. Concomitantly, legislative power is identified procedurally or sequentially so that the same decision may be considered "legislative" if undertaken by Congress in writing a statute and "executive" if undertaken by appointed officials in the process of implementing a statute. As a consequence, a new standard for judging decisions that are equivalent to lawmaking or legislating comes to the fore. The logical or inherent character of the subject matter provide no criteria for constraining congressional decision making in the regular legislative process; but Congress cannot exercise power over the implementation of its laws in a binding or controlling fashion except by returning to the regular legislative process.

Thus, in Chadha Chief Justice Burger argues that,

> Disagreement with the Attorney General's decision on Chadha's deportation - that is, Congress' decision to deport Chadha - no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way: bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.[12]

Similarly, in the FERC case Judge Wilkey argues that the House veto of the FERC rule represented a congressional "second look" or "reconsideration" of its previously enacted policy.[13] He therefore concludes that the veto is illegal:

> The President and both houses of Congress agreed on a policy when they took their "first look". Undoing their policy requires adherence to the same procedure.[14]

A procedural approach to legislative power greatly facilitates the ability of the veto's critics to cope with the problems raised earlier.

First, once Congress has delegated authority, it is no longer "legislative", even if highly discretionary and even if vested in an independent agency. Chief Justice Burger thus states that the actions of the Attorney General in the Chadha case were "presumptively" executive.[15] Similarly, Judge Wilkey argues that, though FERC is an independent agency, it performs

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(See footnotes at end of article.)

executive functions in exercising its delegated rule making authority.[16] To be sure, both judges acknowledge that the authority delegated to governmental officials must not involve unconstitutional delegations of legislative power. However, if the non-delegation of legislative power requirements of Article I are satisfied, the only legitimate binding checks on the exercise of delegated authority are the terms of the statute, judicial review, and subsequent legislation.[17]

Second, the claim that veto review is merely a condition contemplated in the original enabling statute and not equivalent to lawmaking can simply be dismissed. If Congress cannot legitimately act to affect the exercise of delegated authority in a controlling or binding fashion except through the regular legislative process, then congressional forms of the veto represent an improper attempt by Congress to reserve power to itself. Thus, Chief Justice Burger can argue that negation through a one house veto is equivalent to an amendment or a repeal of a statute and therefore that the device is unconstitutional because such ends can only properly be achieved through the regular legislative process.[18]

The third and final part of the critics' case against the legality of congressional forms of the veto involves linking particular arguments to general principles. The case against the veto cannot rest solely on a demonstration that specific constitutional provisions have been violated; what also must be shown is that these violations injure or harm the principles and goals of the separation of powers design of the Framers of the Constitution. Both Chief Justice Burger and Judge Wilkey regard this as an easy task. They see no need to attempt any broad examination of the existing balance of power between the branches and the veto's impact in this regard. They simply point out that the Framers regarded the presentment and bicameral requirements of Article I as essential both to allow the President to protect his prerogatives and to insure wise and balanced deliberation in the lawmaking process. Hence, if these requirements are violated, so too are the principles and goals of the Framers' separation of powers design.[19]

II. The Merits of Chadha

The arguments of those who deny that congressional forms of the veto violate the bicameral and presentment provision of Article I can also be divided into three parts.

(See footnotes at end of article.)

Their initial approach is to argue that the one house form of the veto, involved in the Chadha and FERC cases, is distinguishable from a law or statute because the negation of proposed actions or decisions by resolution does not change the law but only maintains the legal status quo.[20] This argument, however, does not provide an adequate foundation for defending congressional forms of the veto. It does not apply to approval forms and it does not come to grips with Chief Justice Burger's argument that veto action, even when negative, is equivalent to lawmaking because it accomplishes what could otherwise only be accomplished by law.[21]

However, defenders of the legality of congressional forms of the veto no more restrict their case to one level of argument than critics of these forms. Thus, in Chadha Justice White argues that the House's veto of Chadha's deportation suspension did not violate Article I because it existed as a condition on the exercise of delegated authority laid down in the original enabling act.[22] He recognizes explicitly that the lynchpin of the majority opinion is the claim that Article I requires "all action with the effect of legislation to be passed as law."[23] And he offers two broad arguments in opposition. On the one hand, he asks why the test must be more exacting in the case of the Congress than in the case of officials in executive or independent agencies. After all, these officials make decisions with the force of law without bicameral approval or presentment to the President. Moreover, in both cases discretion is authorized by an original enabling statute and limited by the terms of the statute.[24] On the other hand, he argues that the Court has not been strict in controlling either the agents to whom authority has been delegated or the standards under which authority has been delegated. He thus finds it "odd" that a Court, which has allowed the non-delegation of legislative power requirements of Article I to become a virtual nonentity and a group of farmers to veto marketing orders, cannot abide veto review as a condition of congressional delegations of authority under Article I.[25]

Nor are these the only or even the most cogent points that can be made in defense of congressional forms of the veto. The procedural premises and arguments of the veto's critics can be challenged more directly.

First, what line of reasoning or evidence supports the proposition that Congress cannot affect or limit the exercise of delegated authority in a

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(See footnotes at end of article.)

controlling or binding fashion except through the regular legislative process. On their face the bicameral and presentment provisions of Article I do not prohibit Congress from conditioning its statutory grants of delegated authority so as to provide for veto review. Given this fact, the proposition rests implicitly more on conceptions of executive duties or prerogatives in implementing the law than on conceptions of legislating or lawmaking.[26] Thus, both Chief Justice Burger and Judge Wilkey argue that the instances in which one or both houses of Congress can take binding action outside the regular legislative process are few and, aside from proposing constitutional amendments, specifically stipulated, e.g. impeachment, confirmation, etc.[27] But this argument does not come to grips with the issue of whether veto review infringes duties or prerogatives reserved to the executive. It rather presumes to know the answer from the start. As Justice White points out, "the fact that matters such as impeachment are stipulated "hardly demonstrates a limit upon Congress' authority to reserve itself a legislative veto, through statutes, over subjects within its lawmaking authority."[28] In short, then, the claim that congressional forms of the veto violate the bicameral and presentment clauses of the constitution is not as clear and straightforward as it appears. Rather, on the basis of certain presumptions about executive duties or prerogatives, it assumes what it needs to prove: that Congress cannot exercise binding control over the implementation of delegated authority except through new legislation.

Second, proponents of congressional forms of the veto can provide substantive constitutional grounds in support of their argument that Congress has the power to make veto review a condition of grants of delegated authority. The vertical effects of the necessary and proper clause of Article I are well known. However, this provision not only endows Congress with the ability to employ all appropriate and convenient means to carry out its enumerated powers, it also endows Congress with the same ability with reference to the powers of all other governmental units. Hence, it can be argued that the necessary and proper clause has a horizontal as well as vertical effect; that it endows Congress with broad discretion over the means of implementation as long as they too are appropriate and convenient and do not violate any express provisions of the Constitution.[29] Indeed, this was one of the main arguments in the Atkins case in which the Court of

(See footnotes at end of article.)

Claims upheld a one house veto over federal salaries.[30] And it is an argument Justice White employs in Chadha as well.[31]

Finally, proponents of congressional forms of the veto, like opponents, appeal to broader constitutional principles. In Chadha Justice White does so in two mutually reinforcing ways. On the one hand, he denies that the one house veto injures or harms separation of powers principles or goals. His point is that though veto procedures reversed the regular legislative process, the one house form did not impair the ability of either house or the President to control results.[32] This is arguably true in Chadha and even more difficult to dispute in cases in which veto proposals must formally be presented by or through the President. On the other hand, he argues that congressional forms of the veto provide a means of readjusting the balance of power between the branches in an age when circumstances have required and the Court has permitted substantial delegations of discretionary authority to governmental officials. They thus serve to preserve the separation of powers, not destroy it.[33]

III. The Implications of the Chadha Decision

What then can we conclude regarding the constitutional standing and merits of the legislative veto?

One fact that is clear is that Congress retains considerable leeway. The Supreme Court, explicitly or implicitly, has outlawed the one house, two house, and committee forms of the veto. However, the same logic or rationale that accomplishes this result makes the joint resolution and waiting period forms very difficult to challenge, even though in practice these forms often permit powerful committees and members to exercise as much leverage as congressional forms.[34]

If, as is argued in Chadha and FERC, the hallmark of constitutionality is that Congress cannot alter the terms of delegated authority except through the regular legislative process, then forms of the veto that involve bicameralism and presentment are not objectionable. Even though these forms impose "conditions" on the implementation of delegated authority, they clearly do not violate Article I. Nor can a procedural approach to legislative power, as argued and relied upon in Chadha and FERC, sustain an attack on these forms based on alleged infringements of executive prerogatives under Article II. A procedural approach, no more than an inherent function approach, can provide

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(See footnotes at end of article.)

grounds for limiting Congress' authority to legislate within its enumerated powers in instances in which no express grants of power to the President are violated. Hence, it cannot provide an adequate foundation for challenging law forms of the veto under either Articles I or II.[35]

Last, but not least, the rationale of the decisions in Chadha and FERC widens the constitutional potential of one specific type of congressional form — house or committee vetoes tied to the appropriations process.[36] If the distinguishing line between legislative and executive power is procedural or sequential, then bars to the prospective appropriation of funds, established on the basis of simple, concurrent, or committee resolutions, can be strongly defended as internal acts of rule making or self-governance and integral aspects of Congress' historic right to appropriate or not appropriate as it alone sees fit.[37]

A second conclusion that may be drawn is that good and substantial reasons exist for disagreeing with the decisions in the Chadha and FERC cases. As has been argued, the contention that congressional forms of the veto injure basic separation of powers principles because they violate the presentment and bicameral requirements of Article I turns out when closely examined to be problematic and inconclusive rather than clear and undeniable. The contention that these forms of the veto violate executive duties and prerogatives under Article II is equally, if not even more vulnerable. This type of argument was employed by Judge Wilkey in the FERC case as a second and independent basis for invalidating congressional forms of the veto and it is a frequent refrain among the veto's critics.[38]

Yet, unless one assumes either inherent executive functions or implied executive power, it is difficult to see why congressional forms of the veto violate Article II. To be sure, these forms interfere with administration or execution, but so do all forms of congressional review, including authorization and appropriation.[39] Admittedly, they differ from informal forms of oversight and regular legislation in that they provide for binding control without presentment to the President and possibly without bicameral passage as well. However, this fact constitutes no constitutional defect unless the presentment and bicameral provisions of Article I are violated.[40] If they are not, there is no legitimate difference between what Congress can accomplish regarding administrative control through congressional forms and what it can accomplish through regular legislation. Thus, the case against congressional forms of the veto on grounds of violating Article II rests

(See footnotes at end of article.)

on presumptions about Article I just as the reverse obtains when Article I is the focus of attack.[41] This, indeed, is the underlying reason law forms of the veto are immune to attack on grounds of violating Article II!

The claim that congressional forms of the veto violate separation of powers principles and goals because they infringe executive prerogatives thus also lacks a firm foundation.[42] This claim can still be argued more broadly on the basis of alleged deleterious impacts on the balance of power between the branches or alleged deleterious policy impacts. However, the latter argument is highly debatable and it is questionable that the Court should decide constitutional issues on the basis of its judgment of policy impacts or results.[43] As for the former argument, it is easily countered. Judicial fears that the veto involves open-ended possibilities for congressional aggrandizement exaggerate the dangers. Congressional forms of the veto can accomplish no more than law forms or regular legislation and presidential power can be protected by structuring the device so as to require submission by or through him, non-amendability, discharge, etc. Conversely, the weight of the evidence suggests that it is Congress that is most threatened by modern conditions of government, not the President and certainly not the bureaucracy.[44]

In conclusion, then, the case against the constitutionality of congressional forms of the veto is circular and unconvincing. It is one in which presumptions alternate as needed to buttress different parts of the argument regarding the violation of constitutional provisions or arrangements. Indeed, it is only by assuming what they need to prove that critics overcome the fact that congressional forms are not expressly barred by the Constitution nor equivalent to statutes in character or effect.[45] Given such fragile underpinnings, judicial claims that basic separation of powers principles and goals have been injured also are unconvincing. The Supreme Court thus would have been better advised to have approached the veto with less confidence in its institutional wisdom and more humility toward the views of its sister branch. If nothing else, a presumption in favor of Congress would have avoided the embarrassment of introducing a highly restrictive and literalist interpretation of "legislating" in the case of congressional decision making when for so many years the Court has treated the concept in a highly permissive, almost metaphysical manner, in the case of executive

(See footnotes at end of article.)

decision making.[46] More positively, such a presumption would have been true to the wisdom of past Justices, such as Holmes, Cardozo, Frankfurter, and Jackson, who understood that separation of powers principles must not be interpreted in an isolated and "truismatic" fashion if the core values and goals of our Constitution are to be preserved over time.[47]

IV. Strategies For Congress

If we may assume that the veto is neither bad nor unnecessary, and there is ample evidence to support both contentions, the preceding analysis of the constitutional status of the veto suggests two basic strategies for the Congress to pursue.[48]

Since Congress has no choice but to operate within parameters set by the Court, its immediate response to Chadha should be to substitute law forms of the veto for congressional forms. In so doing it should be attentive to the costs and benefits of different types of law forms of the veto.

Negation by joint resolution or by bill under waiting period requirements provides greater opportunities for the conservation of time and effort, two very scarce resources in a late 20th century Congress of some 500 members. Issues can be selected in terms of their political importance and only cursory attention need be devoted to matters that are non-controversial. The cost, of course, is the need for a two-thirds majority if the President and Congress disagree, which reduces the power of the mechanism and Congress' leverage in applying it. Approval by joint resolution provides for greater legislative control. However, it requires Congress to pass on each and every matter subject to veto review. The results are likely to be quite costly in terms of floor time, even if special calendars or procedures are invented to expedite consideration.

In addition, different types of law forms impact executive leverage for reasons beyond the size of the majority required to exercise control through veto review. Under negative law forms proposed decisions or actions go into effect unless opponents can organize a majority on the floor to strike them down. Under affirmative law forms proponents have to organize the floor majorities. Negative law forms thus provide the President and other officials with greater leverage.[49] Moreover, the leverage is usually even greater under waiting period forms than joint resolution forms since in the former case common practice has been to

(See footnotes at end of article.)

provide only for a waiting period and not to include provisions for discharge and limited debate with respect to the bill in contrast to frequent practice with respect to veto resolutions.

In sum, then, for a variety of reasons negative law forms provide the President and other officials with far greater political leverage than affirmative forms. However, in terms of sheer organizational efficiency negative forms are superior in their flexibility and range of application. Congress therefore should design and apply law forms of the veto by balancing time constraints against the degree of control that would abstractly be desirable. Given the press of other business and the variety of special calendars that already exist, wholesale or even widespread use of approval by joint resolution would be a mistake. Selective use to control especially important matters of policy, combined with greater reliance on various negative law forms, is the more viable approach. In other words, a rifle rather than a shotgun approach is generally preferable for approval forms.[50] In addition, Congress should also apply negative forms with concern for their impact on floor business. Hence, simple waiting period forms without expedited procedures must continue to be heavily relied upon and negative joint resolution forms with expedited procedures not applied where the likely result is to produce hundreds of issues annually to vote up or down on the floor. However, the sting of relying primarily on negative law forms may also be attenuated by several expedients: changing House rules to make it easier to amend appropriations bills on the floor in cases where waiting period forms of the veto are in place and inventing different types of expedited procedures for negative joint resolution forms which vary in their effectiveness.

A final point concerns some of the operating features of the veto mechanism. Submission by or through the President, non-amendability, discharge, and cloture are extremely desirable features of one and two house vetoes both for legal and policy reasons.[51] Law forms allow more leeway. Limits on amendments are not as critical since the President will have an opportunity to sign or veto the resolution or bill. Special discharge and cloture procedures can vary depending on the degree of leverage it is thought desirable to provide the President and potential demands on floor time. Submission by or through the President remains generally desirable

(See footnotes at end of article.)

on policy grounds, but less critical since he will have an opportunity to sign or reject the resolution or bill.

Reliance on law forms of the veto, however, should not be Congress' only response to Chadha. For the reasons indicated in this essay good and substantial grounds exist for disagreeing with the Chadha decision. Nor are the points at issue merely academic. In fact, negative one and two house forms combine the power or leverage advantages of affirmative law forms and the efficiency or flexibility advantages of negative law forms. It is not surprising that these forms were the most heavily used congressional forms before Chadha.[52] Hence, though law forms have some advantages that congressional forms lack, on balance they do not provide an adequate substitute for one and two house vetoes. Congress thus ought not simply to give up what are overall the most effective and desirable forms of the veto because of an opinion as weak and as flawed as the Chadha opinion. The rub, of course, is how to contest the Court while observing legal proprieties and staying safely within constitutional boundaries.

Two possibilities may be suggested. First, the Congress should seek to mobilize and apply support that exists for congressional forms of the veto in the academic and legal communities. There are a wide number of highly respected scholars who have defended the constitutionality of the veto and are likely to believe that the Chadha decision is "bad law".[53] Congress thus should keep the issue alive through hearings, committee-sponsored studies in particular areas, CRS reports, and even special conferences involving members, academics, lawyers, and respected columnists.

Second, Congress should test the Chadha decision in the Courts. The issue needs to be brought forward again and the Court required to rethink it in a context far less narrow and prejudicial to the veto than private immigration bills. Perhaps, the best way to accomplish this end is to carefully construct a usage in which the veto is tied to the appropriations process and applied to rule making. As noted earlier, the procedural or sequential approach to legislative power, adopted in Chadha, is particularly vulnerable to a veto usage tied to the appropriations process. If legislative power is equivalent to decision making within legislative processes and procedures and executive power commences when legislative decision making is completed, then it is exceedingly difficult to object constitutionally

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to the manner in which Congress structures its processes for making appropriations. Indeed, when the issue arose in the Eisenhower Administration, President Eisenhower on the advice of his Attorney General conceded the constitutionality of vetoes tied to the appropriations process, though he objected to other forms of the veto.[54] Similarly, usage with respect to rule making is desirable because it highlights the highly discretionary nature of the subject matter being controlled and limits the possibility for critics of the veto to fall back on an inherent function approach, even though such an approach clashes with other positions they take and is not compatible with the rationale used in Chadha.

The precise manner in which an appropriations veto over rule making should be constructed needs to be carefully examined by persons expert in House and Senate rules. One way that may be considered for purposes of stimulating discussion is as follows. First, pass a waiting period requirement for a specified category of administrative rules. Second, change House and Senate rules so as to permit agency rules subject to the waiting period requirement to be disapproved as contrary to congressional intent by simple resolution. Third, include, as a feature of the above change in House and Senate rules, instructions to the Appropriations Committees to add provisos, barring the expenditure of funds for implementing rules so disapproved, in any and all future funding measures. Fourth, permit any member to raise a point of order against a funding bill that is not in accord with this new rule.

V. Conclusion

The Chadha decision has had an important impact in limiting congressional leverage and flexibility with respect to the veto mechanism. Nonetheless, neither the reach nor the rationale of the decision is powerful enough to deny Congress a variety of options and strategies it can pursue to retain the veto. More important, neither the words nor the standing of the Court is powerful enough to alter the underlying realities in executive-legislative relations that have led to the invention and development of the veto mechanism. Hence, both incentives and opportunities continue to exist to preserve the veto and Congress should strive to do so.

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Though it might seem far easier in the wake of Chadha to abandon the device and rely totally on Congress' traditional legislative and appropriations powers, this would be a grave mistake. Such a path is fervently recommended by critics of the veto. But it is a path which can only be chosen through self-deception and which, if followed, will ultimately lead to frustration for all those who believe that congressional power is vital to preserving the rigorous balance between consent and action that our constitutional order intends.

The simple truth is that in an age in which major policy problems, both foreign and domestic, are complex and turbulent, Congress' constitutional role will be imperiled if it is denied the latitude in adapting to the 20th century that has been so freely and lavishly granted to the executive. In the 1980's substantive and political uncertainties often either render Congress incapable of writing detailed legislation or force it to do so in ways that impair the executive's ability to act effectively. Denied access to the veto in such instances, Congress must choose among self-defeating alternatives. It can make broad delegations without adequate control; it can simply obstruct; or it can pepper authorization and appropriation measures with detailed provisos which hamstring the executive without doing much to promote the attainment of Congress' larger purposes.

The great advantage of the veto is thus that in a variety of important policy areas it permits modern American government to escape the dilemma of choosing between executive leadership and congressional control. Its fate is accordingly closely tied to the future of Congress and through Congress to the future of a constitutional order premised, not on rule by bureaucrats or judges, but by the elected representatives of the people.

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Notes

[1]See H. Lee Watson, "Congress Steps Out: A Look at Congressional Control of the Executive," 63 California Law Review 983 (1975); James Sundquist, The Decline and Resurgence of Congress, Washington: Brookings Institution, 1981, pp. 344-367; Joseph Cooper and Patricia Hurley, "The Legislative Veto: A Policy Analysis," 10 Congress and the Presidency 1 (1983); and Barbara Craig, The Legislative Veto: Congressional Control of Regulation, Boulder: Westview Press, 1983, pp. 15-45.

[2]Immigration and Naturalization Service v. Chadha, 51 United States Law Week 4907 (1983).

[3]The cases were both from the D.C. Circuit. Consumer Energy Council of America v. FERC, 673 F. 2d 425 (1982) and Consumers Union v. FTC, 691 F. 2d 575 (1982).

[4]Joseph and Ann Cooper, "The Legislative Veto and the Constitution," 30 George Washington Law Review 467 (1962).

[5]Cooper and Hurley, supra note 1 at 6-9 and Arthur Maass, Congress and the Common Good, New York: Basic Books, 1983, pp. 192-193.

[6]Cooper and Cooper, supra note 4 at 468-469.

[7]Clark Norton, 1978 Congressional Acts Authorizing Congressional Approval or Disapproval of Proposed Executive Actions, Washington, D.C.: Congressional Research Service, 1979, pp. V-VI (Report No. 79-46) and Craig, supra note 1 at 18.

[8]M. S. Cavanagh, et.al., Congressional Veto Legislation: 97th Congress, Washington, D.C.: Congressional Research Service, 1982, pp. 1-7. The figures are for provisions passed up to 8/5/82.

[9]51 United States Law Week 4916 (1983).

[10]Ibid.

[11]673 F. 2d 465-468 (1982).

[12]51 United States Law Week 4917 (1983). For a discussion of the differences between an inherent function and procedural approach to legislative power see Cooper and Cooper, supra note 9 at 480-499. For a lengthier statement of the case for objecting to congressional forms of the veto on

the basis of a procedural approach to legislative power see Testimony of Antonin Scalia, Hearings Before House Rules Committee on Regulatory Reform, 96th Congress, 1st Session, Washington, D.C.: Government Printing Office, 1979, pp. 532-535.

[13]673 F. 2d 468 (1982). See also 469-470.

[14]Ibid.

[15]51 United States Law Week 4917 (1983).

[16]673 F. 2d 471 (1982).

[17]51 United States Law Week 4917 (1983).

[18]51 United States Law Week 4916-17 (1983).

[19]51 United States Law Week 4917-18 (1983) and 673 F. 2d 463-465 (1982).

[20]51 United States Law Week 4924 (1983). In addition, see Buckley v. Valeo, 424 U.S. 285 (1976) and Atkins v. United States, 556 F. 2d 1063 (Ct.Cl., 1977).

[21]51 United States Law Week 4917 (1983). See also Testimony of Benjamin Civiletti, Regulatory Reform Hearings, supra note 12 at 395-400 and "The Legislative Veto," 34 Record of the Association of the Bar of the City of New York 214 (March, 1979).

[22]51 United States Law Week 4926 (1983).

[23]Ibid., 4925.

[24]Ibid., 4925-26.

[25]Ibid.

[26]Nor is this surprising given reliance on a procedural approach. The premise is that once Congress has delegated a power, the power becomes executive and since Congress cannot execute the laws, it cannot meddle or interfere with performance unless it passes a new law. See Atkins v. United States, 556 F. 2d 1066-67 (Ct.Cl., 1977). In addition, the attention critics of the veto feel they must devote to the character of conditions that may validly be attached to delegations of legislative power also supports the point. See, for example, Robert Dixon, "The Congressional Veto and Separation of Powers: The Executive on a Leash," 56 North Carolina Law Review 453-457 (1978) and John B. Henry, "The Legislative Veto: In Search of Constitutional Limits," 16 Harvard Journal of Legislation 752-756 (1979). Indeed, one critic explicitly bases his argument regarding violation of the presentment and bicameral provisions of Article I on the veto's alleged effect of vesting congressmen with executive office with the result that in his view

it cannot validly be accepted as a precedent condition. David Martin, "The Legislative Veto and the Responsible Exercise of Congressional Power," 63 Virginia Law Review 293-300 (1982).

[27]Ibid., 4917 and 673 F. 2d 457-460 (1982).

[28]51 United States Law Week 4927 (1983). White also notes that "all of these carefully defined exceptions to the presentment and bicameralism strictures do not involve actions of the Congress pursuant to a duly-enacted statute," Ibid, 4926. See also Atkins v. United States, 556 F. 2d 1068 (Ct.Cl., 1977).

[29]Testimony of Eugene Gressman, Regulatory Reform Hearings, supra note 12 at 464-478.

[30]Atkins v. United States, 556 F. 2d 1069 (Ct.Cl., 1977).

[31]51 United States Law Week 4925 (1983).

[32]Ibid., 4928.

[33]Ibid., 4920-23 and 4929-30.

[34]Cooper and Cooper, supra note 4 at 468.

[35]In Sibbach v. Wilson, 312 U.S. 1 (1941) the Supreme Court upheld a waiting period form of the veto over federal rules of civil procedure on grounds that determining such rules was a function of Congress over which it could reserve power. However, if the Court had taken a more procedural approach, it nonetheless would have been difficult to argue that setting an effectuation date is somehow separable from the act of legislating or lawmaking. In Chadha Chief Justice Burger distinguished Sibbach because the statute only gave Congress power to review the rules before they became effective and required congressional action to take the form of regular legislation. 51 United States Law Week 4912 (1983).

[36]Cooper and Cooper, supra note 4 at 469.

[37]Congress' discretionary right of appropriations was established in the 1790's. George Galloway, History of the House of Representatives, New York: Thomas Y. Crowell, 1961, pp. 193-194.

[38]See 673 F. 2d 470-477 (1982). See also, for example, Civiletti, supra note 21 at 407-412; Dixon, supra note 26 at 440; 69 American Bar Association Journal 1259 (1983); and Carl McGowan, "Congress, Court, and Control of Delegated Power," 77 Columbia Law Review 1152 (1977).

[39]Some opponents of the veto read recent decisions of the Court regarding Richard Nixon to mean that the test of whether executive functions have been infringed is whether congressional action "prevents the Executive Branch from

accomplishing its constitutionally assigned functions." Nixon v. Administration of General Services, 433 U.S. 425, 433 (1977). They then argue that because congressional forms of the veto involve delay, undermine notice and comment procedures, etc., they disrupt executive functions and violate Article II. See 69 American Bar Association Journal 1258-59 (1983). This, however, is simply to read implied executive power into the Constitution despite the steel seizure case. Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579 (1952). The executive branch, apart from express powers granted to the President, has no constitutionally assigned functions other than to execute the laws Congress has written within the terms specified. 51 United States Law Week 4929 (1983). Indeed, since all forms of oversight "interfere" with execution, the argument that equates "disruption" with infringement provides a rationale for undermining congressional review in general. See Cooper and Cooper, supra note 4 at 488-489.

[40]See Judge Wilkey's opinion in FERC, 673 F. 2d 476 (1982).

[41]In addition to arguing that congressional forms of the veto infringe executive prerogatives under Article II, critics also argue that the veto allows congressmen to assume executive office in violation of Section 6 of Article I. See Dixon, supra note 26 at 441 and Martin, supra note 26 at 299. This argument takes many forms, but in all its forms boils down to the claim that to allow congressmen to make binding decisions regarding the implementation of delegated authority outside the lawmaking process transforms them into "administrators." However, once again this is to assume what needs to be shown: that decisions necessarily become executive once delegated and thus that Congress cannot impose the veto as a condition in the original enabling act. See also Cooper and Cooper, supra note 4 at 499-501.

[42]Some critics also contend that congressional forms of the veto infringe judicial duties and prerogatives under Article III. The premises are procedural: that Congress through the veto interprets the law and that this usurps judicial functions. See Civiletti, supra note 21 at 412; Brief of American Bar Association as Amicus Curiae in Immigration and Naturalization Service v. Chadha, Supreme Court of the United States, October Term, 1981, p. 12; and Consumer Energy Council of America v. Federal Energy Regulatory Commission, 673 F. 2d 477 (1982). Once again, however, the argument rests on the presumption that the veto cannot validly be stipulated as a precedent condition. In addition, it may be asked how the same veto decision can simultaneously invade executive and judicial functions. In

Chadha Justice Powell ruled against the veto on grounds that in deciding on the deportation of specific individuals Congress assumed a judicial function. Justice White's answer is powerful, but in any event this type of objection does not apply to any other instance of veto usage. 51 United States Law Week 4918-20 and 4930 (1983).

[43]Part and parcel of the American Bar Association's argument that congressional forms of the veto "disrupt" executive functions is that the device has "bad" policy consequences: that it results in ad hoc, arbitrary, and unrepresentative policy making. See supra note 39 and Bar Association Brief, supra note 42 at 9-12 and 21-23. Mixing such contentions with constitutional arguments is inappropriate and even somewhat arrogant, given its pretensions to absolute wisdom in a highly controversial area. See William West and Joseph Cooper, "The Congressional veto and Administrative Rulemaking," 98 Political Science Quarterly 285 (1983); Maass, supra note 5 at 191-203; and Sundquist, supra note 1 at 344-367.

[44]See, for example, Arthur Miller and George Knapp, "The Congressional Veto: Preserving the Constitutional Framework," 52 Indiana Law Journal 367 (1977) and Charles Black, "Some Thoughts on the Veto," 40 Law and Contemporary Problems 87 (1977).

[45]See Geoffrey Stewart, "Constitutionality of the Legislative Veto," 13 Harvard Journal on Legislation 613-615 (1976).

[46]See Bernard Schwartz, "The Legislative Veto and the Constitution — A Reexamination," 46 George Washington Law Review 374 (1977) and McGowan, supra note 38 at 1127-28.

[47]See Atkins v. United States, 556 F. 2d 1066-1067 (Ct.Cl., 1977); Springer v. Philippine Islands, 277 U.S. 189, 209-11 (1928); and Panama Refining Company v. Ryan, 293 U.S. 388, 440 (1935). The term "truismatic" is from Justice White's opinion in Chadha. 51 United States Law Week 4924 (1983).

[48]In support of the policy and institutional impacts of the legislative veto see Sundquist, supra note 1; Cooper and Hurley, supra note 1; Maass, supra note 5, and West and Cooper, supra note 43. In addition, see I. M. Destler, "Dateline Washington: Life After the Veto," 52 Foreign Policy 181 (1983).

[49]This, indeed, was one of the prime reasons for the invention of the veto mechanism. See John Millett and Lindsay Rogers, "The Legislative Veto and the Reorganization Act of 1939," 1 Public Administration Review 176 (1941).

[50]House Minority Whip Trent Lott (R., Mass.) has recently suggested subjecting major rules to approval by joint resolution and non-major rules to disapproval by joint resolution. His plan also provides for the creation of a special calendar and discharge. Roll Call, Washington, D.C., pp. 3-4 (September 29, 1983). Lott's plan may be compared to another proposal to require Congress to approve major rules and to create a special calendar for handling such business. See Robert Litan and William Nordhaus, Reforming Federal Regulation, New Haven: Yale University Press, 1983, pp. 159-183. All in all the Lott plan is less unwieldy since under it action would be on the final version of the rule, not a proposal for a rule which has yet to go through notice and comment proceedings. It, however, remains arguable whether subjecting all rules to veto review, albeit negative in the case of non-major rules, is worth the cost in terms of floor time.

[51]West and Cooper, supra note 43 at 303-304.

[52]Cooper and Hurley, supra note 1 at 9.

[53]51 United States Law Week 4923 (1983).

[54]Cooper and Cooper, supra note 4 at 469.

Mr. MOAKLEY. Thank you.
Dr. Ornstein.

STATEMENT OF NORMAN J. ORNSTEIN, AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH

Mr. ORNSTEIN. Thank you, Mr. Chairman.

I generally agree with what Joe Cooper said. I am more of a defender of the veto, I think, than many of the people we have heard from today. I didn't see the veto acting in most instances as something that got Congress into areas that it is poorest at getting into.

I saw it mostly as a form of deterrence. Most vetoes were never exercised. It was a useful form of deterrence against overdone actions on the part of executive agencies. It was something that I think worked well as a potential threat, much better than it did when it was actually exercised.

I am sorry to see it go.

My unhappiness at the time of the *Chadha* decision waned a bit as I began to reflect on it. Much as Joe has, as I looked through the logic of the decision, it occurred to me there were other methods Congress could use.

I don't think too many agencies are going to go off and flout the desires of Congress in the absence of a veto. I think still that this is going to hurt the executive branch as much or more than it will hurt Congress.

I am puzzled why Presidents have opposed the veto per se—why they have done something that I see as self-destructive. But that is an issue for another day.

I want to address myself briefly to the question of workload, which hasn't come up too much today. Any way you look at it, it seems to me this is going to increase the workload of Congress and increase it substantially at a time when we are having difficulty coping with the workload.

It may be in modest cases that that workload will take the form of additional detail in legislation that might be desirable. But I think we have to look at why we have not already seen the kind of detail that we have talked about this morning in legislation.

It hasn't been because we have had the legislative veto or at least entirely that provides Congress an easy way out. It is for a whole variety of reasons.

Over the last 20 years or so we have seen Congress pass fewer laws, not more laws. The laws that have been passed have generally been longer, not shorter.

It is not that Congress is passing short, undetailed legislation. They are passing fewer laws that are greater in length. It is not so much that we are not including detail.

We have more detail than ever before. Leaving some issues aside, leaving some of the more difficult issues aside, even as we are putting in more detail in other fashions.

It is taking place for a whole set of reasons that relate in part to the greater decentralization and democratization of the institution. It is getting more difficult to pass anything through Congress.

So we find ways when we pass things through of using them as vehicles to add on a lot of other elements. That is not going to change with the legislative veto gone.

It is not going to be easier to cope with the workload problem. It is not going to necessarily even force Congress to do so.

But still we have a problem and we have to address that problem in a variety of fashions. I think at a deeper level we have to go back to one of the root causes and that is the nature of the committee system.

This institution has failed several times in the last decade, as the former chairman of the committee can tell you in great and graphic detail, at coping with the nature of the committee system.

We have tried to grapple with it. I think it is time to sit down once again and maybe the *Chadha* decision will force that. That, of course, is a longer term solution. It is not going to happen for several years.

In the shorter run, to deal with the additional workload brought about by the legislative veto itself, I have a few suggestions.

I think you have to have a coordinating mechanism, a coordinating mechanism to figure out what regulations you are dealing with, what potential mechanisms exist, what the timing is, and not let it be diffused through the existing committee system.

And I recommend the creation of a body, a clearinghouse, that would have as its purpose coordinating and disseminating information on what kinds of actions Congress might be required to take or might wish to take, or what regulations ought to be flagged for the institution.

I have in mind something that would operate perhaps in a fashion similar to the Joint Committee on Taxation. It would be largely a limited staff set up that would be overseen by representatives of relevant committees and party leadership, perhaps a joint committee on regulations.

It doesn't have to be a committee. And I hate to recommend formation of a committee. It might just simply be an office.

But I think there has to be a central clearinghouse. I think you have to figure out ways, if we go the route of joint resolution, of approval or disapproval, if we tie them, as Joe Cooper suggests, to appropriations bills with mandates to appropriations committees, making sure these issues come up and don't get caught in the queue of bills waiting to reach the floor.

This committee ought to consider possibly a new calendar or at least a way of being sure that joint resolutions get their time on the floor and have a specific time allotted to them. I think you ought to seriously consider rules that would greatly limit the amount of time debating these and limit the amendments that would be allowed.

I will leave it at that.

[Mr. Ornstein's prepared statement follows:]

TESTIMONY OF

Norman J. Ornstein
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and

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Before the

House Committee on Rules

November 10, 1983

In the aftermath of the Supreme Court Chadha decision, Congress has had an opportunity to begin to sort out the broad implications of this sweeping ruling. We have of course moved beyond simple criticism of the action taken by the Supreme Court. That action has been acknowledged, and universally, if grudgingly, accepted, in the political process. We must now address what Congress can do and should do in the future. Congress will clearly not come up with a single, overarching replacement for the legislative veto. Things will not be as easy as that. The suggestions for replacements, made by Congressman Levitas, Senator Levin and many others will be useful in some instances but not in others. There will have to be a highly selective tailored set of processes developed on Capitol Hill to resolve or begin to resolve the many issues raised daily between executive agencies and legislative mandates.

One thing is clear at the outset, however: the Executive Branch will come to regret this decision, over the long run, even more than the Legislative Branch. Whatever solutions in general Congress turns to--refusing to delegate authority at all, at one extreme, or putting a mass of enumerated restrictions on the grant of authority, at the other--freedom to operate and use discretion, overall, in the Executive, will be lessened.

As for Congress, the legislative veto decision is mostly, but not entirely negative. At least in some instances, it will force Congress to make more sharply focused and less vague laws and to be more disciplined in its lawmaking processes. In many ways, the legislative veto was a cheap and easy way out for Congress. It's no longer there.

The overall effect for Congress, however, it seems to me, is clearly an enormous expansion in workload at a time when Congress is having difficulty coping as it is with legislative burdens. Problems with scheduling have grown enormously in the last several years. Problems of committee decentralization and fragmentation and overlapping jurisdiction and authority have plagued the legislature for years--but will clearly get worse after Chadha. In looking at what to do after Chadha, Congress has to think first of its larger workload dilemma.

Whatever substitutes Congress devises for the legislative veto, from requiring prior approval by passage of a resolution for any Executive action to delaying the effective date of implementation of a regulation, additional congressional action--more bills and resolutions on the docket for consideration on the House and Seante floors, more oversight in congressional committees of Executive actions or procedures--will be required.

With existing workload problems thus compounded, Congress must begin by assessing once again the basic features of its committees and committee systems. The House has failed the last few times that committee reform has come up to take significant action. Another attempt at assessing the system and recommending an overhaul is in order. This means looking at the number and nature of committees and subcommittees, the processes of committee assignment and the numbers of members' assignments, along with the role of floor debate, bill scheduling and other management areas.

Obviously this will not happen immediately; even if the process began today it would take months, if not years, to move toward a comprehensive reorganization package. It would certainly not solve or ease the immediate problems. Therefore, I suggest several interim steps to help Congress cope with the post-legislative veto environment. First and foremost, I recommend that the House create a series of procedures for identifying, coordinating and managing the flow of Executive regulations and congressional responses to committees and on to the floor. The basic element here would be a new joint panel to act as a clearinghouse. It should be run by a permanent professional staff to maintain communication with agencies and to monitor the relevant provisions built into laws. I envision a panel comparable to the Joint Committee on Taxation--i.e., a staff support body overseen by represenatatives of relevant committees and by party leaders. I would recommend movement begin as quickly as possible to set up this committee so that it

could begin its first task: to explore the range of decisions that will require a congressional action or response, and dissect the various alternatives available to Congress to replace the legislative veto; and to issue a report to indicate where different alternatives would be most appropriate. Once this task is completed, the joint committee would then be in place to act as a clearinghouse to track and coordinate executive decisions requiring congressional responses.

Secondly, I recommend that the Rules Committee consider, following this early report, what impact the new rule burden will have on floor scheduling. The Rules Committee should consider the possibility of creating a new calendar, an Executive calendar, that would set specified times in the legislative week when bills ratifying or overturning regulations would be in order. If no time is specifically allotted for this purpose and no priority given, there will be great difficulty sorting out which regulations and resolutions will reach the floor and when. The Rules Committee should also consider whether or not strict restrictions on debate time and amendments to resolutions of approval or disapproval will be necessary.

Finally, Congress must begin to sort out another great problem dumped on the policy process by the Supreme Court. What do we do about dozens of laws on the books thrown into limbo because they have legislative veto provisions? In the short term, Congress must be sure that important laws stay in effect without creating the chaos engendered by their disappearance or mutilation. To sort out the questions, from severability to a definition of what the Supreme Court meant by "legislative veto," I endorse the notion of creating a bipartisan, bicameral commission, including officials from the Executive Branch, to work through this major problem.

I do not see how the Supreme Court decision can do anything but increase the burdens on an over-burdened Congress. I do not see how it can avoid creating more problems for the Executive Branch than administration officials are willing to concede. I hope that Congress will not often resort to drastic solutions--such as cutting off entirely the delegated authority to regulatory agencies--to resolve this issue. It will be difficult, and require a multiplicity of means and an increment of resources, to begin to reconstruct a delicate balance in the policy process that had been worked out over decades.

Mr. MOAKLEY. Thank you very much.

On behalf of the committee, I want to thank you very much for coming here. I am very happy that we have a panel that doesn't agree completely on every issue, because the purpose of the committee is to get all degrees of discussion on this issue.

I would like to put out a question. Do you think that the joint resolution of approval—if you had to go, would you go on the approval method or disapproval method, as far as the legislative veto goes?

Mr. FISHER. That is a tough question. I will play with it. What I first think of, which I have mentioned——

Mr. MOAKLEY. It is all predicated on how the President feels about that bill that is coming before him.

Mr. FISHER. What you do on approval or disapproval will have an effect not just on the executive branch but on the courts. I am just thinking now if a rule were to come to Congress and require a joint resolution of approval, how would that affect what you would like to see done on the judicial side, judicial review?

If someone were to contest that in court, could a court carry out its responsibilities under judicial review, under the APA, with Congress having already passed a joint resolution of approval?

Mr. MOAKLEY. I think probably it would have exhausted the matter——

Mr. FISHER. That is one thing to think through. You do have expectations in the Administrative Procedure Act. And the other approach isn't much better.

If you think of a joint resolution of disapproval—a rule would come up, you would have a chance to disapprove it. And suppose you did not, would a court take that into account? I think a judge would take that into account. That you had an opportunity, no matter what boilerplate language you put in there, that this inaction would be significant.

Mr. MOAKLEY. The question would be why didn't Congress act?

Mr. FISHER. A few years ago, Judge Leventhal came up here. He was asked that question. He was on the D.C. Circuit.

They have their own workload problems, their own difficulties in handling cases. They will take cues on when you act and don't act.

It has very important implications in rulemaking. A lot of the legislative veto issue is discussed in rulemaking terms. That is just one part.

But it is something to think through.

Mr. COOPER. It is a practical matter. The joint resolution of approval is not a good form for rulemaking. There are just too many rules. Insofar as you stick with forms that are clearly and constitutionally valid under *Chadha*—insofar as you stick with the logic of the *Chadha* decision and you use forms that involve presentment to the President and bicameral approval, I don't think you have much choice except playing with the negative, joint resolution or waiting period forms.

You just cannot handle hundreds or maybe even thousands of rules under the approval method. The approval method is a good method, but it has to be limited to areas where there are relatively few things that will come up a session

Mr. MOAKLEY. There was a bill before the Subcommittee on Rules which puts any bill costing over $100 million—and then give the President the discretion to make 50 or 75 rules, major rules. So it will only deal with major rules. In the course of a session of Congress, the most rules you would have to work on, this joint resolution of approval, would be, say, 125 or so. How would you feel about that?

Mr. COOPER. Well, I would still be skeptical because of the characteristics of the workload. I think there are a variety of other areas you would want to control through the veto, including using some joint resolution of approval forms.

I therefore think the perfect way to control some categories of rulemaking is the old way, whereby the rules went into effect unless disapproved by concurrent resolution. That way you only had to take up the ones there was serious political objection to. And that is why I would say in rulemaking what I would try to do is use House rules.

First, I would subject the category of rules to be controlled to a waiting period requirement. Then I would change House rules to make it possible to move resolutions of disapproval on the floor with regard to rules controlled by that waiting period requirement.

And then if you passed one of those, I would also have House rules say that the Appropriations Committee was ordered to include a proviso barring the use of funds for implementing the rule. So internally what you have done is to re-create the older procedure, which has the flexibility and the control.

Mr. LONG. Regarding that, if I may, and maybe all the Members would like to comment. Up to this point we have had only one previous suggestion with respect to the old maxim, he who pays the piper calls the tune.

Explore with us for a minute, if you would, and perhaps it is a too simplistic approach to the problem—the use of funding restrictions as an effective mechanism in this regard.

Discuss with us the advantages and disadvantages of that as you would see them.

Mr. COOPER. Well, it is something that you need to use with some care and limit to especially important matters of policy. I don't think you want to write hundreds of additional pages of House rules, or be troubled by lots of resolutions of disapproval on the floor.

So it needs to be used with some circumspection. The other problem is——

Mr. LONG. Why is that? And why does that differ from the amount of work that you would have and the consequences of doing it in some other form?

Mr. COOPER. I think under this form, if you had 125 important rules, there might only be 5 of them really controversial. You would only have to handle those five.

You would not have to pass on the other 120.

Mr. LONG. We wouldn't if we didn't move to cut off funds. You have the same culling method.

Mr. COOPER. I am talking about the distinction between a joint resolution of approval as a control over major rules versus this appropriations form of control over the rules. Under a joint resolu-

tion of approval, you would have to pass in some way on each and every one of the rules.

Those 120 rules are still a lot of rules. And you would need a special calendar. Mondays and Tuesdays you have suspension, first and third Mondays you have consent, first and third Tuesdays you have private. Thus, there isn't a lot of time for adding new special calendars either.

I think the advantage of the older form—was it really—gave you some flexibility. You could focus on the ones that were really disturbing and let the others go. When you focused on them, the Executive was ready to talk to you, because they knew there was a possibility of a disapproval resolution.

Mr. ORNSTEIN. I am uneasy about legislating on appropriations bills, in general, because of the precedents set in the last several years.

Mr. LONG. It has been one of the most difficult problems we in the Rules Committee have to deal with. It becomes an impossible situation.

Mr. ORNSTEIN. If you use it on a regular basis—in this fashion—without any checks, you are going to open the floodgates again. But what Joe is suggesting, I think, is a useful way to do it. If you don't just allow the appropriations process, per se, to be used as a substitute for the legislative veto, but instead have an internal mechanism comparable to what was done before—to go through the veto process and then as a stage of that process—but only within the context of that process, order the Appropriations Committee, you are not having somebody get up on the floor and simply offer an amendment that would legislate on an appropriations bill.

You are going through an internal mechanism that in a sense protects the appropriations process. Under those circumstances, it seems to me that it is perfectly appropriate.

But I would also argue that if you use it through the method of a joint resolution of approval, you are playing to Congress' weaknesses, not strengths. You are opening up the opportunity as well for people to use the delaying mechanism as a lever for barring anything in other ways we have seen done too many times in the past.

Mr. LONG. We need no more of that. That is correct.

Mr. JONES. What gives you the confidence that the Court would not find that unconstitutional as well?

Mr. COOPER. If they are consistent, they cannot. I would like to recall for you that in the fifties this issue came up. There was a dispute between President Eisenhower and the Congress about a committee veto over certain kinds of projects—Lease Purchase Act, the Public Buildings Act, and the Small Watershed Act, and so forth.

What the Congress did at that point was, it changed the straight committee form of veto over these projects to an appropriations form. If the projects were not approved by the committees, then no appropriation could be made for them.

Now, Eisenhower vetoed one form, the straight committee veto, but he accepted the appropriations form, in terms of the logic that this was an internal part of the legislative process.

What I am suggesting is that in terms of the logic of *Chadha*, which argued that the problem with the veto was that subsequent to legislative action Congress tried to control administrative action in a binding fashion, the appropriations form is quite permissable.

In terms of Burger's logic, anything that happens internal to the Congress or the legislative process is OK.

Mr. LONG. Up until it gets to the point where it becomes the law.

Mr. COOPER. If he challenges that, what he is challenging is Congress' discretionary right to appropriate. Then he is going back to the fight over the Jay Treaty in the 1790's.

That would be quite a challenge.

Mr. ORNSTEIN. The logic of *Chadha*, in addition, suggested that a real problem was that the President had no opportunity to come back as the lawmaking process suggests. If he worked through the appropriations process he can veto that veto, which didn't exist in other vetoes.

Mr. JONES. I disagree with that. Again, looking at it from the Court's point of view—the appropriation mechanism is triggered by a within-House, single-House action. It doesn't happen independently.

It is triggered by that. I can imagine the Court saying you are getting the same effect.

Mr. FISHER. What the Court did was to strike down a resolution that would direct the executive agency, you cannot do that anymore, but if you want to direct yourself, there is a footnote in *Chadha* that suggests that is appropriate.

And the Justice Department——

Mr. LONG. Basically, today these take the form of instructing the agency involved that they shall use no funds for a particular activity.

Mr. FISHER. The Public Works Committee today, they would have to pass a resolution. Only after passing a resolution could you appropriate funds. That is totally inside the House.

Mr. LONG. Interesting legal question.

Mr. COOPER. The way it could be attacked would be a problem for the Court. They could say that Congress cannot do this because it interferes with Executive functions in some inherent way. But once you admit an inherent function argument, then Congress is delegating legislative power all the time.

The inherent function approach is very traditional, but a devestating approach for the Court to take. Burger, I think, knew what he was doing when he didn't take an inherent function approach, because if he had taken it and said this is legislative power that is really being delegated, it would be pretty hard to say you couldn't condition it.

Mr. MOAKLEY. Senator Pepper has a strong feeling that the *Chadha* decision was too simplistic. He has a feeling—he has stated, that we should be passing specific bills so that they would go up to the Supreme Court to whittle away at the *Chadha* decision and, therefore, really get down to the fine points.

I don't feel this is the unanimous consent of the Rules Committee. But I just wonder what your feeling is on that.

Mr. COOPER. Well, I agree, within limits. I see the appropriations form of the veto as probably the best way of doing that. I think a

straight committee veto is so easily disposed of by the Court in terms of the logic of *Chadha,* that that is not going to be much of a test.

Other than a straight committee veto, I don't know what other way—I don't—can't think of any better way to test it than by using the appropriations process.

Mr. FISHER. The Court hasn't given itself any room to get out of this, because they have based it on the two broadest grounds: presentment and bicameralism.

Mr. LONG. I am of the feeling that it would be futile to try to resolve the problem.

Mr. MOAKLEY. We figure some clerk up there would just stamp it and send it back. I have a feeling that the courts have spoken on *Chadha,* now let's look at the alternatives, and let's not go back and muddy ours in trying to whittle down and get the finest possible distinction out of the courts.

Mr. JONES. I concur in that.

Mr. LONG. If there were no other vehicles available, that might be the approach you would want to use. But there are other approaches available for the Congress that are probably constitutional, that we could use to attack this problem.

Mr. COOPER. There are. But they do force you to choose between control and flexibility.

Mr. LONG. Agreed.

Mr. COOPER. And that is a tough choice. It really is.

That is why I think, at least in a few instances, trying this appropriations approach is worth doing.

Mr. MOAKLEY. Another general question for the panel. Do you think congressional control should be any different over independent agencies as opposed to executive agencies, as far as any kind of joint resolution of approval of disapproval are concerned?

Mr. FISHER. The Justice Department, when it has come up to the Hill since *Chadha,* has testified that *Chadha* talks very clearly about legislative powers. You do your work up to a public law, and you get out of the way, and from then on it is Executive powers.

So the Justice Department is reading *Chadha*—we have a good, clean separation of powers; you have all three powers under all three branches. Then they take that a step further, saying, what are these odd creatures, the independent commissions and all these things floating off to the side, the fourth branch—why don't we—Deputy Attorney General Schmults testified, why don't we take all of that back and put it under the executive branch, directly under the President?

My own feeling is we have gone through that many, many times with the Brownlow Committee and the Hoover Commission and everyone wants to make Government very neat under one branch. There are real valid reasons for having agencies that are not directly under the executive department.

Mr. LONG. Neatness is not always a virture.

Mr. ORNSTEIN. I certainly have been uneasy with the approach that has been recommended and used by Congressman Levitas and others, that has really been geared toward the independent regulatory agencies to essentially take away all of their power and make

them come hat in hand on their knees to Congress for every element.

Mr. LONG. I am uneasy about that, too.

Mr. ORNSTEIN. I think it is in a sense a punitive way of expressing frustration with what the court has done that is not useful for the policy process.

Mr. OGUL. Congress has always labored under certain kinds of restraints. And most of those remain, so that anything, such as a comprehensive proposal that will inflict massive amounts of new work on the Congress, is something that I don't think has much chance of working. All of the constraints on your time and energy remain what they have been before, and that creates a danger.

Second, the discussion has indicated to me reinforcement of the notion that piecemeal solutions are probably what we are going to have to end up with. Though comprehensive solutions are magnificent on paper, they seldom work out in practice.

Members of Congress find themselves very uneasy with comprehensive solutions and frequently for good reasons, especially when they are someone else's comprehensive solutions.

Mr. MOAKLEY. Mr. Beilenson?

Mr. BEILENSON. I personally have found these hearings very useful and interesting, because we have heard an assortment of views. Although, the more you listen, the more it seems that the differences aren't really all that great. Even those who are supportive of the legislative veto generally, have some feelings similar to those of us who are not, as to how it should be used.

I think we should keep in mind a couple of things. One is that this is an opportunity, as Dr. Ornstein and others have pointed out, for us to look at congressional procedures and practices, and to encourage us to do our job properly in all kinds of ways.

Perhaps we ought to take a look at what work subcommittees are doing. The fact is, we don't pass an awful lot of new laws these days.

It may well be that a decent amount of time for some of our committees and subcommittees can be spent in more oversight—taking a look at existing legislation and cleaning up what we have done in the past. In fact, committees probably don't spend as much time reviewing programs under their jurisdiction as they ought to and as they can. Most members are not that interested in oversight.

I think we should, as we on this committee have pushed for in the past, do what we can to try to strengthen oversight functions within the Congress. The second part is to try to fashion some kind of sensible response to the decision. I, too, don't like the sort of antagonism that prevails with respect to our attitudes toward the bureaucracy and our feelings that we have to have some check on what they do. The fact is, as the dean suggested, we may not be able to do any better because of political and time limitations in writing more detailed legislation.

We shouldn't really look at the rulemakers as adversaries, but in a sense as almost a lower level of legislature, like another layer of courts. So perhaps some disapproval apparatus such as has been suggested is the kind of thing we should do.

Finally, along with some of my colleagues on this committee, I haven't been all that upset by the *Chadha* decision. I never

thought the veto was all that useful. I am forced to rethink that because of suggestions by two or three of the members that it did perform some kind of deterrent effect. I would like to know more about that. I don't know whether the agencies sit around and worry about the existence of the veto, and therefore are more careful about what they do. Maybe that is true.

As Mr. Dingell pointed out to us yesterday, with the exception of reorganization proposals, and rescisions and spending deferrals, it has only been used 35 times in 50 years. So perhaps it is not all that useful a function, unless in fact it does serve some deterrent effect. Any testimony people have with respect to how we determine the extent of that would be useful. Obviously, we are not in a terrible situation because of the decision.

I think the more distance we have between the decision and the present, the less upset people will be about the decision itself. We obviously have the authority and the ability to do what we want to do if we want to do it.

Mr. ORNSTEIN. Mr. Chairman, one additional suggestion that the committee might consider. So far as I know, we do not have a really good and systematic feel for how the lawmaking process, on the floor particularly, has evolved over time. We know, as I said earlier, that we are getting fewer laws coming out and that they are getting longer. I think it would be useful for the committee, either itself or perhaps by directing the Congressional Research Service, to do a little study of how this process has changed, what kind of bills are coming up, and what kind of bills are not, the extent to which legislation is occurring through the amendment process on the floor and has gotten away from committees, whether we are moving simply toward just doing authorizations and appropriations with a handful of other things, and what is different from the past.

I think that would be a very useful process—short of a reorganization of the committee system, it might get the committee and the Congress thinking about ways that it could improve the lawmaking process without a complete overhaul.

Mr. MOAKLEY. Actually, because we have more subcommittees and more staff, you would think we would have more legislation. But, on the other hand, I think that in our world today there are so many things that the Congress has become involved in that maybe the great deal of their time isn't just focused upon new legislation. Maybe there are other things they have to deal with in their daily lives.

Mr. LONG. We spend enough time getting out of the fires we have already created.

Mr. COOPER. I think that in terms of the *Chadha* decision, we might disagree on the effect of the veto and whether it is good or bad and so forth. But there is one aspect of the decision I think all Members ought to be concerned about. Here you have a court which has made a very political decision against the Congress. It went against all the traditions and precedents with regard to the status of independent commissions and the nature of legislative power. It went against all the cases by which it has given a free hand to the delegation of legislative power, so the nondelegation

doctrine is practically a nonentity, and it has stood on its head in various ways to justify that.

And yet, in this case, where the part of article 1 that concerns congressional decisionmaking is concerned, all of a sudden the Court is as strict and as literal as it can be. It is so inconsistent in so many different dimensions, and so against the Congress. I find that for the Court to presume to know the Congress' best interests for the Congress, and not to give more credence to what the traditions of the Congress are and to let the Congress correct whatever kind of abuses exist in the veto, to be very disturbing as a precedent for future actions and future congressional prerogatives.

Mr. JONES. Joe, are you tremendously disturbed that Congress cannot recapture that kind of authority?

Mr. COOPER. No. I am disturbed that the Court doesn't have a higher sense of humility toward the Congress.

Mr. MOAKLEY. You will find when you are appointed for life as oppossed to elected, humility goes out the window very quickly.

Mr. COOPER. There was a period after 1937 when the Court was very humble.

Mr. FISHER. Mr. Chairman, I also think it would be a mistake to read *Chadha* simply as an executive-legislative conflict, because it is not. The people who were against the legislative veto, primarily from the White House and the Justice Department, have a certain view of things. You will talk to people in the agencies and departments who have for decades worked with the committees and know what has to be done, and they have a totally different view, a totally different view of Government in the abstract versus Government in operation, what you have to do day to day and the agencies have to do.

So there is a great deal of sympathy and understanding for the patterns of conduct that existed before *Chadha,* and I have no doubt will exist after *Chadha.* The Court decision cannot affect the sort of understandings and working relationships you have had over the years.

Mr. MOAKLEY. Thank you.

Mr. OGUL. I agree with Joe that there are some real problems in the decision. There are factors that may make that decision not as difficult over the middle run as it seems at the moment. One of these is that despite absolute statements in court decisions, courts have a way sometimes of retreating over time.

Second, in cases such as this where there are legitimate arguments on both sides of the legislative veto controversy, new judges sometimes have a way of making new law. And since there are going to be new judges shortly, there may be another avenue out.

Third, informal understandings: It is quite clear—and I want to thank Lou Fisher for his work in pulling all this together—the executive and legislative branches, or parts of them, are continuing to reach the informal understandings in some areas they have always reached, despite the *Chadha* decision. And I see no reason why that should not continue. It is political good sense on all sides to do that.

Mr. MOAKLEY. Good.

Gentlemen, thank you very much. We have 2 minutes to vote on the continuing resolution.

Thank you very much for your appearance here. I am sure we will be calling upon you either individually or collectively for further information as regards the *Chadha* decision and the bigger picture. Thank you.

The subcommittee is recessed until 11:48 a.m.

AFTER RECESS

The CHAIRMAN [presiding]. The committee will resume its hearing, please.

Our next witness is the distinguished gentleman from Georgia, Mr. Levitas, one of the best known, perhaps the leading spokesman in respect to the subject of the legislative veto in the House of Representatives. We are particularly pleased to have the advantage of the valuable views of Mr. Levitas.

We will ask him to proceed with his statement.

STATEMENT OF HON. ELLIOTT H. LEVITAS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. LEVITAS. Thank you, Mr. Chairman.

I have a prepared statement which covers my views on where we are now in the aftermath of the *Chadha* decision. It discusses the need for devising a mechanism to cover the subjects that were previously dealt with through the traditional legislative veto device.

I will not read my statement. I would like to put it in the record.

The CHAIRMAN. Without objection, it will be received in full.

Mr. LEVITAS. Let me just touch on one or two things, because I have obviously spent a lot of time thinking about where we are in the aftermath of the *Chadha* decision. I believe that there are several ways that we can address the legislative veto issue within the constitutional framework that the *Chadha* opinion outlined. We can devise one or more mechanisms that will accomplish the same result as a legislative veto. When Congress has delegated to the Executive or to an independent agency some authority, rulemaking or otherwise, these mechanisms would give us an opportunity to review that action and, where appropriate, prevent it from going forward through constitutional mechanisms.

One of the proposals is incorporated in a bill that Mr. Lott has introduced—a number of people have cosponsored this bill, including myself—which provides for a joint resolution of approval of major rules. And that is precisely the teaching of the *Chadha* decision. If it were limited to major rules, it would simply say that where there is a major rule that has a tremendous impact on the public, perhaps Congress ought to be legislating it, and not letting it happen simply through bureaucratic action.

In the case of minor rules, it could be fashioned in the form of a two-House joint resolution of disapproval, signed by the President, with expedited procedures that would assure that these resolutions could not simply be bottled up in a committee and never see the light of day.

Another thought that I have set forth in here is the use of the appropriations process in fashioning a new legislative veto mechanism. A disapproval resolution coming out of a committee would have the effect of making it out of order for funds to be appropri-

ated for that particular action or rule, under this procedure. I understand there was testimony earlier today from another witness that seemed to endorse that concept.

One of the concerns about the approval mechanism, Mr. Chairman—aside from the question of time—was just clutter on the calendar. In my statement, I make reference to a proposal that was authored in an op ed piece in the New York Times by Robert E. Litan, an attorney here in Washington, and William Nordhaus, a professor of economics at Yale who used to be, I believe, on the Council of Economic Advisers in the last administration. [See p. 298.] They propose in effect a regulatory calendar where all of the regulations subject to this process would be bunched up and periodically considered in a bundle. And I was very pleased to note that in earlier testimony today by our colleague, Congressman Udall, he, in effect, endorses this or suggests this as an appropriate way to proceed.

The CHAIRMAN. Excuse me.

How would you summarize that?

Mr. LEVITAS. The way it would work is the rules that would be subject to this, Mr. Chairman, would be accumulated, the way we do in budget reconciliation, when you bring all the proposals together, and you put them in one omnibus bill and you vote on it. I think Messrs. Litan and Nordhaus suggest you do it every 6 months—bring them together. You can do it every 3 months, 4 months. And for those rules which are controversial, you would pull them out of the pile and deal with them separately.

As Mo Udall notes in his testimony, that is similar to the process we already use for budget reconciliation. Each committee that has jurisdiction over a certain authorization or appropriation matter brings that out into the omnibus reconciliation bill. So the procedure is there to do it; and it also would accomplish the same purpose.

The suggestion of using the appropriations process does have the benefit of maintaining the legislative veto pretty much in the same way we have done it historically, but doing it in a context that is consistent with the *Chadha* decision. It is perhaps the simplest way of doing it. And in my testimony, I discuss the constitutionality aspect of that particular matter.

Mr. BEILENSON. If I may interrupt.

Very briefly, how would it work?

Mr. LEVITAS. OK. Let me give you the broad concept of it without trying to be specific to spell out dates and times and things of that sort.

Conceptually, it would work this way: There would be a mechanism which would permit a committee to report out a disapproval of an action or a regulation.

Mr. BEILENSON. In conjunction with an appropriation bill?

Mr. LEVITAS. No. This would go through the authorizing committee. And if that resolution of disapproval were adopted by the House, there would be a rule of the House, which the Rules Committee would structure, that says whenever a resolution of disapproval, pursuant to XYZ, is adopted, it shall not be in order for the appropriations bill funding that particular subject to contain funds for its implementation.

Mr. BEILENSON. It would be a limitation on an appropriations bill?

Mr. LEVITAS. It would be an automatic limitation on an appropriations bill. And what you would do is, you would retain jurisdiction within the authorizing committee, where you should keep it, rather than putting it on the appropriations committee. The rules of the House would simply say that where the House has adopted one of these disapproval resolutions of an action or regulation, that that would trigger this particular section of the rules of the House, making it out of order to appropriate funds for implementing that action. It would be just like if it exceeded the budget resolution; that would be a good example.

Now, obviously the Rules Committee, where appropriate, could, in the rulemaking order the appropriations bill, waive that provision—obviously. But I would think that if we are looking for an effective mechanism that will meet the problem raised by the *Chadha* decision, this is one that would do it.

I was extremely pleased to see that Dean Cooper of Rice, quite independently has proposed the same idea. And however you structure it, it is really the simplest way, the cleanest way to do it, because it keeps you out of having to deal with every rule; keeps you out of getting into the Presidential signoff on the thing; and it gives the authorizing committee the opportunity of dealing with those matters under its legislative jursidiction.

If I had the whole thing worked out in my mind, I would lay it out for you with language.

Mr. BEILENSON. I simply didn't understand.

Do you have a preference for that over a resolution of disapproval, for example?

Mr. LEVITAS. Yes, I do, because, No. 1, I think it is less cumbersome; and No. 2, it keeps the President out of it.

You say, why do you want to keep the President out of it? Let me explain why you want to keep the President out of it. Because if it is a rule that comes out of his agency, you have shifted the majority necessary from 50 to 66⅔ percent. That is what you have done. And so I think that if we are looking for a legislative veto, this is the way to do it.

Let me conclude by making one further point, Mr. Chairman. I discuss it here, the continuing problem of severability, even under the present *Chadha* decision. And there are going to be cases coming down the pike—right now, there are some in court—that raise the question: Would Congress have delegated the authority to an agency or to the Executive, given this, if it didn't have the legislative veto?

I know of certain examples myself—in airline deregulation, for example—where I have sat in on the bill from beginning to end, where we would never have granted certain authorities if we didn't think we had a legislative veto. Would Congress have created the War Powers Act without the concurrent resolution? And that is a point that you have raised several times in recent weeks on the floor.

What about foreign arms sales? Barney Frank said the other day we could control foreign arms sales through the appropriations process. But he missed the point. That was not a foreign arms sale.

That was a grant. That was a foreign aid project, the Jordanian force. Foreign arms sales are quite different.

Would we give the Executive the authority to make these arms sales without having had the legislative veto? And what about budget control and impoundment, things of that sort?

Now, I am preparing right now—they have been working on it for several weeks, and I hope to be able to introduce it before the House adjourns next week—what I call a supersunset bill. And what this bill would do is it will identify every statute on the books today where there is a delegation of some authority—rulemaking, war powers, nuclear nonproliferation, the offshore leasing, all of those things—identify every one where there has been a delegation of any authority, coupled with a legislative veto mechanism. And it will say that 180 days after the passage of supersunset, all of that authority will be repealed, unless Congress in the meantime decides that, yes, it would have delegated the authority to the President to deploy troops, even if we didn't have the concurrent resolution; yes, we would have given the Department of Labor the right to issue regulations on employee protection under airline deregulation.

So we are forced to make the decision, whether we would have delegated the authority without the legislative veto. And if we would have, fine, let them do it. If we would not have, either we need to take back the authority or link it with some form of new legislative veto. And I think that is going to make the issue.

My guess is that that bill would be jointly referred to a number of different committees, which would give them the opportunity to pull out their little piece of the action, or big piece of the action, and deal with it.

One last point that I would like to make, because you asked the question earlier, John Dingell said yesterday the legislative veto has only been used 35 times except for reorganizations and budget impoundment.

Mr. BEILENSON. Presidential spending deferrals.

Mr. LEVITAS. His conclusion is, do we really need legislative veto if we are only going to use it 35 times? Maybe this overstates the point, but there was the old story about the fellow who had this little icon in front of his door, and a guest who came in his house one day said, "What do you have that little idol there for?" He says, "To keep tigers away." This was in Georgia. And he said, "But there are no tigers in Georgia." He says, "Well, it must work."

Now, my idol keeps the tigers away. It could very well be it hasn't been used, because it does keep the tigers away. The real impact—and I have said this 100 times—of a legislative veto, is not that we are going to use it a lot, but that because it is there the people who are about to take that action or issue that regulation will be a lot more careful about what they are doing and try to reach the accommodation with the Congress on the particular action, whatever it may be—rulemaking, offshore leasing—than they would if this were not there. Then they feel a relatively free hand.

I am chairman of an oversight subcommittee. I serve on the Government Operations Committee. I can tell you that oversight is a

totally inadequate way of dealing with individual rules, regulations or actions by executive agencies. What goes into oversight—you can oversee a program, you can oversee misconduct or abuse or waste; but you cannot effectively use oversight as the cure for action, specific action or regulations that are contrary to what Congress really had in mind.

This committee is really the place where it has to happen. I hope we don't let all the horses out of the barn and then lock the stable door. I think we are going to have to try where we can to put disapproval or approval mechanisms on bills as they come through. But I would hope this committee, with some degree of urgency, will do what I know you want to do, Mr. Chairman, and deal with this problem.

I think I see for the first time in the 9 years I have been looking at it a realistic opportunity for something to be done, and I think if it is going to happen it will happen here. It will not happen in the Judiciary Committee. It will happen here.

The CHAIRMAN. Mr. Levitas, I am pleased very much to hear what you have to say. I hope I find in your last statement there some support for the idea of experimentation on our support to sort of feel our way into this field, because able scholars in the field of the Constitution, like Professor Tribe at Harvard Law School—there seems to be somebody in doubt as to what the Supreme Court really was getting at, what they really meant to accomplish.

Was that a beginning of a restrictive effort on dedication of powers by Congress, which they might think has gone too far, or what was it? As you know, I don't know whether you have seen the article by Professor Tribe in the Harvard Law Journal. He makes a very critical examination of the opinion. He shows in many respects the opinion is not the kind that will eventually hold water, that may not be subject to some modification or restriction; that just striking down 200, or whatever the number is, of statutes all at one time, including maybe the war powers resolution, everything else—it is not a kind of thing you ordinarily expect from so restrictive and restrained a body as the Supreme Court. That is the reason I favor sort of protruding out into that area, to find our way—what do they really mean.

The facts of the *Chadha* case are very restricted, very narrow, as you know, giving rise to Justice Powell suggesting that what Congress authorized might even be a bill of attainder, and that would have to be stricken down on that ground.

There was a case where one individual's rights were definitely affected by the action of Congress, one House of Congress. That doesn't seem to cover the whole question, for example, of the war powers. That is a much broader question. Yet, it does provide for a concurrent resolution.

So that is the reason I have suggested that I thought it would be desirable for all the committee staffs, standing committee staffs, to take all the bills that have cleared that committee, that have any kind of a veto authority in them, take a careful look at those bills—why did this committee approve putting that language in there; what were they seeking to achieve; was that the only way they could achieve what they wanted to achieve?—was to use that veto there?

Now, if we removed the severability clause and provided the veto by one House maybe in respect to certain other generalities, like certain rulemaking, certain other things, the Court might look upon it differently a little bit later, after they sort of see the reaction of the bar and the Judiciary to it. So I felt that we ought to sort of feel our way along.

The only way that we can ever get any possible multiplication of that decision is to present different kinds of circumstances, different efforts on our part to meet the situation. If they strike down one, we could try another one, to see if that approach is an acceptable approach as we go along.

I am hopeful that we will never use it when we feel we don't have to. We will have an option of things that we may do. But if we do feel there that what they call the legislative veto is still the best approach in that particular situation, I see no reason why we could not leave it in the bill and let it come on up through the courts and let the courts perhaps at some future time, maybe with some change in personnel, take a look at it: Is this what they meant to strike down in *Chadha*, or did they just want to stop this process now and maybe force us to begin to consider other methods and be more modest in our approach?

Mr. LEVITAS. I think, Senator, that the Supreme Court, the majority opinion in that case, displays such an abysmal ignorance of our Government, I think they are beyond salvation, I am afraid. And I think Professor Tribe's point is one we really ought to take to heart.

If they are saying to us, "You ought to stop delegating this authority," then they don't understand that there is no way that we, Congress, can legislate everything that comes down the pike—we just cannot do it. The world is too complex. Decisions need to be made at the first level by people with expertise, or by the President during an emergency, or whatever, on the one hand. On the other hand, if they are saying—as I am afraid they are saying—this is the way we read the Constitution, I don't disagree with the result in the *Chadha* case.

As you just said, before the *Chadha* case was decided I said that case was a quasi-judicial proceeding where a fellow came in with his own immigration status at stake, presented evidence on both sides in a due process hearing, and then Congress said you, Mr. Smith, or Mr. Chadha must leave town. That is quite different from rules and regulations.

But the problem is, Mr. Chairman, shortly after the *Chadha* decision, the Supreme Court affirmed lower court decisions involving the Federal Trade Commission and the Federal Energy Regulatory Commission dealing with rulemaking in both instances, one within the executive branch and one without, and said without comment *Chadha* applies.

So I think that I would encourage this committee and the legislative committees, and especially this committee, to fashion one or more—probably more—alternative mechanisms that skin the cat another way. I firmly believe that one day Justice White's dissent will be the law of the land.

The CHAIRMAN. I agree with you 100 percent.

Mr. LEVITAS. I firmly believe that. I think it is one of those great documents that could have been written by Holmes or Brandeis that one day will become the law. But, in the meantime, I just think this issue is one of power-sharing within the Federal Government at the highest level. And we cannot just sit back and either turn it over to them or muddle through with 10 years of confrontation.

I think what you are doing is important. I don't know anything more important ongoing now than what you are addressing.

The last point I would like to make in that regard is on that severability question that I mentioned before. You, at an earlier meeting we had in here, raised this point. Would Congress have delegated the authority without having the veto connected with it?

There is a case—I don't know if it has been discussed with you yet—that was decided a few weeks ago in Mississippi. It involved the Equal Employment Opportunity Commission; I make reference to it in the statement. What happened was this: The Court found that the EEOC was existing and operating because it was a creature of the 1977 Executive Government Reorganization Act; that the Reorganization Act let the President prepare a plan of reorganization which went into effect if there was a veto of the plan. The President did propose a plan. It did go into effect. And there was no veto. But the Court said that because the statute was unconstitutional, because it had a legislative veto in it, then the EEOC could not do what it did.

The Court went on to say that because it was clear to the judge that the Congress would have never given the President the right to reorganize government without a veto, without being somewhere in the thing, that it was unseverable. So the whole thing collapsed. They just threw it all out.

Now, there have been hundreds of reorganization plans since 1932. I believe that the Court, even this Court, is not going to let that decision stand up. They are going to have a hell of a time getting around it.

But the point is, Mr. Chairman, we have got to do something. And I just commend you for doing it.

[Mr. Levitas' prepared statement, with additional material, follow:]

PREPARED STATEMENT OF HON. ELLIOTT H. LEVITAS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. Chairman, and distinguished members of the committee, I appreciate your inviting me to appear before you today to testify on what I believe is one of the most important issues facing the Congress, and indeed our entire Government, today. I have appeared before this committee many times to testify on the subject of today's hearings, but never before have the concerns surrounding the issue of legislative veto been so critical as they are today in the wake of the Supreme Court's June 23, 1983, ruling that the legislative veto is "unconstitutional".

It is indeed staggering to consider the impact of this decision on government today. The Supreme Court's decisions in *INS* v. *Chadha*, and in the two subsequent cases which were handed down, *Consumers Energy Council of America* v. *Federal Energy Regulatory Commission (FERC)* and *Consumers Union of American* v. *Federal Trade Commission*, are truly landmark decisions which, until reversed, will fundamentally change the way in which our Government operates. We have, in my opinion, experienced a train-wreck in government, and it is going to take some time to put the engine back on the tracks and get it moving again.

There is no point in dwelling on the merits or demerits of the majority opinion, for it is what we must work under at least for the time being. Some observations on the history of the legislative veto, however, do put the Court's opinion in perspective.

The legislative veto came into use in this century as a mechanism to deal with the realities of modern government. Some historians trace the use of a legislative veto device back many years in English history. To those scholars, the legislative veto was such a common instrument of government that the Founding Fathers saw no need to write such a procedure explicitly into our Constitution.

In 1929, President Herbert Hoover recognized the purpose a legislative veto could serve in the U.S. Government in the twentieth century. Facing the need to reorganize parts of the Federal bureaucracy and the structure of the executive branch, and realizing that it would be better for the executive branch to devise reorganization plans than for Congress to do so, the Congress agreed to give President Hoover the authority to reorganize the executive branch with the stipulation that Congress could disapprove his reorganization plan through a legislative veto if they chose to do so. This delegation of authority to reorganize the government has continued to operate with the check of a legislative veto as a means for maintaining the balance of power. Even as recently as the Carter and Reagan Presidencies, administrations have contended that this type of legislative veto is constitutional. (Compare to *EEOC* v. *Allstate Insurance Co.*, discussed below.)

In other areas, the need arose for Congress to delegate authority to the executive branch in order that the Government might cope realistically with the growing complexity of the society which it served. Control through the legislative veto mechanism has spread into numerous areas over the years—war powers, budget impoundment and control, foreign arms sales, nuclear proliferation, export controls, immigration policy, and regulatory policy. As Congress increasingly delegated authority, the bureaucratic agencies—both independent and those in the executive branch—swelled in number and in the size of their personnel. These agencies were given the authority to write rules and regulations which govern our society with the same force and effect as the laws written by the elected Congress. In order to maintain its control over this authority, Congress, in some cases—though not often enough, in my opinion—required that these rules and regulations be subject to Congressional review and if the Congress deemed appropriate, a legislative veto.

The system which evolved was simply a means by which the Congress could delegate to the President or to the executive branch or the independent agencies, the discretion to take certain actions, with the understanding that Congress, in the exercise of its plenary legislative power under Article I of the Constitution, would be able to look at that action; and if the Congress decided that the action was excessive, or arbitrary, or oppressive, or just plain stupid, then the Congress, the elected Representatives of the people, could reject that action.

The legislative veto was not used as a means through which Congress could interfere in the legitimate business of the executive branch. It did not deal, at all, with enforcement or execution of the laws. Rather it was a means by which the Congress could maintain control over what was the legitimate responsibility of the Congress—the responsibility for making the laws of this country. Granted, in some cases, Congress may have delegated too much authority to the agencies and to the executive branch, but in most cases some delegation was necessary. The purpose of the legislative veto was to assure that the final responsibility and accountability for the actions taken under the delegated authority rested with the elected Representatives of the people.

Congress must answer every 2 years, or every 6 years, to the people for its decisions. If a Member of Congress, or a Senator, makes decisions which his or her constituents disagree with, the constituents can make their views known at the polls. But that is not the case with the unelected officials in the bureaucratic agencies. They are not elected, they do not suffer the inconvenience of having to run for office, and thus they do not have to answer to the people. It only makes sense that under our system of government, which is based on democratic principles, that those who are accountable to the people have the final say over these rules and regulations which have the force and effect of law. If the Congress finds that a rule or regulation is arbitrary, oppressive, or contrary to the intent of the law, then the Congress ought to have the right to stop that rule from going into effect. The legislative veto provided a means for doing that.

In his dissenting opinion, Justice Byron White says of the legislative veto:

> It is an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress' control over lawmaking . . . the veto has been a means of defense, a

reservation of ultimate authority necessary if Congress is to fulfill its designated role under Article I as the Nation's lawmaker.

I believe that Justice White's dissent will eventually become law, for it reveals a clear understanding of the workings of government today, and the manner in which the legislative veto is framed by our Constitution as it operated today. Unfortunately, the Supreme Court, in its majority opinion, displayed an abysmal ignorance of the way in which our Government has evolved today.

Nevertheless, we must move on, for the problem still remains. Congress must delegate, and the Congress must be able to control the authority which is delegated. There are more ways than one to skin a cat, and I am certain that the Congress will continue to move forward and reassert its authority over the executive branch and independent agencies. I would like to present to the committee the ideas which I, along with several of my colleagues, have been pursuing for the future course.

Certainly, one of the major questions to be answered is what becomes of the many laws on the books which contain legislative veto provisions. Legislative veto provisions have been included in over 200 laws, and it is unclear at this point whether or not the Supreme Court decision invalidates only the legislative veto provision, or whether or not the entire law becomes invalid under this decision. For in many cases, it is questionable as to whether or not Congress would have delegated authority to the executive branch without the string of a legislative veto attached. It is going to take time to determine which of these laws will stand without the legislative veto procedure.

The issue will most likely have to be resolved through careful analysis of the legislative history on each individual law, and possibly through litigation. The Court did not make it clear how they would rule in such cases in the future. In the *Chadha* decision, there was a severability clause, and the Court determined that the remainder of the law should stand. But in the *FERC* case, there was no severability clause, yet the Court still ruled that the rest of the challenged law stands.

Yet, the courts are now calling into question acions taken years ago under statutes now shadowed with constitutional questions emanating from the *Chadha* decision. The U.S. District Court for Southern Mississippi struck down the Reorganization Act of 1977 as unconstitutional, finding "no doubt that Congress intended the one-House veto provision to be an integral and inseparable part of the entire act . . ." (*Equal Employment Opportunity Commission* v. *Allstate Insurance Company,* No J82-0186(B), slip op. at 4 (D. So. Miss. Aug. 19, 1983). If this decision were to hold, and I doubt that it will, the repercussions would topple significant government institutions. The ruling certainly points to the significance of the severability question.

In cases where the courts might rule that the legislative veto provision was severable, once again the risk arises that delegated authority will stand even if Congress would have been unlikely to delegate the authority without the legislative veto check. The difficulties of answering the severability question have prompted the former counsel for the House of Representatives to recommend a wholesale repeal of delegations of authority affected by the Supreme Court decision.

I hope the Congress will move to repeal much of the authority it has delegated in many cases, and we should do so, for we cannot simply leave the authority unchecked. But I think it is also important that Congress address this issue head-on, and eliminate the uncertainty that will exist if we just wait for cases on the various provisions to wind their way through the courts. The clearest path is for Congress to legislate the answer to the severability question. I will soon be introducing legislation, which would, 180 days after its enactment, repeal all authority delegated where the string of a legislative veto had been linked to that authority, unless during those 180 days, the Congress acted to reinstate the authority with or without an alternative, "son of legislative veto" mechanism. This "Super Sunset" legislation would erase the uncertainty which now exists and which will continue to exist until Congress deals with the issue of severability.

In the short term, while these laws are being examined and conclusions are being drawn as to their standing without the legislative veto provisions, Congress is going to have to keep the agencies on short leashes and under short rations of appropriations. Short time periods for authorization and appropriations for agencies and programs will allow Congress to review agency action on a more frequent, periodic basis and curtail action which is inappropriate through the funding and authorizing process.

There are other mechanisms which the Congress may devise which would have the same effect as the traditional legislative veto, but which would fit within the framework of the Supreme Court decision. Some of these measures have already begun to be accepted by the Congress as alternatives to the legislative veto.

For example when the Houses of Representatives considered the reauthorization of the Consumer Product Safety Commission (CPSC) on June 29, 1983, I offered an amendment, which was accepted by the House, requiring that CPSC rules which were previously subject to a legislative veto be affirmatively approved by the Congress before taking effect. The rules would have to be approved through the enactment of a joint resolution, passed by both Houses of Congress, and signed by the President. Obviously, if one House fails to pass the resolution of approval, we have in effect exercised a one-House legislative veto.

In an article which appeared in *The New York Times*, on July 5, 1983 Robert E. Litan, a Washington attorney, and William D. Nordhaus, a professor of economics at Yale University, both of whom are noted as experts on regulatory reform, explore a proposal similar to the one I have put forward. Litan and Nordhaus suggest that the President present to Congress periodically the major regulatory proposals which are pending, with an analysis of their costs and benefits. These regulatory proposals could then be put into effect if affirmatively approved through an act of Congress in an omnibus bill. This idea deserves serious consideration, and I would like to have their article made a part of the hearing record.

There are other procedures which must be considered as well. Another approach which deserves serious consideration is that embodied in legislation introduced by Senators Carl Levin and David Boren. This legislation proposes a "report and wait" mechanism, which requires that agency rules and regulations be submitted to the Congress for a certain number of days during which time the Congress could review the regulations and act to disapprove them through the enactment of a joint resolution. The procedures for expedited consideration of a resolution of disapproval, which are contained in this bill, would allow for discharging the resolution if the committee which was considering it did not act within a specified period of time. I strongly support the expedited procedures provision, and I think it is most important in that it assures that the decision on whether or not to disapprove regulations is not made by a handful of committee members who may be sympathetic to the agency, but is made by the full Congress.

In considering the CPSC authorization bill in the House, Congressman Henry Waxman offered an amendment which was similar to the Levin-Boren approach except that it did not include the expedited procedures. Without expedited procedures, a committee chairman could prevent full consideration of the disapproval measure. The Waxman amendment was accepted on the CPSC legislation along with my amendment, so it will be up to the conference committee to decide which provision will become law. I am confident that the committee will accept my amendment as it offers a better means of assuring control over the unelected officials of the Consumer Product Safety Commission.

A combination of an approval mechanism, along the lines of that accepted by the House of Representatives on the CPSC authorization bill, and a disapproval mechanism, such as that offered by Senators Levin and Boren, offers an attractive alternative to the legislative veto. The major rules of all agencies could be subject to the approval process, and the non-major rules could be subject to the disapproval process. This combination would provide for true veto control by the Congress in requiring affirmative action on the most significant regulations issued by the agencies, that is, rules with an economic impact of over $100 million per year; but this procedure would not unnecessarily burden the Congress or delay rulemaking which is more routine and less significant. Congressman Trent Lott and others have recently introduced legislation which incorporates this concept, combining the use of the approval mechanism and the disapproval mechanism in such a fashion. I support this legislation and urge the committee to look favorably upon it.

One concern expressed over the use of an approval mechanism is that it might cut off some avenues of judicial review of agency development of the rule. While this belief is purely speculative, the problem can be avoided by structuring the mechanism in such a way that it does not affect the validity of the rule. For example, an approval resolution could simply approve authority for the agency to *implement* the rule. In this case, it would be clear that enactment of the resolution does not constitute approval of the rule itself for the purpose of judicial review.

A Congressional Research Service analysis of this point concludes that "The mere statutory statement of approval of a rule or regulation, however, is ambiguous." Commenting on the approval mechanism included in the CPSC reauthorization bill, the report notes "Congress does not adopt the language of the regulation as its own when it passes the resolution. Under such circumstances, a court might be reluctant to hold that Congress intended, in effect, to implicitly repeal the rulemaking procedures governing the CPSC in the case of a particular regulation and cut off challenges to the regulation by aggrieved parties' (Richard Ehlke, "The Impact of Joint

Resolution of Approval of Agency Rules on Judicial Review of "Approved Rules", Congressional Research Service, September 22, 1983). This report suggests that if the Congress does not intend to cut off judicial review, it can make this intent clear to the courts through the legislative history and/or through specific language in the resolution.

Even if affirmative approval of major rules does have the effect of legislating the rules and subjecting them only to the judicial review accorded to a statute passed by Congress, who can really object? Who can object to the elected Congress legislating? It is far better than unelected officials legislating with very limited judicial review which is available only to those who can afford it. The opportunity for accessibility and input by the public is the best check on arbitrary action and that occurs in the legislative process. In the case of major rules, this is altogether proper, and again, in the wake of the *Chadha* decision seems to be the course advocated by the Supreme Court.

Yet another approach which could be used to accomplish the purpose of the legislative veto is available through changes in the internal rules of the House, and I ask that this committee pay particular attention to this proposal.

> The rules of the House could be changed to provide that whenever rules or regulations are disapproved by the House of Representatives, appropriations for the implementation of those rules would be deemed "out of order". This change in the rules would be accompanied by legislation requiring that proposed rules be sent to the Congress for a review period ("report and wait"). During this time, the appropriate committee of legislative jurisdiction could review the regulations, and if it decided to do so, report a disapproval resolution to the House. The House could adopt the disapproval resolution, and in doing so prevent funding for the implementation of the regulations.

This procedure would have no effect on the validity of the rule, but it would be controlled through the purse strings. The Supreme Court has ruled previously that it is up to Congress to determine what should be funded and what should not be funded. For example, in the case *Harris* v. *McRae* dealing with Federal funding for abortions, the Supreme Court ruled that the refusal of the Congress to fund an activity "cannot be equated with the imposition of a 'penalty' on that activity" (*Harris* v. *McRae*, 448 U.S., October Term, 1979).

These are some of the ideas which are being considered as alternatives to the legislative veto. Having had several months now to reflect on the impact of the *Chadha* decision, and having worked with a number of my colleagues to develop these responses to the decision, I believe it is now time for the Congress to consider seriously the enactment of alternative legislative review provisions.

While I think it is preferable to consider this matter in an omnibus fashion, if we are going to do so, I think it is necessary to move expeditiously with enactment of legislation such as the "Super Sunset" legislation I am proposing, which will force the Congress to deal with the laws now containing legislative veto provisions. And I would urge this committee to do what it can to move toward expeditious consideration of omnibus congressional review provisions such as that contained in the Lott bill.

I am greatly concerned about the confusion and uncertainty which has resulted from the Supreme Court decision, and shortly after the decision was handed down, I wrote to President Reagan and proposed that he, and the leaders of the Congress, call for the convening of a National Conference on Power Sharing to address these concerns in a comprehensive fashion. A National Conference on Power Sharing could have helped to avoid the disruption, and the confrontation between the branches of government, which we are now facing.

The conference I proposed would have brought together high administration officials, leaders in Congress, representatives of the academic community, and the "think tanks" such as the Brookings Institution, and the American Enterprise Institute, as well as representatives of the business community, organized labor and public interest groups. Through this conference a dialogue could have been established from which solutions to the problems could have been devised in a more structured context. This was not to be another "commission" to look at a problem, but simply a conference to discuss the impact of the *Chadha* and what we should do to cope with it.

My letter to the President was dated July 19, 1983. I was informed through a letter from Kenneth Duberstein, Assistant to the President for Legislative Affairs, dated August 1, 1983, that my proposal was being carefully reviewed by the White House Counsel. On September 15, 1983, I wrote to the White House Counsel, Mr. Fred Fielding, to inquire about their review of my proposal. I was wondering why I had received no answer. I received a response back from Mr. Fielding saying that I

would soon be hearing from the Deputy Attorney General on this matter. The next day, September 20, 1983, I received a letter from Deputy Attorney General Edward Schmults. Mr. Schmults informed me in his letter that the administration did not think we needed to have a National Conference on Power Sharing. They seemed to think the problems would take care of themselves.

It is interesting to note the main reason for the administration rejecting my proposal. According to Mr. Schmults' letter, they did not think it was wise to set up another "commission" as these kind of new government entities tend to take on a life of their own. Although I never suggested we set up a commission, I found that excuse interesting in that it came from the same administration which has set up a commission to study social security reform, the MX missile, hunger in America, U.S. policy in Central America, and so forth. The week I received this letter was the week the Attorney General announced the formation of a commission on domestic violence. I wrote Mr. Schmults to point out this inconsistency but have never heard back from him on the matter. I would like to make the correspondence between myself and the administration on this matter a part of the hearing record. I believe it is unfortunate that the administration did not move forward on this proposal, but since they did not, I believe it is even more important that we in the Congress move forward in dealing with the concerns emanating from the *Chadha* decision.

While I do favor approaching the issues raised by the *Chadha* decision in a comprehensive fashion, at the same time, I do not think we can let authorizing legislation which involves the issue of legislative veto languish. I would urge this committee, and the authorizing committees, to move bills, such as the authorization bill for the Federal Trade Commission, to the floor at the earliest possible date. And, I would urge that you bring these bills to the floor under a rule which would allow for consideration of not one, but several, of the alternative approaches which have been proposed. It is time to allow the House of Representatives to consider and work its will on both legislation providing for comprehensive legislative review proposals and on legislation for particular agencies such as the Federal Trade Commission.

I want to commend Chairman Pepper for convening these hearings on the important issues facing us in the aftermath of the *Chadha* decision, and I look forward to working closely with this committee as we move to resolve these problems. It is very important that we act responsibly, yet swiftly, for we must move to reassert the control of Congress, the elected Representatives of the people, over the unelected officials in the executive branch and the independent agencies. Their actions have the force and effect of law, and in the end, the Congress stands acccuntable for those laws.

[From the New York Times, July 5, 1983]

With the Veto Gone

(By Robert E. Litan and William D. Nordhaus)

WASHINGTON.—The United States Supreme Court's decision striking down the legislative veto corrects a longstanding defect in the Federal legislative process.

Since the veto device was introduced in the 1930's, Congress has grown progressively sloppy in writing laws. Instead of the careful crafting envisioned by the Founding Fathers, Congress often gave a blank check to the Executive or to an independent agency. But it sometimes reserved the right to put a "stop" order on these checks, by the now-unconstitutional veto, should it later (spurred by a special-interest group) change its mind.

Nowhere is the excessive delegation of legislative functions more extreme than in economic and social regulation.

Even though regulation is as important a part of the legislative process as, say, raising and spending revenues, many regulatory statutes are egregiously vague, simply directing an agency to regulate in the "public interest." Natural-gas prices became regulated under a general "public interest" standard, not because Congress decided it was sound energy policy. Cities are required to make subways and buses accessible to handicapped people even though Congress never envisioned this outcome.

In other cases, statutes are specific but place no limits on the amounts that regulators can require firms to spend. Businesses spent $32 billion in 1981 controlling air and water pollution because Congress delegated to the Environmental Protection Agency a legislative function of taxing and spending on pollution control. Nuclear power is dying under the weight of safety regulations. Regulating everything from

teddy bears to 747's, our fourth branch of Government legislates more pervasively, and more autocratically, than King George III.

In the last few years, many in Congress have become concerned about this over-delegation. Legislative vetoes are now in place (but in peril) for a few regulatory statutes—in seat-belt regulation, in Federal Trade Commission rules and in some natural-gas rules.

In recent reform proposals, more over, many members of Congress hoped to reverse the problem of excessive Congressional delegation by an omnibus legislative veto provision for all major Federal regulation. This route is now clearly closed.

In the wake of the decision nullifying the legislative veto, the Nation should pause to consider fundamental issues of who should legislate, and how.

Some think that Congress will now have to write highly detailed statutes; others think that, like an overburdened mule, Congress will simply balk and bring the legislative process to a halt.

In the regulatory arena, some worry that the first alternative will lead to overly politicized regulatory decisions traditionally left to agency "experts." Others, noting that good legislation requires time and effort, fear that Congressmen will devote neither and instead retreat to a haven of noncontroversial inactivity.

There is a middle way. The central problem for Congress, with no legislative veto as a crutch to lean on, is to structure its consideration of the issues, such as regulatory policy, in such a way that precious Congressional time is devoted to major questions, while execution and implementation are delegated to administrative agencies.

We believe that there is a mechanism through which Congress can structure its regulatory decision making in a fashion that meets both these objectives.

Specifically, we suggest adoption of a "legislated regulatory calendar" under which the President would present to Congress each year all of the 50 or so major Federal regulatory proposals. Each proposal would be accompanied by an analysis of costs and benefits. An act of Congress would then be required before agencies could put their rules in final form. The calendar proposal resembles the Congressional budget process, which has, since 1974, allowed Congress to direct the broad pattern of its spending. Such a process could serve well as a model for regulation.

A regulatory calendar would remove legal uncertainties about rules (such as the automobile air-bag rule, still unresolved 13 years after it was first proposed). It would permit Congress and the Executive to set regulatory priorities—a task nowhere performed today.

But most important, it would provide a constitutionally sound mechanism by which central issues, such as the quality of our air and water or the safety of our highways, could be directly decided not by unelected regulators but by elected Representatives.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., July 19, 1983.

The PRESIDENT,
The White House,
Washington, D.C.

DEAR MR. PRESIDENT: The Supreme Court's decision relating to the legislative veto has created a situation of uncertainty and the potential for disruption and serious confrontation within our Government. I would hope that the Executive and Legislative Branches can address this new circumstance in a constructive and cooperative way so that the manner of power sharing and accountability within the Federal Government can be resolved in a meaningful and harmonious context.

I will not address the merits or demerits of the Court's decision nor relate the historical and pragmatic and evolutionary constitutional development of the legislative veto concept. You are well aware of the rationale and importance of the legislative veto, having editorially supported it as a commentator and a columnist, having specifically endorsed it as a candidate for President (Youngstown, Ohio, October 8, 1980) and having embraced it as part of the 1980 Republican Party Platform. Therefore, I will address myself to the vital question of where we go from here.

Obviously, Congress can devise a host of mechanisms within the scope of the Court's decision that will reassert the Congressional authority over decisions of the President, executive agencies, and independent agencies. These mechanisms could range from stripping away all, or most, of the delegated discretionary powers to the use of appropriation restrictions to the structuring of procedural devices to requiring affirmative Congressional approval for all major actions or regulations to proposing a Constitutional Amendment—to name a few. Indeed, both the House and

Senate have already taken actions in the Court decision's aftermath to do some of these things.

Some of the potential Congressional responses to the Court's decision are more intrusive, restrictive, and unwieldy than others, but all manner of means will be utilized to reassert an accountability to the Congress over actions previously covered by the legislative veto.

So long as this uncertainty exists I foresee the potential for years of wasteful and better confrontation and even chaos in our government. It is for this reason that, as one first step, I urge the early convening of a Conference on Power Sharing to address this new situation and consider solutions. I truly believe we are at a new crossroads in the course of our governmental development, and I believe we need to deal with it as responsibly and objectively as possible, not just for the present but for the future as well.

The Conference I propose would involve assembling representatives of the Executive Branch, leaders in the Congress, people from the academic community, representatives from "think tanks" (e.g. American Enterprise Institute, the Brookings Institution, etc.), organized labor, the business community, public interest groups and the like. This Conference would not be a Commission expected to propose by consensus or vote specific solutions, but rather would be a means for laying out the problem, defining it, and exploring directions that could lead to solutions in a free and open and thorough dialogue. I believe this Conference could meet for a relatively short period in early Fall and provide a focus for the cooperative consideration of this matter. It would take the joint efforts of yourself and the Congress to call and provide for such a Conference, but I think the benefits would be enormous and the failure to take such action will leave the consideration of this issue to years of disruptive, haphazard and confrontational resolution.

The Conference could result in some short term or long term specific proposals, or it could lead to a subsequent more formally structured Commission but surely it would go a long way to defining the dimensions of this problem and outlining areas of concern that need to be addressed. It would provide a forum for providing a common data base and avoid having all of the different points of view speaking to each other from a distance in press releases and legislative or administrative actions. It would surely lead to a better and clearer understanding of both differences and common ground.

I hope you will favorably consider this proposal so that you and the leadership in Congress can proceed without delay in its implementation to provide for the convening, preparation, background work, and staffing of the Conference.

With best wishes, I am

Very truly yours,

ELLIOTT H. LEVITAS,
Member of Congress.

THE WHITE HOUSE,
Washington, August 1, 1983.

DEAR ELLIOTT: On behalf of the President, I would like to thank you for your letter proposing a Conference on Power Sharing in response to the recent Supreme Court decision relating to the legislative veto.

The President appreciates your thoughtful comments on this important issue. Rest assured that your proposal is now being shared with White House Counsel for careful study and consideration.

With best wishes,

Sincerely,

KENNETH M. DUBERSTEIN,
Assistant to the President.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., September 15, 1983.

Hon. FRED FIELDING,
Counsel to the President, The White House,
Washington, D.C.

DEAR FRED: What is taking so long in responding to my letter to the President about the National Conference on Power Sharing? I need to have an answer one way or the other within the next ten days.

I will appreciate your attention to this matter.
Very truly yours,

ELLIOTT H. LEVITAS,
Member of Congress.

THE WHITE HOUSE,
Washington, September 19, 1983.

Hon. ELLIOTT H. LEVITAS,
U.S. House of Representatives,
Washington, D.C.

DEAR ELLIOTT: Thank you for your note of September 15, inquiring into the status of the Administration's response to your proposal that a "Conference on Power Sharing" be convened to consider the effects of the Supreme Court's decision in *Immigration and Naturalization Service* v. *Chadha*. It is my understanding that you will soon be receiving a reply over the signature of the Deputy Attorney General. I am sorry if the delay has caused any inconvenience.
Sincerely,

FRED F. FIELDING,
Counsel to the President.

OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., September 20, 1983.

Hon. ELLIOTT H. LEVITAS,
House of Representatives,
Washington, D.C.

DEAR ELLIOTT: The President has asked me to respond to your letter of July 19, 1983 regarding the aftermath of the Supreme Court's legislative veto decisions.

We enthusiastically share your view that the Legislative and Executive Branches should address the issues created by the legislative veto decisions in a constructive and cooperative way. We applaud your initiative in this approach. The Administration looks forward to productive deliberations with you and other interested Members of Congress on this subject.

As you know, the Administration provided testimony concerning the Supreme Court's legislative veto decisions on July 18, 1983. At that time, I was a witness before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary of the House of Representatives. The positions which the Administration expressed to Congress through my testimony included our analysis of the Supreme Court decisions and our observations regarding potential future actions to enhance the accountability of government decisionmaking, particularly by "independent" agencies. I provided, along with my testimony, a comprehensive inventory of all of the statutes which we had identified which contained legislative veto provisions. I am enclosing herewith a copy of my testimony and our inventory.

We have some reservations, at least at this time, regarding the need for a formal conference or commission to discuss legislative vetoes or the appropriate Executive or Legislative Branch response to the Surpeme Court decisions. Since there are so many forms of vetoes connected with so many different substantive laws which are designed to operate in such diverse ways, we are concerned with treating the situation in a manner which may assume that one "solution" or "response" is desirable or even possible. I believe it will be useful to hear from various scholars and commentators in the form of articles and speeches and to otherwise listen to the marketplace of ideas before formalizing any commission or conference structure. A premature and structured forum for attempts to resolve these questions may simply lead to solutions for the sake of solutions before all of the alternatives are analyzed.

Perhaps we should consider the extent to which the Administrative Conference of the United States might be an appropriate forum for the discussion of matters such as this. As you know, that is a permanent agency established by Congress for the purpose of providing a medium through which Federal agencies, assisted by outside experts, can cooperatively study mutual problems, exchange information and develop recommendations on matters of administrative law. The Conference membership includes, in addition to its governmental membership, thirty-six private lawyers, university faculty members and others specially informed in law and government. Of course, Members of Congress would participate fully, as experts or otherwise, in any consideration by the Conference of issues raised by the legislative veto decisions.

I believe we should be reluctant to support the creation of new entities for the examination of problems which can be as easily considered by existing institutions. Ad hoc committees and commissions, once created, seem to develop perpetual life. Institutions created by the Constitution and staffed by the dedicated people placed in them by the electorate and the President's appointees presumptively ought to be capable of addressing these difficult issues. I would hope that this might be an instance in which we could respond to this important subject without creating another government entity.

Please let me know if you wish to discuss this in greater detail.

With best regards,

EDWARD C. SCHMULTS,
Deputy Attorney General.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., September 21, 1983.

Hon. EDWARD C. SCHMULTS,
Deputy Attorney General, U.S. Department of Justice,
Washington, D.C.

DEAR ED: I have your letter of September 20, responding to my letter to the President of July 19 proposing a National Conference on Power Sharing.

Since the Administration has rejected the proposal I made, it appears that we are destined for an era of confrontation as well as uncertainty and confusion. But so be it. The choice was the Administration's to make, but I find it hard to believe this was President Reagan's personal decision.

I suppose the War Powers Act and some of the authorization bills now moving through Congress are as good a place to begin as any. Let's have at it.

The suggestion that the Administrative Conference of the United States would be an appropriate forum to discuss matters such as this is hardly one that should be taken seriously. The type of policy considerations and expertise needed to deal with this milestone in constitutional evolution does not exist in the Administrative Conference of the United States. It has neither the status nor purpose nor credibility to address the full scope and range of this issue.

To suggest that the Conference (*not* a Commission) I had suggested was the creation of a new "entity" or that such a meeting and forum could take on perpetual life is totally absurd. In fact I find that laughable coming from an Administration that has established commissions for everything under the sun, including Social Security reform, Central American policy, strategic weapons and arms control, educational policy, the handicapped, hunger, just to name a few. In fact, didn't the Attorney General himself just this week announce a new commission on domestic violence? Surely, Ed, you were embarrassed writing your letter to me and giving that reason. How about telling me what the real reason is.

I am also somewhat surprised that the response to my letter came from the Justice Department rather than the White House. The matter which I addressed to the President is of such pervasive Executive Branch-Legislative Branch policy nature that to consign the matter to the Justice Department rather than dealing with it directly in the White House is perhaps indicative of the failure of the Administration to appreciate the scope and extent of the confrontation that now—unnecessarily, but inevitably—lies before us.

Very truly yours,

ELLIOTT H. LEVITAS,
Member of Congress.

The CHAIRMAN. We sure appreciate your help.

Any questions?

Mr. BEILENSON. Does your office or someone you know of have a list of the 35 times the veto has been exercised? I am interested especially in what occasions in recent years it has been exercised.

Mr. LEVITAS. I can give you some right off the bat. The largest number of exercises have come out of the Education and Labor Committee on rules issued under the General Education Provisions Act. That was a two-House veto. It had to do—just recently, I think

last year, the year before last—with some handicapped education regulation.

Mr. BEILENSON. Which passed almost unanimously.

Mr. LEVITAS. It passed unanimously.

Let me give you another example that a lot of people have forgotten about. In the aftermath of Watergate, Congress passed a law dealing with the handling of Presidential tapes by GSA and had a legislative veto, because there was some suspicion that maybe GSA would not handle them in a way that Congress wanted. On two occasions—three occasions, twice in the House under the leadership of John Brademas, and once in the Senate—Congress vetoed regulations by GSA dealing with the custody of Presidential tapes.

Mr. BEILENSON. OK. Some more substantive ones now, the more controversial ones.

Mr. LEVITAS. There was an attempt to veto the regulations dealing with seatbelts, passive restraints. Congress defeated the disapproval. The veto was introduced but was not passed. The used car rule was vetoed. And FERC—the phase II incremental gas pricing.

Mr. BEILENSON. What happened to the veto of the FTC's rule on funeral practices?

Mr. LEVITAS. Never got to the floor.

Let me make a point here. One of the arguments—I don't think you want to get into the political arguments, but some people say this favors business. It doesn't favor business. It is a two-edged sword. There are regulations that environmentalists and consumers would have gone after had this mechanism been there. For example, I remember during the Ford administration when they downgraded the beef quality standards by regulation. Many of the things Mrs. Gorsuch and Mr. Watt were able to accomplish, we would have had some way to deal with.

Mr. BEILENSON. Are we talking about including any criteria that must be used as a basis for overturning agency decisions?

Mr. LEVITAS. I would urge you not to do that.

Mr. BEILENSON. In other words, we are relegislating.

Mr. LEVITAS. That is right. I would simply say we are making a legislative decision. If you do anything other than that, you are in effect making a judicial-type decision: Did the agency exceed its authority? It may have or may not have. I think that is a judgment that the Congress should be making at the time it exercises the veto.

Mr. BEILENSON. Do you think it is irrelevant whether or not they are going beyond their authority? You are saying even if it is clear they did not, but we don't like what they are doing, or we changed our mind, in effect, perhaps——

Mr. LEVITAS. That is a political argument. I am saying as you structure your mechanism, I don't think you ought to write it in.

I think one of the arguments we would have to fight out as legislators is to say, "I want to see this vetoed because they exceed their power." And you say, "No, that is not at all the case; they did not exceed their power. You just don't like what they did." And I think that is a very relevant consideration.

But I think you make a mistake by trying to spell that out. I think it then becomes a judicial consideration rather than a political or legislative consideration. I think that is one of the things we

have to be responsible for, rather than trying to spell it out. I think you create problems by doing that rather than solve problems.

Mr. BEILENSON. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Mr. Levitas. We appreciate your valuable contribution. We want to work with you and keep in consultation with you.

Mr. LEVITAS. Any way I can help, Mr. Chairman.

The CHAIRMAN. Thank you very much.

That is the last witness scheduled for today. We recess the hearing.

[Whereupon, at 12:30 p.m., the committee adjourned, subject to the call of the Chair.]

LEGISLATIVE VETO AFTER CHADHA

THURSDAY, FEBRUARY 23, 1984

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RULES,
Washington, D.C.

The committee met, pursuant to notice, at 2 p.m., in room H-313, the Capitol, Hon. Claude Pepper (chairman) presiding.

Present: Representatives Pepper, Derrick, Beilenson, Frost, and Wheat.

OPENING STATEMENT OF HON. CLAUDE PEPPER, CHAIRMAN OF THE COMMITTEE ON RULES

The CHAIRMAN. The committee will come to order, please.

Mr. Dante Fascell is our first witness, but I want to make a brief opening statement, and perhaps by the time I have completed my own statement, Mr. Fascell will be here.

Today the Rules Committee continues its hearings on the legislative veto. The issue arises because of the Supreme Court's decision in the case *Immigration and Naturalization Service* v. *Chadha* which found the legislative veto unconstitutional. Following the Court's decision 17 committee chairmen wrote to me expressing their belief that precipitous action in this area could lead to more troubling consequences than those which were raised by the Supreme Court decision. These chairmen requested that the Committee on Rules provide a forum to analyze the complex institutional and legal issues pertaining to the *Chadha* decision

Accordingly, the Rules Committee is going to try to be helpful in coordinating the responses of the standing committees as well as the responses of individual Members of Congress. The job ahead will not be easy since the legislative veto is not a single device but a variety of devices applied to a wide range of policy areas. The fundamental problem is not a sudden reallocation of constitutional prerogatives but instead the dismantling of a host of delicate, often hard-won interbranch accommodations that have become the basis of useful working relationships between the Congress and the Executive in a number of sensitive areas.

The congressional response will be shared by those who persistently and doggedly pursue their course as well as by those who act as conciliators in the never-ending process of bringing extremes to the center. It will also be formed by those who understand the practicalities of the political process as well as by those with knowledge of history and a vision of the future.

The Rules Committee held 2 days of hearings on this subject in November 1983. At that time we received testimony from the Hon-

orable John Dingell, the Honorable James J. Florio, the Honorable Carl Levin, the Honorable Joe Moakley, the Honorable Charles Grassley, the Honorable Trent Lott, the Honorable Morris K. Udall, the Honorable Elliott H. Levitas, and a distinguished panel of academicians: Dr. Joseph Cooper, Dr. Louis Fisher, Dr. Charles O. Jones, Dr. Morris S. Ogul, and Dr. Norman Ornstein.

Today, in continuing our hearings on the legislative veto, we have invited committee chairmen and their ranking minority members as well as some public witnesses to look at the following questions: Why did Congress create the legislative veto? How did it affect various areas of public policy? What alternatives to the legislative veto are available, if any?

These hearings will continue on February 29 and March 1, 1984, at which time witnesses will examine the impact of the Court's decision on the authorization/appropriation process. We will devote special attention to five issues:

No. 1. Any effect the Supreme Court decision may have on riders on appropriation bills;

No. 2. The use of regular or supplemental appropriations bills to disapprove deferrals;

No. 3. The appropriateness of a constitutional amendment that would give Congress the legislative veto and the President the item veto;

No. 4. Nonstatutory controls such as committee and subcommittee prior approval of agency reprogramming;

No. 5. The use of internal roles as a substitute for legislative veto such as the practice of the House Public Works Committee requiring GSA to prepare building prospectuses in response to committee resolutions.

In additional hearings on March 7 and March 8, 1984, the Committee will examine the impact of the Supreme Court ruling on the administrative process, on March 21, the impact on the judicial process, and on March 22, the impact of expedited procedures on House operations.

As I stated when we dealt with this complex of issues last fall, we start our deliberations without any preconceptions as to a preferred solution in any area or with a preference for any device. We will seek advice and counsel from a variety of different perspectives and disciplines; from each branch of our Government, from the business world and academia, from Republicans and Democrats, and any other source that can assist us. In the end, we hope we may distill from this collective wisdom a framework for action keeping in mind as Jefferson advised us, that, "The patch should be commensurate with the hole."

Mr. Fascell, we are delighted to have you as the distinguished chairman of the Committee on Foreign Affairs.

We welcome your statement.

STATEMENT OF HON. DANTE B. FASCELL, CHAIRMAN, HOUSE FOREIGN AFFAIRS COMMITTEE

Mr. FASCELL. Mr. Chairman and members of the Rules Committee, let me first thank you, Mr. Chairman, for undertaking this task.

I think it is vitally important that this outstanding and presti ous committee address the issue that you have described in yo opening statement, and develop a constitutionally acceptable alt native.

The Committee on Foreign Affairs held some hearings on tl subject last year in July. We had any number of witnesses from t administration. We had some legal scholars, we had the counsel the House, and we entered into discussion. I believe the transcri has been made available to the committee and it might be useful you and staff, as you pursue this matter, because we were looki at the effect on the parameters as it applied to the jurisdiction the Foreign Affairs Committee.

The CHAIRMAN. We have examined that, Mr. Fascell, and fou it most useful.

Mr. FASCELL. As you know, we have 16 statutes which are affe ed. The principal two are the War Powers Act and the Arms Co trol Provisions under 36(b).

By the way, Mr. Chairman, I have a prepared statement whicl would like to submit for the record.

The CHAIRMAN. Without objection, it will be received.

Mr. FASCELL. We are confronted with the proposition as legisl tors which is most undesirable. Without getting into the merits demerits of the Court's decision, and how far it is legislatively politically, the fact is that in dealing with the delegation of autho ity, the legislative branch to the executive branch, we are nc under constraint, and it is not a satisfactory solution to the pro lem to say that we must here not delegate at all because we ca have no control or restraint on the delegation of authority on made or to say that if you delegate, the only way you can have a control on it would be either to repeal the authority of the deleg tion or to withhold the money to the Executive.

Both of those are extremely blunt and difficult instruments use in the political process.

It is obvious for that reason that the legislative veto proce came into being so that some more sensible and reasonable a proach could be taken to it.

In 36(b), for example, where the Congress is trying to exerci reasonable oversight and authority with respect to delegation power on arms sales where we establish a threshold saying ov and above a certain amount we must be notified of the act and tl Congress has the right to act in disapproval if it so wants to.

Our only choice now, obviously, would be to either withdraw a of that authority to the Executive, or to pass a joint resolution i every case of either approving or disapproving, both of which a cumbersome, and we are beginning to struggle with that proce ourselves. It is a lot better, therefore, to approach this from tl overall viewpoint, it seems to me, than to have every legislati committee where their jurisdiction is impacted as a result of tl *Chadha* decision, to try to deal with that separately.

That is where the committees are now. Everybody is going t come to grips with that problem as they run through their autho zation bills as they come up for renewals or the administration r quests are there.

I am not sanguine enough to believe that we are going to find an immediate solution here this year. We may have to ride with where we are today until such time as the overall view can be taken and an easier approach can be found.

Without claiming to be a legal scholar, although I was once almost in the ballpark with the chairman of this committee in terms of legal capability and the normal measurement of a criteria that is used to determine one's legal ability, meaning he had a lot more money than I did, I have come down on the side that there has to be a sensible way of meeting the problem constitutionally.

Maybe my logic is tortured in some way because I have not examined the impact of the *Chadha* decision that carefully although I have listened to a few legal scholars and entered into a rather lengthy discussion with them in the hearings before the Foreign Affairs Committee.

However, to say that we cannot as a legislative body make a conditional or limited delegation of authority seems to me to be denying us under the Constitution something which we are entitled to do. To say as a legal proposition under the Constitution that the only delegation of authority we can make is a complete delegation of authority in every case does not seem to me to make good law or good public policy.

If that is the case, we had better darn well change something if that is really what we are confronted with. I am not sure and the legal scholars will address the point on how far in their judgment the direction or the dicta in the *Chadha* case goes toward the ultimate proposition, and maybe the legal brains can come together, and I hope you can, in drafting some median ground that meets the constitutional task.

If we take the pure position that there has to be action by both parties in a presentment to the President in every single case, we are going to have to change a lot of statutes in this country, and my judgment is it will create havoc with all kinds of delegations of authority—just pick out any trade for example—my goodness, and we are concerned about the foreign policy aspects.

I wish you well in your studies.

Right now, we are reasonably content in the Foreign Affairs Committee, to take what legislative action seems prudent without going too far in trying to establish a precedent and wishing you and your colleagues on the committee success in trying to solve this problem.

I want to thank you very much, Mr. Chairman.

[Mr. Fascell's prepared statement follows:]

PREPARED STATEMENT OF HON. DANTE B. FASCELL, CHAIRMAN, HOUSE FOREIGN AFFAIRS COMMITTEE

Mr. Chairman and Members of the Rules Committee. Thank you for your kind invitation to appear before the Rules Committee today to testify on the impact of the *Immigration and Naturalization Service* v. *Chadha* decision on the legislative process. It is always a pleasure to appear before this prestigious committee and especially to address an issue on which the Chairman and Dean of the Florida delegation has taken the leadership to develop a constitutionally acceptable alternative to the legislative veto provisions currently in law.

The Committee on Foreign Affairs conducted a series of extensive hearings on July 19, 20, and 21, 1983, to examine the far-reaching *Chadha* ramifications on the 16 statutes within the purview of the committee. Of special concern to the Commit-

tee was the impact of the decision on the War Powers Resolution and Section 36(b) of the American Export Control Act relating to congressional disapproval of arms sales. The Committee heard testimony from Mr. Stanley Brand, former legal counsel to the House of Representatives; the Honorable Kenneth W. Dam, Deputy Secretary of State, and the Honorable Edward C. Schmults, Deputy Attorney General, representing the Executive Branch; and Professors Gene Gressman and David A. Martin, two recognized legal scholars in the area of congressional vetoes. I have provided copies of the Committee's printed hearings for your perusal. I believe that the information contained in the printed hearings will assist you in developing alternatives to the current legislative veto mechanisms.

It would be an exercise in futility for me to argue why Congress adopted various legislative veto mechanisms and how they affected the Foreign Affairs Committee's jurisdiction. The legal scholars can address these issues. The legislative veto was, at least in theory, a unique device designed by Congress to conditionally delegate certain authorities to the Executive Branch while trying to maintain the status quo ante.

The fact remains that this Congress has made large scale delegations of authority to executive and independent agencies conditioned on now unconstitutional legislative veto mechanisms. Furthermore, the Supreme Court in *Chadha* has broadly decided that the legislative veto provisions are severable absent a showing that Congress would not have enacted the remainder of the statute without the unconstitutional provisions, thus leaving the statutes stand without the legislative veto provisions. In essence, the Supreme Court has shifted the legislative law making authority vested in the elected Representatives in Congress to the life-tenured Federal judges by giving the judges the authority to redraft the statutes passed by this legislative body and signed into law by the President. Congress cannot ignore the prospect of the courts interjecting themselves into the sensitive legislative process of Congress, particularly in the foreign affairs area.

The Foreign Affairs Committee has confronted the legislative veto issue on a wait-and-see/statute-by-statute basis. This approach has worked on a short-term basis since no consensus alternative or alternatives have emerged as a viable replacement for the current legislative veto mechanisms. For example, the Committee responded to two international events involving U.S. armed forces in Lebanon and Grenada when the President failed or refused to report under Section 4(a)(1) of the War Powers Resolution. In both cases, Congress acted on appropriate legislation and the President signed the joint resolution on Lebanon into law. However, if Congress is going to regain control over the institutional powers it has already delegated, then it must develop a consensus alternative or alternatives that are constitutionally acceptable in the post *Chadha* environment.

The witnesses who testified before our Committee agree that a joint resolution of approval or disapproval would be constitutionally acceptable under the *Chadha* criteria; i.e., they would meet the bicameral and presentment requirements of *Chadha* and the subsequent decisions in *Consumers Energy Council* v. *FERC* and *Consumers Union of United States* v. *FTC*. I agree that these alternatives are constitutionally acceptable and should be substituted for the present legislative veto provision in some statutes within the Foreign Affairs Committee's jurisdiction. For example, Congress specifically delegated to the President the authority to make arms sales and unless Congress curtails this authority, the President will be free to sell to any country pursuant to the legislative veto free Arms Export Control Act. However, I am sympathetic to those legal scholars who argue that the *Chadha* decision did not automatically negate all forms of the legislative veto, especially in the foreign affairs area where no authority has been delegated and most especially in the case of the War Powers Resolution. The same Supreme Court has refused on a number of occasions to rule on foreign policy disputes between the Congress and the Executive Branch.

Mr. Chairman, I congratulate you and this distinguished Committee for your efforts to resolve this critical conflict. You are faced with the difficult task of developing a constitutionally acceptable alternative or alternatives to the existing legislative veto provisions; a device that Congress can use in executing its foreign policy obligations without creating a constitutional crisis with the executive branch.

I hope that my comments will contribute to your deliberations. I will be pleased to offer the services of our Committee staff for any consultations that might be helpful to you as you proceed in this matter.

The CHAIRMAN. Are there any questions of Mr. Fascell?

Mr. FASCELL. Mr. Chairman, I might point out that the citations are all contained in my prepared statement.

The CHAIRMAN. Mr. Derrick?

Mr. DERRICK. I have no questions.

The CHAIRMAN. You have made an excellent statement, and I think you have stated very clearly and rightly a problem Congress faces without the authority to make any kind of veto or submit any kind of additional requirements.

If you are saying it is no solution to say, of course, you can do it by joint resolution and send it to the President, that is just another statute. That is just passing another law.

You can always pass another law to repeal another one, so you are not talking about a solution to the problem.

I think we all recognize it may have been that Congress has gone further into the legislative veto than we should have, and maybe all of our committees should examine carefully when they are using a legislative veto to see if it is necessary in the public interest or to effectuate the public interest of that legislation to impose those conditions that are provided in a legislative veto, or is there any other way we can get the same result that will be a satisfactory alternative.

Once Congress feels just like, for example, your committee granting economic aid to some country in some part of the world. Do you want to condition that maybe on observing human rights or not being guilty of certain violations of the law and the like.

You would not want your money to be expended unless it was going to be expended subject to those conditions.

You need a lot of flexibility, not just an arbitrary provision in the law. Somebody has to take a look at it to see if the intentions are being violated.

We had 17 standing committees which wrote this committee a letter and asked us to take the initiative in looking into this question to see what we could come up with to protect the legitimate powers of the Congress.

We thank you very much for coming and making your very able statement.

Mr. FASCELL. Thank you, Mr. Chairman.

The CHAIRMAN. Our next witness is the Honorable Jack Brooks, chairman of the House Government Operations committee and with him is the distinguished ranking Minority Member of that distinguished committee, the Honorable Frank Horton.

Mr. Brooks, we are pleased to have you here, and we will be happy to hear you.

STATEMENT OF HON. JACK BROOKS, CHAIRMAN, HOUSE GOVERNMENT OPERATIONS COMMITTEE

Mr. BROOKS. I want to congratulate you for holding this series of hearings to investigate the appropriate congressional response to the Supreme Court's legislative veto decision of last spring. There is no issue more vital to Congress' institutional integrity than the question of how it should carry out its functions of oversight of the agencies and department of the executive branch. The Supreme Court's decision has denied Congress one tool which it had adopted with increasing frequency in recent years to insure that the executive branch and independent agencies would be responsive to the

intent of Congress. However, the decision does not prevent our examining other ways of carrying out this goal and strengthening the other tools at our disposal.

I want to say at the outset that, while I don't think there is any Member of Congress who has been more vigorous than I have been in working for effective oversight of executive branch agencies by the Congress, on many occasions in recent years, I have argued the dubious constitutionality of the legislative veto procedure. I can't gain much satisfaction from any Supreme Court action that weakens Congress in its relationship with the executive branch. Nevertheless, I feel that the decision was proper as a matter of constitutional law.

My committee's experience with the legislative veto mechanism stems from its historic use in the statutes which for decades, in one form or another, have permitted the President to reorganize statutory functions of the executive branch through the submission of reorganization plans. As a matter of fact, it is very likely that reorganization authority was one of the first statutes, if not the first, to make use of the legislative veto mechanism. The Executive Reorganization Act of 1932, a couple of years before you and I entered Congress, Mr. Chairman, provided for congressional disapproval of reorganization plans by either House of Congress. Subsequent grants of reorganization authority to the President have provided for other forms of legislative veto.

When the last congressional grant of reorganization authority expired a few years ago, concurrent with the Supreme Court's consideration of the legislative veto case, I asked the Attorney General for his view of the constitutionality of reorganization authority in light of its position in opposition to the legislative veto. As a result of the administration's reply, the current bill providing for reorganization authority, H.R. 1314, which has been approved by my committee and has been referred to your committee, since May 14 of last year, provides for positive approval of reorganization plans by a joint resolution of Congress, rather than for disapproval by a one-House legislative veto.

Mr. Chairman, I said earlier that the Supreme Court's legislative veto decision should not prevent the Congress from exercising its constitutional function of seeing to it that executive branch agencies follow the will and intent of Congress in carrying out delegated responsibilities. Congress has other means at its disposal to insure that executive branch agencies adhere to congressional intent. The most important of these is vigorous and continuous oversight of these operations by the committees of Congress.

Various mechanisms can be adopted to facilitate this oversight process. I've found that an extremely effective tool is a statutory requirement that the agency notify committees of Congress of actions taken pursuant to delegated authority. An example of such a requirement is the provision in the Federal property and Administrative Services Act which mandates that the General Services Administration notify appropriate committees of Congress of plans to dispose of Federal property by means other than competitive bid. They want to trade it off or brother-in-law it to somebody.

This requirement is a direct and forthright means of preserving Congress' constitutional authority over Federal property and main-

taining scrutiny over executive branch actions in this area. It makes no provision for vetoing a property transaction or altering the terms of such a transaction. But it does carry with it the clear possibility that the executive branch agency will be held to account if the congressional committee with jurisdiction over this area feels that the agency is failing to administer the statute as Congress intended. I can tell you, Mr. Chairman, that the possibility of a week of intensive subcommittee hearings tends to concentrate an agency administrator's mind wonderfully.

As a footnote, I should add that a court of claims judge, caught up in the enthusiasm of the legislative veto decision, has ruled that this reporting provision is unconstitutional—even though it provides for no legislative veto and no means by which Congress could block the agency's action.

An amicus brief in opposition to the Court of Claims decision was filed this week on behalf of me and the committee's ranking minority member, Frank Horton, and I think that it is likely that the case will not stand up on appeal. This decision, however, does point out the need for Congress to monitor judicial developments closely in the wake of the Supreme Court's legislative veto decision.

In conclusion, Mr. Chairman, I want once again to stress the alternatives to the legislative veto which Congress possesses. I have described the committee reporting requirement which we have found to be particularly effective in the case of real property transactions. Other arrangements, both formal and informal, can be adapted to the particular arrangements, both formal and informal, can be adapted to the particular statutory framework over which Congress needs to maintain scrutiny. I think it would be beneficial for us to recognize that there is no single magic bullet that will meet all of Congress' needs in this area. Rather, we have a number of different techniques we can use, all aimed at the single goal of effective oversight.

The process of vigorous oversight by the committees of Congress, and the knowledge by agency heads that they have a committee of Congress looking over their shoulder as they administer functions delegated by Congress, will serve the same purpose as legislative veto, and will do the job in a constitutional manner.

I hope that this series of hearings will focus on such means of insuring that congressional intent is carried out and that Congress thereby will be able to fulfill its constitutional responsibilities in a more efficient manner in the future, without arbitrary distortions of their clear intent by various Government agencies.

The CHAIRMAN. Thank you very much, Mr. Brooks.

Mr. Horton.

STATEMENT OF HON. FRANK HORTON, RANKING MINORITY MEMBER, HOUSE GOVERNMENT OPERATIONS COMMITTEE

Mr. HORTON. Mr. Chairman, I have a fairly lengthy statement I will ask be put in the record of this hearing.

With your permission, I will summarize that statement orally.

The CHAIRMAN. Without objection, it is so received.

Mr. HORTON. First of all, I think Dante Fascell gave an excellent dissertation on this *Chadha* decision. I would like to underscore

and agree with what he said in regard to the impact of that decision.

The Constitution was early interpreted by Justice Marshall, I think in the *Marbury* v. *Madison* case, to provide for equal but separate branches. I really feel this decision impinges on the authority we have as legislators. It does that in a very subtle way, but it does it very directly, too.

Jack Brooks has brought out how the Government Operations Committee, over the years since 1932, has had experience with the reorganization authority. Under it, a reorganization plan was sent up here by the President. We would then vote on a motion of disapproval, and then if you approved of the plan, you had to vote no.

I remember there was a lot of confusion about that procedure, but it did operate to make it possible for the executive branch to reorganize very quickly and not have to go through the lengthy process of having both Houses act, and the President sign, a bill.

The CHAIRMAN. The executive branch has approved the veto in the bill.

Mr. HORTON. It did in the past.

As Mr. Brooks said, last May, prior to the *Chadha* decision, we approved legislation in the Government Operations Committee which would require both Houses to pass any reorganization plan, and the President to sign the resolution, for it to become law.

We have established a new process and we can probably live with it, although it eliminates one of the old law's incentives for the executive to reorganize. Rather than use this new procedure, they may just leave the authority alone.

I want to emphasize the last point the chairman made. Jack Brooks was talking about a provision in the Federal Property and Administrative Services Act. There, there is no legislative veto, but what the Court is construing as a legislative veto is the fact that we are asking the GSA to report to the Congress. We ask the Inspectors General to make a report to us every year. That is very important to us. That is not a legislative veto.

I personally think the Court's opinion is an unreasonable extension of the *Chadha* decision. The Court is running down the trail saying, "We got them now, and we will get everything." I think that the Court is trying to extend the concept of legislative veto to the point where it will be impossible for us to get any information from the Executive.

We have filed an amicus curiae brief on that, and we hope that decision will be changed.

Mr. Chairman, as far as I am concerned, you are probably one of the most able Members of the House to deal with this subject on an individual basis because of your wide experience in the Senate and, more recently, the last 22 years here in the House. I am glad that your committee is looking into this issue.

Mr. BROOKS. Mr. Chairman, we will furnish you a copy of that brief which I just received yesterday for your perusal and consideration.

The CHAIRMAN. Do you recall in roughly how many of the cases supposedly covered by the *Chadha* decision contain legislative vetoes for your Committee on Government Operations?

Mr. BROOKS. We had 133.

If you are asking how many reorganization plans, about 133 reorganization plans have been submitted by the Presidents over the last 50 years.

He is going to put into jeopardy that number of statutes and I think that is foolishness. He is asking constitutional questions that nobody asked him. No, thank you, but no thank you. I am hopeful that better judgment can prevail.

The CHAIRMAN. I share your hope very strongly, Mr. Brooks.

As a matter of fact, as you know, the very able dissent of Mr. Justice White in the *Chadha* case lays out very clearly as you have indicated, the overreaching nature of that decision. In the first place, the Court just rather cavalierly, as Justice White said, declared unconstitutional more statutes than had been invalidated by the courts in the history of the country with one sweep, with all kinds of various situations.

Yours are primarily reorganization cases. Others would be like attaching reasonable conditions to the grant of funds.

Mr. BROOKS. It would disrupt the entire framework of Government. It is just absolute foolishness, Mr. Chairman, to allow that to happen.

The CHAIRMAN. I feel while Congress should carefully examine the exercise of veto, perhaps it should not be done unless it is absolutely necessary and if you can't find any other way to achieve what you want to achieve, but I think we should keep putting it in legislation, let it go back to the courts and up through the system.

One fellow said to me the Court is good in making distinctions. They will begin to carve out a differentiation between these particular cases and the sweeping judgment they entered in the *Chadha* case, and, eventually, by having these different types of cases, they will come to a sound distinction as to what cases are proper for legislative veto and what cases are not.

Mr. Derrick?

Mr. DERRICK. Mr. Brooks, did you say you agreed with the decision of the Supreme Court or did I misunderstand?

Mr. BROOKS. Basically, I did on the constitutional issue. I always had questions about it. I think we get around it in the new reorganization bill.

Mr. DERRICK. You agree with the law but not necessarily with the conclusion?

Mr. BROOKS. That is right.

Mr. DERRICK. I agreed with them, I think, probably and also agreed with the law as well as the decision.

To me, the legislative veto is just a further extension of the legislative process that is not needed. The process has to end at some point. When we say all right, everybody go home for awhile, this is done, let's see how it works. As you pointed out in your statement, we can have at our disposal many things such as conducting oversight hearings.

Mr. BROOKS. We have some other tools, but this new legislative reorganization plan provides for approval in both Houses and is clearly within the constitutional law.

We ought to try to win this case on appeal so that they do not jeopardize all the statutes they have jeopardized already. It is

pretty hard for Congress to pass a bill to take care of everything you have done.

It is difficult to pass a resolution that approves all of the acts of the Board of Directors for the past year. That is kind of tricky in Congress.

The CHAIRMAN. Mr. Beilenson?

Mr. BEILENSON. Thank you, Mr. Chairman.

I agree with the gentleman's testimony very much.

Unfortunately, most of the committees do not work as well as yours does.

Mr. BROOKS. Thank you.

Mr. BEILENSON. Some of the Appropriations subcommittees do but people do not work hard enough anymore. They are too busy running for election and they do not do their work. If they did their work, we would not need a legislative veto. We have other ways of doing things.

The CHAIRMAN. Thank you very much.

We will have to recess briefly for a rollcall.

Mr. BROOKS. We will get you a copy of the amicus brief.

[Mr. Horton's prepared statement follows:]

PREPARED STATEMENT OF HON. FRANK HORTON, RANKING MINORITY MEMBER, HOUSE GOVERNMENT OPERATIONS COMMITTEE

Mr. Chairman and Members of the Committee, I want to congratulate you on your review of the impact of the Supreme Court's *Chadha* decision, which, as Mr. Justice White observed in his dissent, "strikes down in one fell swoop provisions in more laws enacted by Congress than the Court (had) cumulatively invalidated in its history." I very much appreciate your inviting me to testify here today.

In your letter, Mr. Chairman, you asked me in my capacity as ranking minority member of the Government Operations Committee to address three questions: Why did Congress have the legislative veto? How did it affect (my) committee's jurisdiction? What, if anything, would you recommend as an alternative to the legislative veto for the matters within (my) committee's jurisdiction?

The Government Operations Committee can provide a unique perspective on these questions for two reasons: first, a predecessor committee of ours originated the first legislative veto provision to become law, and second, one statute under our jurisdiction is currently the focus for a court's attempt to expand the scope of the *Chadha* decision by broadening the definition of what constitutes a legislative veto. I want to discuss each of these laws with you today.

The original legislative veto was contained in a title of the legislative branch appropriations Act for fiscal year 1933. This title, based on a suggestion by President Hoover, granted the President new authority to reorganize the executive branch of government. Under the title, which was inserted into the bill as an amendment by the Select Committee on Economy, the President could issue executive orders transferring functions between or among agencies; an order would not take effect, however, if either House of Congress passed a resolution disapproving it within 60 days of its receipt.

The purpose of this title was to encourage the President to achieve economies in government—a pressing matter in 1932—without ceding legislative authority to him. I have gone back and taken a look at the House debate on the title, and discovered that even at the inception of the legislative veto, Members thought seriously about the constitutionality of the device and considered it a compromise between two conflicting views of powers granted by the Constitution to the executive and legislative branches.

Representative Holaday of Illinois, the principal proponent of vast Executive powers to reorganize Government agencies, sparked a debate on this subject by proposing to eliminate the section of the title which established the right of either House of Congress to invalidate an executive order. He argued that "the economies possible under . . . this bill are curtailed by the two sections (which) . . . require that any consolidations that the President may make must come back for the approval of Congress. * * * I am in favor, in the face of the emergency that confronts

this country, of giving such authority to the President (alone)." Representative Mapes of Michigan seconded this viewpoint, saying that "some very good lawyers say the passage of legislation giving the President the power to reorganize and consolidate the departments and activities of the Government . . . would be in itself sufficient repeal or amendment of the statutes which created those activities to authorize or permit the President to make the consolidations and reorganizations without reference to any further action by the Congress."

On the other side of the issue, Representative Vinson of Kentucky, who was later Chief Justice of the United States, argued, "Under (the section creating a legislative veto) there is an abdication and delegation of power to the President of the United States to legislate, and if (that section) becomes law, it will be the first time in the history of the Congress that such power was ever given to any President." Representative LaGuardia of New York maintained, "As far as I am concerned, being a fundamentalist and very conservative in my belief in and attitude toward the Constitution, I would not even go (as far as establishing a legislative veto) . . . I prefer the procedure under existing law that Congress act on its own initiative or on recommendation of the President, and that until Congress does legislate affirmatively, no law is enacted."

In between these advocates were the Members of the Economy Committee who had proposed the compromise. They indicated that they had given much thought to the question of constitutionality. Representative Douglas of Arizona, who later became President Roosevelt's first Budget Director, spoke for them, explaining that Mr. Holaday's amendment to remove the legislative veto from the title "would delegate to the President legislative powers which cannot be delegated by Congress." These Members apparently had no concern, however, that their creation shared the same failing.

The legislation regarding transfers and consolidation of executive agency functions has been renewed, in various forms, 15 times since 1932. Although the law frequently lapsed, it was in effect for most of the half-century ending in 1981, when the latest reauthorization terminated.

Throughout this period, renewal of the legislative veto contained in this authority was a focal point for debate concerning the law. The veto was almost always included in the reauthorization, but distinguished Members frequently warned of its failings. In 1939, for example, three members of the Select Committee on Government Organization, including Representative Dirksen of Illinois, stated, "This bill is a device to allow the Executive to obtain legislation by indirection rather than by the usual and proper method of legislating. Does Congress propose at this time," they asked, "to surrender the American form of government and the constitutional method of legislating, . . . for . . . the delegation of more power to the President?" In 1977, Representative Brooks of Texas, the current chairman of the Government Operations Committee, argued, "(M)y understanding of the manner in which laws are made under our system of government (is that before a plan could go into effect, a majority of the House and Senate would have to approve them). To allow a President's proposals to become law without any action by Congress . . . is more in keeping with a system that permits a ruler to govern by decree."

Under the Reorganization Act, Presidents proposed over one hundred plans for improving government efficiency by consolidating or transfering functions among agencies. Since 1939, the Congress allowed 91 plans to take effect. Twenty-three were disapproved. President Truman made the greatest use of the Act, proposing 47 plans, mainly for the purpose of implementing the recommendations of the first Hoover Commission. President Nixon made the most masterful use of this law, establishing through it such agencies as the Office of Management and Budget, Environmental Protection Agency, National Oceanic and Atmospheric Administration, ACTION, and Drug Enforcement Administration. President Johnson reorganized the entire District of Columbia Government under this authority.

All these proposals came under the jurisdiction of the Government Operations Committee and its predecessors. The Reorganization Act encouraged Presidents to think in terms of achieving economies in administration by restructuring functions. It provided Congress with the expertise to evaluate these plans, because each of them was referred to the Committee with government-wide management experience. A direct consequence of this arrangement has been better management of the executive branch of government.

In summary, Mr. Chairman, the success of the Reorganization Act has always hinged on two crucial features: guaranteed consideration of Presidential plans on a timely and orderly basis, with Congress' role limited to veto only. These conditions, while the subject of considerable spirited debate, have generally been felt necessary

to encourage Presidents to undertake the arduous task of government reorganization.

Of these features, the more important is the expedited consideration of plans. The fact that plans must be reviewed quickly by the House and Senate is what most encourages Presidents to use the reorganization authority. In the past, as a practical matter, I supported the use of the legislative veto in the context of the Reorganization Act. My supported stemmed from the fact that the Act has been with us for many years and on the whole has worked well. In looking back over the record, however, I note that the last 23 plans which were sent to the Congress—over a period of 14 years—were all permitted to become law. We obviously didn't use the legislative veto much; perhaps it was not such an essential tool after all. However, be that as it may, now that the veto is no longer available to us, I think we need to develop a replacement for it that preserves the incentive of the Executive Branch to propose and implement reorganizations, while retaining Congress' right to a final say on reorganization matters.

Happily, under the leadership of Mr. Brooks, the Government Operations Committee began even before the *Chadha* decision to rewrite the Reorganization Act in a constitutionally-permissible way. On May 3, 1983, we approved legislation to renew the Reorganization Act. It continues to provide for expedited consideration for Presidential plans, but in place of the legislative veto requires that each plan pass both Houses of Congress and be signed by the President in order to become law. This bill retains the advantages of previous statutes, it is clearly constitutional, and it has the support of the Administration. H.R. 1314 has been before your committee for several months, Mr. Chairman, and I urge you most strenuously to give the whole House an opportunity to consider it.

The other item I want to discuss briefly is a statute that does not create legislative veto, but has been construed by a court to do so. This is section 213(e)(6) of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. 484(e)(6). This law says that:

"Except as otherwise provided by this paragraph, an explanatory statement of the circumstances of each disposal by negotiation of any real or personal property having a fair market value in excess of $1,000 shall be transmitted (by the Administrator of General Services) to the appropriate committees of the Congress in advance of such disposal. * * *"

As you can see, this statute clearly creates nothing more than a reporting requirement; it does not authorize the Congress to prohibit any executive action. This provision has allowed us to monitor some of GSA's operations, but not to control them. As a matter of fact, until GSA recently changed its regulations, the agency often completed sales to which the Committee had registered opposition.

As I read the *Chadha* decision, it expressly sanctions, in dicta, a similar requirement. A reporting provision, the Court said, permits "Congress' oversight of the exercise of . . . delegated authority . . . ."

Nevertheless, in a recent case in the Claims Court *City of Alexandria* v. *United States,* No. 560–82L, Oct. 20, 1983), this statute was ruled unconstitutional. The judge agreed that the case "does not involve an explicit veto by one House of Congress." She found the provision to be invalid, however, because "a procedure established by statute, regulation, and practice is presented whereby one committee of one House of Congress can intervene in and stop a decision of the Executive Branch to contract." The judge noted that the regulation implementing the statute places restrictions on Executive actions; it says that a proposed negotiated disposal shall be consummated only if the agency has not received an adverse comment from a Congressional committee within 35 days from the date of submission of the explanatory statement. The judge also relied heavily on the then-Acting GSA Administrator's testimony that he was contemplating making a sale until a Government Operations Committee staff member indicated that the Committee might not view it favorably.

Mr. Chairman, I think that this decision is wrong. If it is allowed to stand, it would set a precedent that could invalidate the many other reporting provisions which Congress has established as a means of aiding in oversight of executive branch operations. Although many of these provisions create paperwork which is rarely if ever read, some of them are indispensable to my committee and others in their work. Mr. Brooks and I, as Chairman and ranking minority member of the Government Operations Committee, are filing an amicus curiae brief in the Court of Appeals for the Federal Circuit, urging that the decision be overturned. I call the Claims Court's opinion to your attention because if it is upheld on appeal, the scope of your inquiry into legislative vetoes will have to become far broader than it now is.

That concludes my statement, Mr. Chairman. I would be happy to answer any questions which the Committee might have.

[The amicus curiae brief referred to by Mr. Brooks follows:]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 84-713

UNITED STATES OF AMERICA,

Appellant,

v.

CITY OF ALEXANDRIA,

Appellee.

ON APPEAL FROM THE UNITED STATES CLAIMS COURT

BRIEF AMICI CURIAE OF THE HONORABLE JACK BROOKS, CHAIRMAN, AND THE HONORABLE FRANK HORTON, RANKING MEMBER HOUSE COMMITTEE ON GOVERNMENT OPERATIONS

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INTEREST OF AMICI CURIAE

The Chairman and Ranking Member of the Committee on Government Operations of the House of Representatives appear to support the constitutionality of provisions of the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, 40 U.S.C. §471 et seq. (1976 ed. and Supp. III) declared unconstitutional by the Court below under the authority of INS v. Chadha, 103 S.Ct 2764 (1983).

Under the terms of the statute governing the sale of government property declared to be "surplus," 40 U.S.C. §472(g), the terms of negotiated sale are to be submitted to the House Committee on Government Operations by the Administrator of General Services Administration (GSA). Id., §484(e)(6).

In its decision in this case, the Court below construed the requirement that the GSA submit an explanatory statement concerning negotiated sales of surplus property to constitute an impermissible "legislative veto" rendered invalid by the Supreme Court's decision in INS v. Chadha, supra.

The obvious interest of the committee in preserving statutes under which it receives information necessary to perform its legislative and oversight functions compel its Chairman and Ranking Member to present their view to the

Court on the questions presented concerning the constitutionality of the statute.

Indeed, in Chadha itself, and the companion cases decided subsequent thereto[1/] it fell to the legislative parties to defend the constitutionality of the statutory provisions at issue.

As the Court noted in remarking on the argument advanced by the House of Representatives respecting the lack of adversariness, "Congress is the proper party to defend the validity of a statute when a government agency, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional." INS v. Chadha, 103 S.Ct at 2778. Although here the agency apparently will defend the statute against judicial sua sponte onslaught below, it is the Committee's interests which will be most vitally affected by the judicial nullification of the statute. Moreover, because of the adverse decision below would have on scores of other statutes which require reporting or submission of information to Congress by hundreds of executive, independent, and advisory agencies, it is important for the Court to have the views of the bipartisan Committee

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[1/] Process Gas Consumers Group v. Consumer Energy Council of America, 103 S.Ct. 3556 (mem.) and Consumers Union of United States v. FTC, 103 S.Ct. 3556 (1983) See also Pacific Legal Foundation v. Watt, 539 F.Supp. 982 (D.Mont. 1981) reconsideration denied, 539 F.Supp. 1194 (1982); League of Women Voters v. FCC, 489 F.Supp. 517 (E.D. Calif. 1980)

leadership on the statute's operation to assist in evaluating constitutionality.

SUMMARY OF ARGUMENT

The Court below struck down a provision of law which requires the agency responsible for the negotiated sale of surplus government property to merely submit an explanatory statement to the appropriate committees of Congress. The Court catapulted itself across the constitutional rubicon of invalidating validly enacted statutory provisions, sua sponte without urging by the parties or an ample opportunity by the government to adequately address the constitutional issue broached by the Court.

The Court determined that under the recent decision in INS v. Chadha, 103 S.Ct. 2764, striking down the so-called legislative veto because of its violation of the constitutionally prescribed procedures for lawmaking, the provision of the Federal Property and Administrative Services Act of 1949, supra, requiring submission of reports on the proposed negotiated sale of surplus property, together with informal discussions between committee staff and agency personnel, constituted a de facto legislative veto.

The Court further declared that the requirement imposed upon the agency to report, the subsequent informal discussions, and the agency regulations, impermissibly permit the Committee to intervene in and block an Executive Branch decision, all in contravention of Chadha.

The decision below represents a quantum expansion of the Supreme Court's decision in Chadha which is not justified by the Court's holding on legislative veto or the constitutional prescriptions for proper lawmaking which inform the decision. In addition, the Court in Chadha explicitly recognized as constitutional and legitimate the power of Congress to require agencies to "report" and "wait" ancillary to Congress' authority to legislate.

The Court below erroneously and without precedent or authority utilized the subjective state of mind of agency officials to arrive at its finding that the statute was unconstitutional.

ARGUMENT

1. THE LOWER COURT MISCONCEIVES THE EXPLANATORY STATEMENT REQUIRED BY 40 U.S.C. §484(e)(6) AS A LEGISLATIVE VETO

A. The Court Below Erred in Construing the Submission of Information to the Committee as Conferring Binding Power to Reverse an Executive Decision

The Court below held that the explanatory statement required to be submitted to the House Committee by the statute, while not "technically" requiring "congressional approval," City of Alexandria v. United States, No. 560-82L (Ct.Cls., issued October 20, 1983) Slip Op. at 13; conceding that it "merely provides that prior to disposal . . . an explanatory statement must be transmitted to the appropriate committees of Congress," id., and that "[t]his case does not involve an explicit veto by one House of Congress," nevertheless permits Congress to "intervene in and stop a

decision of the Executive branch." Id. Indeed, the legislative history of the statute cited by the Court states unequivocally that the explanatory statement required to be submitted "is viewed merely as a procedure for informing Congress of deviation from the customary method of publicly advertised competitive disposal . . . [which] has not been one of approving or disapproving each negotiated sale, but rather one of general review and of registering objection when it seems apparent that the proposed sale is not in the best interest of the Government." H.R.Rep. No. 1763, 85th Cong., 2d Sess., reprinted in 1958 U.S. Code Cong. & Ad. News 2876 (emphasis added).[2/]

This self-imposed agency deference to congressional sentiment was deemed equivalent to a true legislative veto, despite absence of an "explicit" veto mechanism. The Court premised its decision on testimony that agency personnel were "dissuaded" from taking action in defiance of Congress because of the "spectre" of oversight hearings." The testimony was critical to the Court's conclusion that "[i]n practice, then, one House of Congress, by committee, can veto a proposed sale by the Executive branch to which

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2/ It should be noted that it is the implementing regulation, not the statute, which conditions consummation of the sale upon the "absence of adverse comment by an appropriate committee . . . ." 41 C.F.R. §101-47.304-12(f) (1982). The Court below interpreted the regulations as a determination that the "Acting Administrator deemed himself bound by the requirement" to submit an explanatory statement. Similarly, the other administrative materials indicate it is GSA which imposes Committee approval as a prerequisite to consummation. See, City of Alexandria v. United States, supra, Slip.Op. at 3-4.

Congress, pursuant to art. IV, §3, cl. 2 of the Constitution, has delegated its authority to dispose of public property." City of Alexandria v. United States, supra, Slip Op. at 17.

Finally, the Court below held "that the practice of a committee of the House of Representatives intervening and stopping negotiated sales of surplus property opposed by the GSA is an unconstitutional invasion of the separation of powers." Id. at 20-21.

Amici submit that the Court erred in construing the procedure for "informing Congress," H.R.Rep. No. 1763, 1958 U.S. Code Cong. & Ad News at 2867, as tantamount to a legislative veto.

The theory that requiring agencies of government to report their activities to Congress impermissibly interferes in the executive functions is an unjustified reading of the statute, the legislative history and the Chadha decision on which the holding is presumably based. In addition, because the provision neither binds the Administrator nor expressly provides for disapproval, it does not impermissibly interfere in executive decisionmaking.

The textual distinction between the statute at issue in Chadha, section 244(c) of the Immigration and Nationality Act, 8 U.S.C. §1254(c), and the provision of law in this case, is readily apparent. A side-by-side comparison of the operative language demonstrates the textual distinction:

Section 244(c)(2)
... if during a session of the Congress at which a case is reported...either the Senate or the House passes a resolution stating in substance that it does not favor the supspension of such deportation, Attorney General shall thereupon deport such alien....

Section 484(e)(6)
An explanatory statement of each disposal by negotiation of any real or personal property having a market value in excess of $1,000 shall be prepared. Each such the statement shall be transmitted to the appropriate committees of Congress in advance of such disposal....

In the case of the Immigration and Nationality Act, the statute explicitly devolves upon each House of Congress the power to pass a resolution disapproving and negating the Attorney General's action, which because it altered both Chadha's status and had "the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the legislative branch," INS v. Chadha, 103 S.Ct at 2784, was determined to violate the established constitutional procedures for legislation. In the case at hand, the statute neither expressly authorizes "legislative" action nor action that has the purpose and effect or "character" of legislative action.

"Section 244 (c) purports to authorize one House of Congress to deport and individual alien whose deportation otherwise would be cancelled under §244." Id. Section 484(e)(6), on the contrary purports only to require the transmittal of a report and the terms of the section do not permit one-House, or the committee, to "overrule" GSA, as "[t]he one-House veto operated in [Chadha] to overrule the Attorney General." Id.

Despite this clear and ascertainable distinction between the Section 244(c) veto in Chadha and the Section 484(e)(6) reporting requirement in this case (which the Court below readily acknowledged did not involve an "explicit" legislative veto), the Court proceeded to hold the section unconstitutional based partially upon subtle inferences imputed to the mind of the Administrator through testimony deemed to bind the Administrator to obey a committee request not to consummate the sale. Cf. American Federation of Government Employees v. Pierce, 697 F.2d 303, 306 (D.C. Cir. 1982)(per curiam)(provision in HUD appropriation prohibiting use of funds to reorganize department "without the prior approval of the Committee on Appropriations" constitutes an unconstitutional committee veto).

This "imputation" theory of legislative veto, which according to the lower court renders section 484(e)(6) "[i]n practice," a legislative veto would render virtually every statute requiring transmittal or submission of information to Congress void on the implicit assumption that furnishing information produces intuitive influence or interference in the agencies' decision making. This hardly squares with the Supreme Court's declaration in Chadha that among the "means of control" available to Congress are "formal reporting requirements" such as that at issue here. Chadha, supra at 2786 n.19.

B. The Statute and Its Legislative History Reveal Its Function as a Traditional "Report" and "Wait," Not a Legislative Veto

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Despite the unambiguous language of the statute providing only that an explanatory statement be transmitted to the Committee in advance of disposal, the Court nevertheless turned to the legislative history to ground its determination that the statute conditions sale upon congressional approval. It is axiomatic that where a statute is unambiguous, Courts should not resort to legislative history. United Mine Workers v. Federal Mine Safety and Health Review Commission, 671 F.2d 615, 621 (D.C.Cir. 1982). Accordingly, the Court's reliance on the legislative history was misplaced given the clarity of the statute's terms. In addition, statutes passed by Congress should be construed to avoid constitutionally disabling interepretations. Lynch v. Overholser, 369 U.S. 705, 711 (1962). Moreover, because constitutional adjudication [is] the most important and delicate of [a court's] responsibilities," Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 221 (1974), a court should not reach the issue of constitutionality unless it "is unavoidable." New York City Transit Authority v. Baezer, 440 U.S. 568, 582 (1979). The interpretative gloss imposed on the plain words of the statute by the court, together with its failure to avoid a constitutionally disabling construction, are plain error sufficient to

overturn the decision.[3/]

But even if resort is had to the legislative history, it thoroughly evidences, when viewed in its entirety, the intent to receive "reports" from GSA concerning anticipated negotiated sales, not an intention to "veto" such sales, or alter agency discretion.

As explained by the committee, the "purposes . . . [of section 484(c)(6)] is to continue the present procedure in reporting to Congress those instances where disposal of surplus property is to be made by negotiation rather than competitive bidding." H.R.Rep. No. 1763, supra, 1958 U.S. Code Cong. Ad. News at 2867 (emphasis added).

In addition to language also cited, supra at 5, concerning the purpose of section 484(e)(6) of "informing Congress" rather than providing for "approving or disapproving" of sales, the Committee determined that "[t]o require in legislation prior to disposal efforts in emergency situations to the detriment of the public interest." H.R.Rep. No. 1763, id.

[3/] A statute which if facially constitutional may be applied unconstitutionally, Yick Wo v. Hopkins, 118 U.S. 356 (1886) (municipal ordinance granting supervisory authority to withhold consent to the operation of laundries in wooden buildings unconstitutionally applied on the basis of nationality), but the determination of the agency to exercise its administrative discretion to accord weight to the views of Congress, not a consideration that has even been held to be constitutionally suspect (like those based on race, sex, or national origin), can hardly render the decision constitutionally inform. Moreover, when the agency retains the ultimate authority to make the decision committeed to it by law, there is no attempt "to alter the scope of the agency's discretion" Consumer Energy Council of America v. FERC, 673 F.2d at 469, aff'd 103 S.Ct 3556.

Even in those instances where the Committee described its historical role to "make a study and pass on the propriety of all negotiated sales of surplus property . . .," H.R.Rep. No. 1763, id., at 2862, as a means of facilitating "surveillance of proposed negotiated sales," id. at 2863, the Committee generally characterized its efforts in precatory or hortatory terms.

For example, the Committee reviewed some 60 proposed negotiated sales or surplus property conducted during the 85th Congress, which it had either "requested that several sales be postponed to allow time for more careful study before reaching a decision . . ." or "recommended to the General Services Administration that the sale not be consummated." Id. (emphasis added). See also, id., at 2864 and 2865 (the subcommittee "informally objected to" a sale).

The Committee report discusses the operation of the explanatory statement required by section 484(e)(6) in terms that make clear its function as a traditional "report and wait" mechanism. INS v. Chadha, 103 S.Ct at 2776 n.9. In striking a requirement in the bill of 30 days advance notice, the committee explained:

> The disposal agencies in the past have followed the informal policy of 30 days notification and have been extremely cooperative in extending the time for additional periods when requested in order that further study of a particular sale can be conducted by the committee.

H.R.Rep. No. 1763, supra, at 2867(emphasis added).

While the Committee's authority is defined by reference to the language of the statute itself, the history of the

agency's practice reveals that it has exercised its discretion and ignored the adverse comments of the Committee. Thus, "[i]n the case of property constructed at Laguana Niguel, California . . . subcommittee opposition . . . was disregarded. . . ." H.R.Rep. No. 1778, 94th Cong., 2d Sess. 193 (1976).

That the "report" and "wait" provision is ancillary to the legislative process, as it is required to be, see Pacific Legal Foundation v. Watt, 529 F.Supp. 982, 1003 n.42 (D.Mont. 1981) (legislative bodies and committee may independently exercise authority ancillary to legislation, i.e., to investigate and issue subpoenas, grant immunity, and determine which bills to consider), is also clear from the legislative history:

> The subcommittee's studies and actions in connection with the foregoing and other proposed negotiated sales impressed upon the committee the need for the utmost care in its consideration of this bill.

H.R.Rep. No. 1763, supra at 2866.

The reports received, and the consideration of them, by the Committee are "ancillary to legislation" like a contempt order by one House of Congress, McGrain v. Daughtery, 2173 U.S. 135, 174 (1927), a committee obtained immunity order, United States v. Romano, 583 F.2d 1, 4 (1st Cir. 1978); a legislative injunction of secrecy for the text of a treaty, Ex Parte Nugent, 18 F.Cas. 471, 481 (C.C.D.C. 1848); or the approval by a committee of acquisitions by the Park Service.

United States v. 0.37 Acres of Land, More or Less, 414 F.Supp. 470, 472 (D.Mont. 1976).

Because the "report" and "wait" provisions do not bind the Administrator or purport to limit or restrict his discretion, Pacific Legal Foundation v. Watt, 529 F.Supp. at 1004 (report and wait requiring Secretary of Interior to withdraw land from oil and gas leasing valid so long as committee does not seek to limit Secretary's discretion as to the scope and duration of the withdrawal), they are valid beyond peradventure of doubt under the Supreme Court's Chadha ruling.

II. THE STATUTE IS A WELL RECOGNIZED MEANS BY WHICH CONGRESS OBTAINS INFORMATION TO REVIEW THE ADMINISTRATION OF EXISTING LAWS

The power of the Congress to inquire into the operation of the departments and agencies of the federal government is well established. McGrain v. Daughtery, 273 U.S. 135 (1926); Watkins v. United States, 354 U.S. 178 (1957). In determining whether agencies are properly carrying out the "administration of existing laws as well as [whether] proposed or possibly needed statutes should be enacted," 354 U.S. at 187, "Congress . . . through its Committees . . . must have the widest possible access to executive branch information if it is to perform its manifold responsibilities effectively." Murphy v. Department of the Army, 613 F.2d 1151, 1158 (D.C.Cir. 1979). As the Supreme Court has repeatedly recognized, information from knowledgeable sources is critical to fulfillment of the legislative role

of Congress. McGrain v. Daughtery, 273 U.S. at 175. ("Where the legislative body does not itself possess the requisite information--which not infrequently is true--recourse must be had to others who do possess it.")

By the time of the adoption of the Constitution, the power of the legislature to inform itself relative to the objects of its largesse or on matters within its purview was well established. See generally, Potts, Power of Legislative Bodies to Punish for Contempt, 74 U. Pa. L. Rev. 691, 708-709 (1926). The first congressional investigation, an inquiry into General St. Clair's disastrous defeat by the Indians in 1792, attests to the continuity between colonial and congressional practice in gathering information about the conduct of government. And instances where Congress inquired into the affairs or conduct of government departments are too numerous to list exhaustively. See, e.g., Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153, 169-210 (1926).[4/]

[4/] As Landis explains, "[i]t needed no argument for Montesquieu to conclude that a knowledge of the practical difficulties of administration was a sine qua non of wise legislative activity. But such knowledge is not a prior endowment of the legislator. His duty is to acquire it, partly for the purposes of further legislation, partly to satisfy his mind as to the adequacy of existing laws. Yet the ultimate basis for the duty is the broader presupposition of representative government that the legislator is responsible to his electorate for his actions . . . The very fact of representative government thus burdens the legislature with this informing functions. 40 Harv. L. Rev. at 205.

The Court has endorsed the concept of the "informing function,"[5/] and "congressional efforts to learn of the activities of the Executive Branch and administrative agencies." Hutchinson v. Proxmire, 443 U.S. 111, 132 (1979).

Authority for committees to require reports from executive departments as part of oversight dates back to the First Congress. In 1789, that Congress passed the individual statutes creating the very first Executive Departments. The statute creating the Department of Treasury made it "the duty of the Secretary . . . to make report, and give information to either branch of the legislature, in person or in writing (as he may be required), respecting all matters referred to him by the Senate or the House of Representatives . . . " Act of Sept. 2, 1979, ch. 12, 1 Stat. 65-66 (emphasis added).[6/] With virtually no change, that provision has remained in force and effect for 192 years. See, 31 U.S.C. §1002 (1976).

5/ The term appears to have been first coined by Woodrow Wilson in his Congressional Government 297-303(1885)("The informing function of Congress should be preferred even its legislative function . . .")

6/ Because of the great weight accorded to the enactments of the First Congress as signs of the framers conception of governmental powers, Myers v. United States, 272 U.S. 52, 174-75 (1926); United States v. Midwest Oil Co., 236 U.S. 459, 473 (1915), the reporting function is firmly embedded in our constitutional fabric.

The Supreme Court and the lower courts which have considered the legislative veto have explicitly recognized the validity of the reporting function. INS v. Chadha, 103 S.Ct at 2776, Consumers Energy Council of America v. FERC, 673 F.2d 425, 457 (D.C.Cir. 1982)(investigative and informing powers fall "in the same general category as those powers which Congress might delegate to one of its committees"). The Department of Justice, after the issuance of the Chadha decision, has also acknowledged the validity of reporting provisions in a number of statutes containing legislative veto provisions. The U.S. Supreme Court Decision Concerning the Legislative Veto: Hearings Before the House Committee on Foreign Affairs, 98th Cong., 1st Sess., 52 (1983)(statement by Edward C. Schmults, Deputy Attorney General, Department of Justice)("In closing, I want to emphasize as strongly as possible that the executive branch will continue, as it has done in the past, to observe scrupulously the reporting and waiting features that are central to virtually all existing legislative veto devices.")

The informing function is especially important where Congress seeks to learn of the details of disposal of government property, for pursuant to the Article IV power, "Congress not only has a legislative power over the public domain, but it also exercises the power of the proprietor therein." United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915); See also, Butte City Water Co. v. Baker, 196

U.S. 119 (1905); Light v. United States, 220 U.S. 523 (1922); Sinclair v. United States, 279 U.S. 263 (1929). To discharge its unique function as proprietor of the public lands,[7] the Congress must know how the agencies are administering disposal of the public's property.[8]

The Congress requires by law, and receives, thousands of reports from the President, executive and independent agencies, boards and commissions every year. See, Reports To Be Made To Congress, Communication From the Clerk of the

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[7] If the statutory provision were an actual "legislative veto" it could be contended it is permissible consistent with the unique plenary authority of the Congress over public property. As the Supreme Court has stated, ". . . while the furthest reaches of the power granted by the Property Clause have not yet been definitely resolved, we have repeatedly observed that '[t]he power over the public land thus entrusted to Congress is without limitations.'" Kleppe v. New Mexico, 426 U.S. 529, 539 (1976)(citations omitted). The Article IV basis for Congressional authority in this area places actions respecting public lands and property outside the purview of the Article I procedural prescriptions discussed in Chadha. Since the provision at issue here does not purport to provide Congress with a "veto" authority, it is unnecessary for this Court to consider the constitutional questions concerning the applicability of Article I procedural requirements to actions under the Article IV territory and property clause.

[8] Several of the most well-known and extensive congressional investigations have involved efforts to obtain information concerning management or mismanagement of public lands and resources incident to the Art. IV Territory and Property Clause. Sinclair v. United States, 279 U.S. 263(1929)(Senate inquiry into fraudulent oil and gas leases on government property). In that instance, the Senate adopted a resolution calling upon the Secretary " . . . for information . . . [on] the entire subject of leases upon naval oil reserves with particular reference to the protection of the rights and equities of the government of the United States and the preservation of its natural resources . . . . " 279 U.S. at 287 quoting S.Res. 282, 67th Cong., 2d Sess. (1922).

U.S. House of Representatives Transmitting a List of Reports Which Is the Duty of Any Officer or Department To Be Made To Congress, Pursuant To Rule III, Clause 2, of the Rules of the House of Representatives, H.R.Doc. No. 11, 98th Cong., 1d Sess. (1983).[9/] The lower Court's ruling would transmute all of these report provisions into de facto legislative veto mechanisms.

In this connection, neither the informal consultations between GSA and the committee, nor the GSA regulations respecting consummation of negotiated sales, are inconsistent with the reporting function of section 484(e)(6).

To hold, as the Court below did, that because GSA personnel merely "discussed the case with the Chairman of the House Committee on Government Operations and a staff member," City of Alexandria v. United States, supra, Slip Op. at 10, renders subsequent decision making by the GSA unconstitutional is an unjustified expansion of Chadha. Alternatively, to say that because the "spectre of oversight hearings" hangs over agencies of government, the decisions made are null and void would require Congress to forego its oversight role entirely or subject every government decision

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[9/] Copies of this list are being lodged with the Court to demonstrate to the Court the broad sweep of the lower Court's theory.

to post hoc challenge on ground of congressional interference.[10/] Goland v. CIA, 607 F.2d 339, 346 (D.C. Cir. 1979), cert. denied, 445 U.S. 927 (1980)("Congress exercises oversight authority over the various federal agencies, and thus has an undoubted interest in exchanging documents with those agencies to facilitate their proper functioning in accordance with Congress' originating intent").

The legislative-executive consultations engaged in by the GSA and the committee are part and parcel of the process of government repeatedly acknowledged as an appropriate and constitutional element of the relationship between coordinate branches.

10/ There is a line of cases, not cited to or relied upon below, which does require that adjudication decision making by agencies be made free from undue congressional influence. Pillsbury Co. v. FTC, 354 F.2d 952 (5th Cir. 1966); D.C. Federation of Civic Associations v. Volpe, 459 F.2d 1231, 1245-49 (D.C. Cir. 1971) cert. denied, 405 U.S. 1030 (1972) Koniag v. Andrus, 580 F.2d 601, 610-11 (D.C.Cir. 1978) cert. denied, 439 U.S. 1052. See also, Professional Air Traffic Controller Org. v. FLRA, 672 F.2d 109 (D.C.Cir. 1982)(rulemaking); Sierra Club v. Costle, 657 F.3d 298(D.C.Cir. 1981)(same). But those cases do not prohibit any and all contact between Congress and agencies. Rather "administrative agencies are expected to balance congressional pressure with pressure emanating from other sources. To hold otherwise would deprive the agency of legitimate sources of information and call into question the validity of nearly every controversial rulemaking." Id., 657 F.2d at 409-410. The Court did not identify the so-called Pillsbury doctrine as a source of its ruling, but to the extent it forms a basis for the Court's rationale that the congressional contacts constituted "interference" in GSA processes, that conclusion is not supported by these cases. As the courts have recognized, agency decisionmakers are "fully capable of withstanding incidental efforts, if any, by subcommittee members to influence its decision on the merits of the case." Gulf Oil Corp. v. FPC, 563 F.2d 588, 611 (3rd Cir. 1977).

> Still other examples may be found in the laws relating to the administration by the Secretary of the Navy of the naval petroleum reserves, which require consultation by him with the Armed Services Committees of the Congress before he takes certain types of action, such as entering into certain contracts relating to those reserves, starting condemnation proceedings, etc. (34 U.S.C. 524); and in the statute which requires the Joint Committee on Printing to give its approval before an executive agency may have certain types of printing work done outside of the Government Printing Office (44 U.S.C. 111).
>
> It cannot be questioned that the President in carrying out his Executive functions may consult with whom he pleases. The President frequently consults with congressional leaders, for example, on matters of legislative interest--even on matters which may be considered to be strictly within the foreign policy. There would appear to be no reason why the Executive may be given express statutory authority to communicate to the Congress his intention to perform a given Executive function unless the Congress by some stated means, indicates its disapproval.

Memorandum Re Constitutionality of Provisions in Proposed Reorganization Bills Now Pending in Congress (S.526 and H.R.2361, 81st Cong., 1st Sess.), reprinted in Reorganization Act of 1949, S.Rep. No. 232, 82st Cong., 1st Sess. 20 (1949) (emphasis added).11/

Indeed, informal contacts by Congress with agencies of government have become a part of the way in which oversight is conducted.

> Beyond the letter of the appropriation bills it writes, the Committee is expected to pursue its oversight tasks in nonstatutory ways . . . A third nonstatutory method of oversight involves the informal contact, face-to-face or written, between individual Committee members and the Committee staff, on the one hand, and the chief executives and budget officers of the

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11/ See also War Powers Resolution §§3,4(b), 50 U.S.C. §§1543, 1544(b) (requiring President to consult with and report to Congress before introducing American troops into hostilities); Crockett v. Reagan, 558 F.Supp. 893, 895 (D.D.C. 1982) aff'd. No. 82-2461 (D.C.Cir., issued November 18, 1983).

> executive agencies, on the other. It is expected that Appropriations Committee influence, like that of all House committees, should be wielded in fairly continuous personal communication with executive agency personnel.

R. Fenno, The Power of the Purse: Appropriations Politics In Congress, 18-19 (1966)(emphasis added).

The Chadha court ratified the reporting requirements imposed by Congress as a means of oversight and nothing in the decision can properly be construed as striking down provisions like section 484(e)(6). INS v. Chadha, 103 S.Ct. at 2776, N.9 and 2786 N.19.

The decision below should be reversed as erroneous to clarify that Chadha does not disturb the traditional and constitutional relationships between the branches to foster exchange and cooperation.[12/]

III. CONCLUSION

The decision of the Claims Court below should be reversed by the foregoing reasons.

12/ The Court below applied its erroneous interpretation of Chadha retroactively to a contract entered into in 1979, almost four years before the Supreme Court's announcement of the decision.

The Court should decline to apply the Chadha decision retroactively, even if it concludes that the lowe court was correct in its analysis, to enable the Congress to address the significant issues raised by voiding a well-established procedure through remedial legislation. Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982).

Respectfully submitted,

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[Brief recess.]

The CHAIRMAN. The committee will come to order, please.

Our next witness is the Honorable Hamilton Fish, Jr.

Mr. Fish, we welcome your statement and we appreciate your appearance.

STATEMENT OF HON. HAMILTON FISH, JR., RANKING MINORITY MEMBER, HOUSE JUDICIARY COMMITTEE

Mr. FISH. Thank you very much, Mr. Chairman, and I ask unanimous consent that the full statement be made a part of the record.

The CHAIRMAN. Without objection, it will be received.

There has been a request that TV equipment be permitted in this room.

Is there objection?

If not, they may be permitted to proceed.

Mr. FISH. Mr. Chairman, in your letter to me, you asked that I address three specific questions.

They were: Why did Congress initiate the legislative veto? How does it impact on various areas of public policy? What alternatives to the legislative veto are available in light of the *Chadha* decision?

Allow me to start with why the legislative veto became so popular in Congress.

First, it reflected an institutional reaction to, and frustration with, the growing complexity of the Federal Government itself. Congress felt it was outmatched by the size, power and expertise of the executive branch. Here, I would also include the so-called fourth branch—the independent regulatory agencies.

Second, the veto was used by Congress as a means of retaining a voice in important foreign policy questions, such as that of the War Powers Act and the Arms Export Control Act.

Third, the veto was used as an adjunct of our constitutional appropriations and budget responsibilities.

On this last point, allow me to elaborate. How often, as Members of Congress, have we heard the frustrated complaint of our constituents about unreasonable or unrealistic bureaucratic regulations? People in all walks of life—education, business, medicine, farmers, senior citizens—continuously express dissatisfaction with overregulation in our society. Also, as legislators, we came to recognize that the intent of the laws which we had enacted was often altered, distorted or ignored in the "implementing" regulations.

The legislative veto or congressional veto represented an institutional effort by Congress to reverse this trend. While all veto provisions that were enacted into law were issue specific, there also has been strong congressional interest in legislation to establish a general veto procedure. This was done both in the context of omnibus regulatory reform legislation and in proposals such as that advocated by Congressman Elliott Levitas and others, taking the form of amendments to the Administrative Procedure Act. The broad support for a generally applicable veto procedure reflected and reflects a view, irrespective of politics or philosophy, that the growth of regulatory activity demands closer monitoring. Proponents of legislative veto have argued that administrative rulemaking—that is,

regulation writing—is in the nature of legislation. The legislative veto displayed a valid desire in Congress to recapture or recall a portion of the power delegated.

Perhaps the high-water mark of support for a generally applicable veto procedure in the House of Representatives came in 1976, during the 94th Congress. At that time, the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee gave the congressional veto idea very thorough consideration. Extensive hearings were held over a 2-month period. The subcommittee heard from congressional and administration witnesses, constitutional legal scholars, interested private organizations, and members of two State legislative committees which conduct such a review of regulations.

The result of these deliberations was a clean bill—H.R. 12048. It would have applied the congressional review procedure to all rules and regulations issued by agencies subject to the provisions of the Administrative Procedure Act, 5 U.S.C. 551-559. Under the key procedure of the bill, either House could adopt a concurrent resolution disapproving a proposed rule or regulation within 60 calendar days after its promulgation and prior to its going into effect. Then, unless the second House acted in disagreement with the action of the first House within 30 days thereafter, the regulation was disapproved and did not go into effect.

Now, Mr. Chairman, H.R. 12048 would fall under the *Chadha* decision, but I mention it because it demonstrates the strong House support for the concept.

This Administrative Rule Making and Reform Act of 1976 was considered in the House, under suspension of the rules, on September 21, 1976. On that day 265 Members voted "aye" and 135 voted "no." The measure failed to get a two-thirds vote, by just one vote. This historic footnote demonstrates the broad, bipartisan support for the veto that had occurred.

As this example demonstrates, the House Judiciary Committee has been in the forefront on this issue for some years. Since our jurisdiction extends to the Administrative Procedure Act and the various regulatory reform proposals, we have spent extensive amounts of time analyzing this problem. At the same time, we are affected by the *Chadha* decision in a more specific way. Three of the vetoes invalidated by the *Chadha* ruling are contained in laws directly under our jurisdiction. These are the National Emergencies Act—Public Law 94-412—and two distinct provisions in the Immigration and Nationality Act—Public Laws 82-414 and 84-316.

The *Chadha* decision has called a halt to use of the veto as a legislative shortcut for reaching otherwise valid congressional goals.

Now, to address your third question—what specifically are our options or alternatives?

Well, as with any ruling as to unconstitutionality, a logical first suggestion is a constitutional amendment. Proposed constitutional amendments authorizing one-House vetoes of regulations have been introduced both in the House [H.J. Res. 313—Congressman Jacobs] and in the Senate [S.J. Res. 135—Senator DeConcini]. Constitutional amendments, of course, are referred to the Committee on the Judiciary. Frankly, however, I do not view this option as either advisable or politically practical. The constitutional amend-

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ment process is complicated and time consuming. We have other alternatives available to us that are preferable both in terms of time and temperate response.

Another more viable option is presented to us by the severability issue which is not universally resolved by *Chadha.*

With the large number of laws containing veto provisions, the obvious question is what happens to the remaining provisions of these laws. If Congress does not act specifically to repeal the various veto provisions from these statutes, then the Federal courts will be left to decide which statutes stand and which will fall. Whether or not a particular statute contains a boilerplate severability clause, does not alone dispose of the question. On a case-by-case analysis, the courts will be left to determine whether or not Congress would have enacted the overall statute itself, with or without a legislative veto provision. *Buckley* v. *Valeo,* 424 U. S. 1, 108 (1976). As the Court states in the majority opinion this is, at best, an elusive inquiry. This elusive chase after legislative history could result in confusing and mixed results. In my view, each standing committee of the House should undertake a formal review of those statutes within its jurisdiction and make a recommendation to the whole House regarding the remaining portion of those laws.

Should what is left of the law remain on the books and, second, should the statute be amended to incorporate a review procedure meeting the bicameral requirements of *Chadha?*

This should be undertaken promptly and irrespective of whether other responsive options are explored. We should not, by inaction, leave the severability question on many important laws—such as War Powers and Impoundment Control—solely in the hands of the courts.

The other option, to which I have already alluded, is the report and wait approach advocated by Senator Levin and others. In footnote 9, the Court appears to look with favor on the so-called report and wait approach upheld in *Sibbach* v. *Wilson,* 312 U.S. 1 (1941). Under this approach, Congress does not unilaterally veto roles. Rather, the effectiveness of administrative action is delayed so as to give Congress the opportunity to review the rules before they become effective. Congress can then pass legislation to bar—or further delay—the rules from going into effect if they are found objectionable.

There is precedent for this. This is the exact approach taken in the so-called Roles Enabling Acts, and statutes that come out of the Judiciary Committee.

This mechanism is fully consistent with the bicameral mandate of the *Chadha* decision. Congress by law can delay the effective date of regulations or other forms of administrative action.

Other options also come to mind. In the past, Members of this House have urged that Congress set aside one session of Congress, or an entire Congress, to reexamine existing laws, and this idea should come as a very familiar one to this committee as it was the idea of our former colleague, former chairman of the Rules Committee.

No one argues that overdelegation has, in large part, contributed to the attractiveness of the legislative veto mechanism. Perhaps

now is the time for a genuine oversight Congress that, aside from the essential budget and appropriations items, takes a critical look backward at what is already on the books. Most committees would have more than enough material to review, and hopefully, needed revisions and repeals would result. What I am suggesting is analogous to the theory that prompted and continues to prompt support for sunset legislation. It is an idea even more worthwhile in light of *Chadha*.

Another idea deserving of consideration is contained in the Regulatory Oversight and Control Act of 1983 [H.R. 3939], sponsored by our distinguished colleague, Trent Lott. I am a cosponsor of this measure, which is currently pending in both the Rules Committee and the Judiciary Committee. H.R. 3939 contains variations on many of the concepts contained in previous regulatory reform bills. This includes: First, requiring a cost-benefit analysis of major rules—a defined term in the bill; second, a semiannual regulatory agenda of proposed rules; third, mandatory agency review of existing rules; and fourth, a modified Bumpers amendment.

But, in the context of our discussion, the most interesting provision in H.R. 3939 is contained in section 201. It states that no major rule can take effect unless Congress adopts a joint resolution of approval within 90 days after its transmittal by the relevant agency. This variation on the report and wait procedure, mandates an affirmative act by the Congress before a particular regulation can go into effect. Usually, Congress must act to stop a regulation or other administrative decision.

This approach merits close consideration for two principal reasons. First, while most major rules present important policy choices, the average annual number of such rules is not large. Estimates are that, on the average, the Federal agencies promulgate less than 100 major rules a year. Thus, Congress and its various committees would not be seriously overburdened by this new workload. Second, the burden of proof in justifying the statutory authority and need for a specific major regulation would be placed squarely on the agency. Congress would have to be convinced of its merits or else the regulation simply would not take legal effect. This idea deserves further inquiry by both this committee and the Committee on the Judiciary.

Finally, we can just do a better job as legislators. Better, more exacting drafting of statutes is demanded. Broad delegations of power should be discouraged or carefully considered. We should become even more aggressive in implementing our constitutional taxation and appropriations responsibilities. Oversight is a much discussed element of our role—but all too often it is superficial in nature and lacks followup. Quite aside from the availability of the veto, and substitute mechanisms that must pass constitutional muster, we already have in place the powers to achieve parity in the separation of powers struggle.

This completes my prepared remarks.

Again, thank you for the opportunity to share my views on this important subject.

I would be happy to try and answer any questions you may have.

[Prepared statement of Hon. Hamilton Fish, Jr., follows:]

PREPARED STATEMENT OF HON. HAMILTON FISH, JR., RANKING MINORITY MEMBER, HOUSE JUDICIARY COMMITTEE

Thank you, Mr. Chairman, I appreciate this opportunity to testify on the legislative veto concept and discuss the issue of how Congress ought properly respond to the recent *Chadha* decision.

The "legislative veto," or "Congressional veto" as it has sometimes been called, is not a new idea. It has been the source of controversy and conflict between the legislative and executive branches dating back to the New Deal era. Its use can be traced to 1932—with enactment of the 1933 Fiscal Appropriation bill. Furthermore, the idea is not unique to the Federal level of government, nor even to the United States.

I am advised that some thirty-four State legislatures use some form of a regulations review procedure. Some, but not all of these, permit the repeal of regulations by the legislature or a committee of the legislature. Great Britian, Australia, and other countries have also utilized procedures analogous to the legislative veto. But, of course, in parliamentary systems of government the separation of powers principle is not present. Thus, the constitutional infirmities relied on by the Supreme Court in *Chadha* are not present in those countries.

Since 1932 some 210 different statutes, utilizing some form of Congressional review, have been enacted into law. For many years, the most notable Congressional review procedure was that contained in the Reorganization Act of 1935. It required the President to transmit to Congress any plans for the transfer, abolition, consolidation, or coordination of executive branch agencies or functions. Either House of Congress, then, had sixty days to disapprove the proposed reorganization plan.

The use of the legislative veto device by Congress has greatly intensified in recent years. Of the 210 provisions that existed prior to *Chadha* more than one-half of these were adopted since 1970. Nearly one-half in the last five years. Some of the more prominent examples of recently enacted statutes containing a Congressional veto or Committee veto feature, include: (1) the Congressional Budget Impoundment Control Act of 1974 (Public Law 93-334); (2) the War Powers Act (Public Law 93-148); (3) the Natural Gas Policy Act of 1978 (Public Law 95-621); (4) the Federal Trade Commission Improvements Act of 1980 (Public Law 95-252); and (5) the Nuclear Waste Policy Act of 1982 (Public Law 97-425).

The veto, as we know, has manifested itself in different forms. The most common of these being a one-House veto, allowing for disapproval by passage of a simple resolution. Also frequently used was the two-House veto, requiring disapproval through a concurrent resolution. Variations included the committee veto approach and mechanisms requiring affirmative approval (as opposed to disapproval). The *Chadha* decision found all of the above forms to be constitutionally lacking, except approval requirements which utilize a joint resolution (which is "presented" to the President).

What are the reasons why the legislative veto became so popular in Congress? First, it reflected an institutional reaction to, and frustration with, the growing complexity of the Federal Government itself. Congress felt it was outmatched by the size, power and expertise of the executive branch. Here, I would also include the so-called "Fourth Branch"—the independent regulatory agencies. Second, the veto was used by Congress as a means of retaining a voice in important foreign policy questions (the War Powers Act and the Arms Export Control Act are good examples). Third, the veto was used as an adjunct of our Constitutional appropriations and budget responsibilities. Simply put, the veto has been used as a means of demonstrating the desire to arrest the growth of government spending. Finally, with those vetos focusing on final rules or regulations, it allowed Congress to re-claim a portion of the power it had too broadly delegated to agencies in organic statutes.

On this last point, allow me to elaborate. How often as Members of Congress, have we heard the frustrated complaints of our constituents about unreasonable or unrealistic bureaucratic regulations? People in all walks of life—education, business, medicine, farmers, senior citizens—continuously express dissatisfaction with over-regulation in our society. Also, as legislators, we came to recognize that the intent of the laws which we had enacted was often altered, distorted, or ignored in the "implementing" regulations.

The legislative veto or Congressional veto represented an institutional effort by Congress to reverse this trend. While all the veto provisions that were enacted into law were issue specific, there also has been strong Congressional interest in legislation to establish a general veto procedure. This was done both in the context of omnibus regulatory reform legislation and in proposals such as that advocated by Congressman Elliott Levitas and others, taking the form of amendments to the Admin-

istrative Procedure Act. The broad support for a generally applicable veto procedure reflected and reflects a view, irrespective of politics or philosophy, that the growth of regulatory activity demands closer monitoring. Proponents of legislative veto have argued that administrative rulemaking—i.e., regulation writing—is in the nature of legislation. The legislative veto displayed a valid desire in Congress to recapture or recall a portion of the power delegated.

Perhaps the high-water mark of support for a generally applicable veto procedure in the House of Representatives came in 1976, during the 94th Congress. At that time, the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee gave the Congressional veto idea very thorough consideration. Extensive hearings were held over a two-month period. The Subcommittee heard from Congressional and Administration witnesses, Constitutional-legal scholars, interested private organizations, and members of two State legislative committees which conduct such a review of regulations.

The result of these deliberations was a clean bill—H.R. 12048. It would have applied the Congessional review procedure to all rules and regulations issued by agencies subject to the provisions of the Administrative Procedure Act. 5 U.S.C. Sections 551–559. Under the key procedure of the bill, either House could adopt a concurrent resolution disapproving a proposed rule or regulation within 60 calendar days after its promulgation and prior to its going into effect. Then, unless the second House acted in disagreement with the action of the first House within 30 days thereafter, the regulation was disapproved and did not go into effect.

This "Administrative Rule Making and Reform Act of 1976" was considered in the House, under suspension of the rules, on September 21, 1976. On that day 265 Members voted "aye" and 135 voted "no". The measure failed to get a two thirds vote, by just *one* vote! This historic footnote demonstrates the broad, bipartisan support for the veto that had occurred.

As this example demonstrates, the House Judiciary Committee has been in the forefront on this issue for some years. Since our jurisdiction extends to the Administrative Procedure Act and the various regulatory reform proposals, we have spent extensive amounts of time analyzing this problem. At the same time, we are affected by *Chadha* decision in a more specific way. Three of the vetoes invalidated by the *Chadha* ruling are contained in laws directly under our jurisdiction. These are the National Emergencies Act (Public Law 94–412) and two distinct provisions in the Immigration and Nationality Act (Public Laws 82–414 and 85–316).

The *Chadha* decision has called a halt to use of the veto as a legislative shortcut for reaching otherwise valid congressional goals. The precise issue in *Chadha* was the constitutionality of section 244(c)(2) of the Immigration and Nationality Act of 1952, providing for a one-House veto of agency suspensions of deportation. But while the case dealt with a particular form of the one-House veto, the opinion is clearly broad enough to negate the two-House veto as well.

The Constitution, the Court said, provided for only one legislative process—passage of legislation by both the House and Senate and "presentment" to the President for his approval or disapproval. The Court took note of the simple but inescapable fact that Article I of the Constitution requires that bills must be passed by both Houses of Congress and presented to the President of the United States.

I cannot say that I was surprised by the Court's decision; nor can I fault the Court's reasoning. While the short-term consequences of this ruling have caused some discomfort, I do not see the dramatic alteration of the balance of power between the two branches that some in the media instantly proclaimed. Hearings such as this reflect a calm, responsible Congress—seeking to explore options, alternatives and new approaches. But, clearly, if Congress is to reclaim control over the bureaucracy it has created, and cut back on the vast delegations of authority that we have granted, then it must now do so through the normal legislative process.

Before leaving the *Chadha* holding itself, two other important aspects of the case should be noted. These are the severability question and the apparent constitutional validity of the "report and wait" approach.

With the large number of laws containing veto provisions, the obvious question is what happens to the remaining provisions of these laws. If Congress does not act specifically to repeal the various veto provisions from these statutes, then the Federal courts will be left to decide which statutes stand and which will fall. Whether or not a particular statute contains a boilerplate severability clause, does not alone dispose of the question. On a case-by-case analysis, the courts will be left to determine whether or not Congress would have enacted the overall statute itself, with or without a legislative veto provision. *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976). As the Court states in the majority opinion this is, at best, an "elusive inquiry." This "elusive" chase after legislative history could result in confusing and mixed results. In my

view, each standing Committee of the House should undertake a formal review of those statutes within its jurisdiction and make a recommendation to the whole House regarding the remaining portion of those laws.

A footnote in the majority decision points to another alternative available to Congress, fully consistent with the bicameral action requirement. In footnote 9, the Court appears to look with favor on the so-called "report and wait" approach upheld in *Sibbach* v. *Wilson*, 312 U.S. 1 (1941). Under this approach, Congress does not unilaterally veto rules. Rather, the effectiveness of administrative action is delayed so as to give Congress the opportunity to review the rules before they become effective. Congress can then pass legislation to bar (or further delay) the rules from going into effect if they are found objectionable. This is the exact approach taken in the so-called "Rules Enabling Acts"—28 U.S.C. 2072 (Federal Rules of Civil Procedure); 18 U.S.C. 3771 (Federal Rules of Criminal Procedure); and 28 U.S.C. 2076 (Federal Rules of Evidence).

Senator Levin has introduced legislation (S. 1650) that would institutionalize this report and wait procedure. However, some including the Justice Department caution that even the "report and wait" approach becomes constitutionally suspect if the bill contains procedures allowing a Committee, one or both Houses of Congress to delay the effective date of administrative action. An unencumbered report and wait provision is contained in H.R. 2327—an omnibus regulatory reform bill introduced by Congressman Sam Hall, which is now pending in the House Judiciary Committee.

Unlike some of my colleagues, I do not believe that the *Chadha* decision inevitably means a weaker Congress. What it should mean is that Congress will be much more cautious and explicit in enacting future legislation. Broad delegations of power to the agencies should no longer be the pattern. I feel confident that Congress will react to this decision by becoming a more precise legislative body, more attentive to the detail of legislative language than ever before.

What, specifically, are our options? Well, as with any ruling as to unconstitutionality, a logical first suggestion is a constitutional amendment. Proposed constitutional amendments authorizing one-House vetoes of regulations have been introduced both in the House (H.J. Res. 313—Congressman Jacobs) and in the Senate (S.J. Res. 135—Senator DeConcini). Constitutional amendments, of course, are referred to the Committee on the Judiciary. Frankly, however, I do not view this option as either advisable or politically practical. The constitutional amendment process is complicated and time consuming We have other alternatives available to us that rare preferable both in terms of time and temperate response.

I have already discussed two other such options—both of which I believe have substantial merit. I refer, first, to an organized review of existing statutes containing invalid veto provisions by the various committees of jurisdiction. This should be undertaken promptly and irrespective of whether other responsive options are explored. We should not, by inaction, leave the severability question on many important laws (such as War Powers and Impoundment Control) solely in the hands of the courts.

The other option, to which I have already alluded, is the "report and wait" approach advocated by Senator Levin and others. This mechanism is fully consistent with the bicameral mandate of the *Chadha* decision. Congress by law can delay the effective date of regulations or other forms of administrative action. Once the proposed regulation or action is made known and studied, we can then pass legislation to prevent or further delay its implementaion. Such legislation would have to pass both Houses and be presented to the President. If we choose this route we must be careful not to grant powers solely to committees or solely to Congress that would be inconsistent with the full legislative process requirements of *Chadha*. So, for example, a particular committee could not be allowed to extend the review period. Final disapproval or extension could not occur but through bicameral action and presentment to the President.

Other options also come to mind. In the past, Members of this House have urged that Congress set aside one session of Congress, or an entire Congress, to re-examine existing laws. No one argues that over-delegation has, in large part, contributed to the attractiveness of the legislative veto mechanism. Perhaps now is the time for a genuine "oversight Congress" that, aside from the essential budget and appropriations items, takes a critical look backward at what is already on the books. Most committees would have more than enough material to review, and, hopefully, needed revisions and repeals would result. What I am suggesting is analogous to the theory that prompted and continues to prompt support for sunset legislation. It is an idea even more worthwhile in light of *Chadha*.

Another idea deserving of consideration is contained in the "Regulatory Oversight and Control Act of 1983" (H.R. 3939), sponsored by our distinguished colleague, Trent Lott. I am a co-sponsor of this measure, which is currently pending in both the Rules Committee and the Judiciary Committee. H.R. 3939 contains variations on many of the concepts contained in previous regulatory reform bills. This includes: (1) requiring a cost-benefit analysis of "major rules" (a defined term in the bill); (2) a semi-annual regulatory agenda of proposed rules; (3) mandatory agency review of existing rules; and (4) a modified Bumpers amendment.

But, in the context of our discussion, the most interesting provision in H.R. 3939 is contained in section 201. It states that no major rule can take effect unless Congress adopts a joint resolution of approval within 90 days after its transmittal by the relevant agency. This variation on the "report and wait" procedure, mandates an affirmative act by the Congress before a particular regulation can go into effect. (Usually, Congress must act to stop a regulation or other administrative decision.)

This approach merits close consideration for two principal reasons. First, while most major rules present important policy choices, the average annual number of such rules is not large. Estimates are that, on the average, the Federal agencies promulgate less than 100 major rules a year. Thus, Congress and its various committees would not be seriously overburdened by this new workload. Second, the burden of proof in justifying the statutory authority and need for a specific major regulation would be placed squarely on the agency. Congress would have to be convinced of its merits or else the regulation simply would not take legal effect. This idea deserves further inquiry by both this Committee and the Committee on the Judiciary.

Finally, we can just do a better job as legislators. Better, more exacting drafting of statutes is demanded. Broad delegations of power should be discouraged or carefully considered. We should become even more aggressive in implementing our constitutional taxation and appropriations responsibilities. Oversight is a much discussed element of our role—but all too often it is superficial in nature and lacks follow-up. Quite aside from the availability of the veto, and substitute mechanisms that must pass constitutional muster, we already have in place the powers to achieve parity in the separation of powers struggle.

This completes my prepared remarks. Again, thank you for the opportunity to share my views on this important subject. I would be happy to try and answer any questions you may have.

The CHAIRMAN. Thank you, Mr. Fish, for your excellent statement.

Are there any questions, Mr. Derrick?

Mr. DERRICK. I have no questions.

The CHAIRMAN. Mr. Frost?

Mr. FROST. No questions.

The CHAIRMAN. Mr. Wheat?

Mr. WHEAT. No questions.

The CHAIRMAN. I think you have made a very careful general survey of this.

Do you feel in general that if we can find an appropriate technique to do it that the Congress should preserve the authority to execute a legislative veto in certain cases?

Mr. FISH. As I indicated, I think what is permissible under the *Chadha* decision is virtually an invitation to seriously consider the report and wait approach that is already in matters before our committee.

For example, under the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, the Chief Justice will make the decision. There is a layover in our committee for a number of days to allow us the chance to make any change that appears desirable.

That is clearly within the *Chadha*.

I think my point was that what we do not need to do is wait for anything to happen. We should have every one of our committees examine those 200-odd bills that are within the jurisdiction of each

and to make the decision in Congress, not have it made in the courts as to whether that legislation stands or falls, despite the principles of the severability clause.

The CHAIRMAN. I think that is a very wise proposal.

If Congress would take back those bills that it has exerted legislative vetoes in and determine whether or not it wishes to reenact that legislation without the legislative veto, of course, they could do so.

If they choose to preserve the legislative veto, then it would depend on what way we found by which we could do it legally or use the joint resolution technique.

Is it your opinion that whether it uses the joint resolution technique or some other that may be approved, Congress will continue to exercise a certain amount of veto power?

Mr. FISH. I do, Mr. Chairman.

I approve of the *Chadha* decision. I think it is very solid constitutional law. I do not think it will hurt us at all to follow the procedures of action by both Houses and present them to the President or to take advantage of the latitude in *Chadha* to adopt a wait and see provision that will give us an opportunity to forestall the effectiveness of regulations until we do it.

The CHAIRMAN. Thank you very much, Mr. Fish.

Thank you for your excellent statement.

Our next witness is the Honorable Marion Barry, the distinguished Mayor of the District of Columbia.

Mr. Barry, we are pleased to have you here today.

Would you give us the names of those who accompany you?

STATEMENT OF HON. MARION BARRY, JR., MAYOR, DISTRICT OF COLUMBIA, ACCOMPANIED BY PAULINE SCHNEIDER AND INEZ SMITH REID

Mayor BARRY. Mr. Chairman, I would, first of all, like to express my great delight and pleasure in being asked to appear before this committee and to thank you, Mr. Chairman, for your strong support for the District of Columbia and all we are trying to do.

With me today is Inez Smith Reid who is the Corporation Counsel for the District of Columbia, and Pauline Schneider, who is our Director of Government Regulations.

The CHAIRMAN. We are pleased to have you here.

Mayor BARRY. Mr. Chairman, I would ask that my entire statement be entered in the record in its entirety.

The CHAIRMAN. Without objection, it will be received.

Mayor BARRY. I will try to give highlights of my statement.

Mr. Chairman and members of the Rules Committee, thank you for this opportunity to testify today on the impact of the Supreme Court decision, commonly called the *Chadha* decision in the District of Columbia.

You have heard testimony today from various committee chairmen as to their views on that decision which struck down as unconstitutional a one-House veto legislative scheme. Members have also discussed the effect of the decision on their committees' jurisdictions and their recommendations for alternatives to the legislative veto process.

In a real sense, Congress, as an institution, has not taken any formal position in response to the *Chadha* decision. Indeed, it has continued to enact legislation which contains various legislative veto mechanisms. Since the decision was handed down in June 1983, Congress has enacted at least 17 veto provisions in five separate laws.

Because the District of Columbia is the only State with a charter that is also a Federal statute which is tainted by *Chadha*, the situation for us is much different and the impact is fundamental to the governance of the city itself. Our need for a resolution is urgent.

We thought we had a resolution for this matter and that the House of Representatives had passed a measure which, in our view, was sufficient to take care of the *Chadha* problem. That was H.R. 3932 which has passed the House of Representatives. We thought we were on our way to resolution in the Senate but, unfortunately, the Senate Subcommittee on Government Operations of the District put out a bill on it at the last minute with objection from the Department of Justice to the bill in the sense that the Department of Justice has had some concerns about the titles 22, 23, and 24 of the criminal code of the District of Columbia.

Mr. Chairman, as you very well know, the Congress acts in three ways as it affects the District of Columbia.

First, amendments to the D.C. Charter are required to be approved affirmatively, concurrent resolution of both Houses of Congress. Second, acts passed by the Council of the District of Columbia and approved by the Mayor are subject to resolutions of disapproval by one or both Houses; criminal code legislation needs to be disapproved by only one House. Third, the statute gives Congress authority to control by resolutions the President's exercise of emergency authority over the metropolitan police force. Of these three provisions, only the second has ever been used by Congress. In using its power, Congress has exercised its veto over acts of the District government only twice in reviewing the more than 700 laws enacted by the city since home rule.

Mr. Chairman, it is the District's position that *Chadha* does not apply to the District of Columbia. However, we find ourselves in a situation where the District's bond counsel is unwilling and unable to give the District an unqualified opinion on the validity of our debt obligations.

This precludes our entry into the bond market.

As a result of this, nearly $400 million in potential bonds are tied up; about $150 million in short-term borrowings and revenue participation notes, and housing and home finance notes; some $50 million to $100 million in industrial revenue bonds.

Previously, the District of Columbia could borrow with long-term debt from the U.S. Treasury. This year, we are borrowing $115 million at Treasury rates.

It would be our desire to go to the bond market in 1985 as any other city would do at substantially lower interest rates, but all of this is tied up because of bond counsel's analysis that *Chadha* does apply to the District, that there is some doubt, and bond counsel is being cautious to look out for the bondholders who have indicated their desire to have this settled by Congress.

Also, Mr. Chairman, we are now being faced with lawsuits challenging the Council's authority to enact certain pieces of legislation based on the legislative veto provisions, particularly in the Criminal Code area.

For instance, in the case of *Eileen Dimond, et al.,* v. *District of Columbia,* the plaintiffs seek to strike down the District's no-fault insurance law by charging that the Home Rule Act itself is unconstitutional since it embodies one-House and two-House legislative veto mechanisms. Two court cases challenge the Council's enactment of the White Collar Crime Act and two other cases attack the validity of changes under D.C. Code sections amended by the Council in the Sexual Assault Reform Act. I might note that recently, Judge Donald Smith indicated that he would not hear anymore sexual assault cases until the question of *Chadha's* application to the District is resolved. While four of the five pending cases deal with criminal issues, it can be expected that there will be additional litigation on both civil and criminal matters.

Therefore, *Chadha* is affecting the District of Columbia. We have been negotiating with the Department of Justice, trying to get some understanding as to why the Criminal Code should be looked at differently than other legislation. In a sense, they are proposing that any changes to the Criminal Code by the council and signed by the mayor be affirmatively approved by the Congress, by both Houses of Congress, and signed by the President.

We think this is a retrogression back to pre-home-rule days when the citizens of the District of Columbia, all of whom pay millions of dollars in Federal taxes, all of whom go to war, to have this done.

In closing, we think this hearing is very relevant, and we hope that this committee will assist us in any way it can, in helping us to influence the Department of Justice and others that now is the time to come to a conclusion of this matter.

Finally, Mr. Chairman, I would like to express our support and appreciation for your support for the District in general, and for senior citizens and others, and we particularly appreciate the opportunity to be here today.

[Mr. Barry's prepared statement, with other material, follow:]

STATEMENT OF
THE HONORABLE MARION BARRY, JR.
MAYOR OF THE DISTRICT OF COLUMBIA
BEFORE THE
COMMITTEE ON RULES

FEBRUARY 23, 1983

MR. CHAIRMAN, MEMBERS OF THE RULES COMMITTEE, THANK YOU FOR THIS OPPORTUNITY TO TESTIFY TODAY ON THE IMPACT OF THE SUPREME COURT DECISION, INS. v. CHADHA, 103 S. CT. 2746, ON THE DISTRICT OF COLUMBIA.

YOU HAVE HEARD TESTIMONY TODAY FROM VARIOUS COMMITTEE CHAIRMEN AS TO THEIR VIEWS ON THAT DECISION WHICH STRUCK DOWN AS UNCONSTITUTIONAL A ONE-HOUSE VETO LEGISLATIVE SCHEME. MEMBERS HAVE ALSO DISCUSSED THE EFFECT OF THE DECISION ON THEIR COMMITTEES' JURSIDCTIONS AND THEIR RECOMMENDATIONS FOR ALTERNATIVES TO THE LEGISLATIVE VETO PROCESS.

IN A REAL SENSE, CONGRESS, AS AN INSTITUTION, HAS NOT TAKEN ANY FORMAL POSITION IN RESPONSE TO THE CHADHA DECISION. INDEED, IT HAS CONTINUED TO ENACT LEGISLATION WHICH CONTAINS VARIOUS LEGISLATIVE VETO MECHANISMS. SINCE THE DECISION WAS HANDED DOWN IN JUNE, 1983, CONGRESS HAS ENACTED AT LEAST 17 VETO PROVISIONS IN FIVE SEPARATE LAWS.

BECAUSE THE DISTRICT OF COLUMBIA IS THE ONLY "STATE" WITH A CHARTER THAT IS ALSO A FEDERAL STATUTE WHICH IS TAINTED BY CHADHA, THE SITUATION FOR US IS MUCH DIFFERENT AND THE IMPACT IS FUNDAMENTAL TO THE GOVERNANCE OF THE CITY ITSELF. OUR NEED FOR A RESOLUTION IS URGENT. WHAT SEEMED INITIALLY TO BE A LEGISLATIVE v. EXECUTIVE CLASH HAS HAD A PROFOUND EFFECT ON THE CITY BECAUSE OF THE BREADTH OF THE DECISION. SPECIFICALLY, OUR BOND COUNSEL ARE UNABLE TO GIVE THE DISTRICT AN UNQUALIFIED OPINION ON THE VALIDITY OF ITS DEBT OBLIGATIONS, THEREBY PRECLUDING OUR ENTRY INTO THE BOND MARKET AND SEVERLY RESTRICTING

OUR ABILITY TO UNDERTAKE ESSENTIAL FINANCIAL ACTIVITIES. INDEED, THE CONSTITUTIONALITY OF THE HOME RULE ACT ITSELF HAS BEEN CALLED INTO QUESTION IN VARIOUS LAWSUITS CHALLENGING COUNCIL PASSED LEGISLATION.

FOR INSTANCE, IN THE CASE OF EILEEN DIMOND, ET. AL. v. DISTRICT OF COLUMBIA, THE PLAINTIFFS SEEK TO STRIKE DOWN THE DISTRICT'S NO FAULT INSURANCE LAW BY CHARGING THAT THE HOME RULE ACT ITSELF IS UNCONSTITUTIONAL SINCE IT EMBODIES ONE HOUSE AND TWO HOUSE LEGISLATIVE VETO MECHANISMS. TWO COURT CASES CHALLENGE THE COUNCIL'S ENACTMENT OF THE WHITE COLLAR CRIME ACT AND TWO OTHER CASES ATTACK THE VALIDITY OF CHANGES UNDER D.C. CODE SECTIONS AMENDED BY THE COUNCIL IN THE SEXUAL ASSAULT REFORM ACT. I MIGHT NOTE THAT RECENTLY, JUDGE DONALD SMITH INDICATED THAT HE WOULD NOT HEAR ANY MORE SEXUAL ASSAULT CASES UNTIL THE QUESTION OF CHADHA'S APPLICATION TO THE DISTRICT IS RESOLVED. WHILE FOUR OF THE FIVE PENDING CASES DEAL WITH CRIMINAL ISSUES, IT CAN BE EXPECTED THAT THERE WILL BE ADDITIONAL LITIGATION ON BOTH CIVIL AND CRIMINAL MATTERS.

CHALLENGES TO THE HOME RULE ACT STEM FROM THE FACT THAT THE LEGISLATIVE VETO PROVISIONS OF THE DISTRICT OF COLUMBIA SELF-GOVERNMENT AND GOVERNMENTAL REORGANIZATION ACT WERE IDENTIFIED IN JUSTICE WHITE'S DISSENT IN INS. v. CHADHA AND BY THE DEPARTMENT OF JUSTICE AS CONSTITUTIONALLY SUSPECT LAWS. OUR HOME RULE ACT INCLUDES THREE CONGRESSIONAL VETO PROVISIONS. FIRST, AMENDMENTS TO THE D.C. CHARTER ARE REQUIRED TO BE APPROVED AFFIRMATIVELY BY CONCURRENT RESOLUTION OF BOTH HOUSES OF CONGRESS. SECOND, ACTS PASSED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA AND APPROVED BY THE MAYOR ARE SUBJECT TO RESOLUTIONS OF DISAPPROVAL BY ONE OR BOTH HOUSES; CRIMINAL CODE LEGISLATION NEEDS TO BE DISAPPROVED BY ONLY ONE HOUSE. THIRD, THE STATUTE GIVES CONGRESS AUTHORITY TO CONTROL BY RESOLUTIONS THE PRESIDENT'S EXERCISE OF EMERGENCY AUTHORITY OVER THE METROPOLITAN POLICE FORCE. OF THESE THREE PROVISIONS, ONLY THE SECOND HAS EVER BEEN USED BY CONGRESS. IN USING ITS POWER, CONGRESS HAS EXERCISED ITS VETO OVER ACTS OF THE DISTRICT GOVERNMENT ONLY TWICE IN REVIEWING THE MORE THAN 700 LAWS ENACTED BY THE CITY SINCE HOME RULE.

IN THE CHADHA DECISION, THE SUPREME COURT CONCLUDED THAT THE REQUIREMENT OF ARTICLE I, SECTION 7, OF THE CONSTITUTION, THAT BILLS BE PASSED BY BOTH HOUSES OF CONGRESS AND BE PRESENTED TO THE PRESIDENT FOR SIGNATURE HAS NOT BEEN COMPLIED WITH WHEN THE VETO MECHANISM WAS USED. SINCE DISAPPROVED DISTRICT OF COLUMBIA LEGISLATION IS NOT "PRESENTED" TO THE PRESIDENT, PRESUMABLY THE AGRUMENT IS THAT IT VIOLATES THE REQUIREMENTS OF ARTICLE I.

ALTHOUGH THERE IS CONSIDERABLE DEBATE AS TO WHETHER CHADHA APPLIES TO THE DISTRICT, CAUTION REQUIRED THAT THE CITY SEEK LEGISLATIVE CLARIFICATION OF THE QUESTIONS RAISED BY THE DECISION. THUS, IN SEPTEMBER 1983, LEGISLATION WAS INTRODUCED IN BOTH HOUSES OF CONGRESS TO CONVERT THE VETO PROVISIONS TO JOINT RESOLUTIONS OF DISAPPROVAL TO CONFORM WITH THE SUPREME COURT DECISION. LIKE LAWS, JOINT RESOLUTIONS MUST BE PASSED BY BOTH HOUSES OF CONGRESS AND PRESENTED TO THE PRESIDENT FOR SIGNATURE. THIS PROCESS WOULD SATISFY THE PROCEDURAL REQUIREMENTS OF ARTICLE I.

IN ADDITION, THE LEGISLATION CONTAINS A SEVERABILITY CLAUSE TO MAKE SUCH PRECAUTIONARY STEPS, AS THE PROPOSED LEGISLATION, UNNECESSARY IN THE FUTURE.

OUR EFFORTS TO PASS REMEDIAL LEGISLATION SEEM TO BE AT AN IMPASSE. H.R. 3932 WAS PASSED BY THE HOUSE OF REPRESENTATIVES IN OCTOBER. HOWEVER, S. 1858, ALTHOUGH REPORTED FROM A SUBCOMMITTEE TO THE COMMITTEE ON GOVERNMENTAL AFFAIRS, IS STILL PENDING BEFORE THE COMMITTEE. THE FULL COMMITTEE REFUSED TO ACT BECAUSE THE DEPARTMENT OF JUSTICE, ON NOVEMBER 15, 1983, IN A LETTER TO SENATOR WILLIAM V. ROTH, CHAIRMAN OF THE COMMITTEE, TOOK THE POSITION THAT ALL CRIMINAL CODE LEGISLATION ENACTED BY THE COUNCIL MUST BE AFFIRMATIVELY APPROVED BY CONGRESS. I HAVE APPENDED A COPY OF THIS LETTER AND OUR RESPONSE TO IT TO THIS TESTIMONY FOR YOUR INFORMATION.

BECAUSE OF THE CURRENT IMPASSE, THE CHADHA DECISION HAS OPENED THE DOOR OF OPPORTUNITY FOR THOSE WHO WISH TO SUBSTANTIVELY CHANGE THE PROCESS BY WHICH COUNCIL ACTS BECOME LAW. TO ACCEPT

THE DEPARTMENT OF JUSTICE'S POSITION WOULD BE A REVERSAL OF HOME RULE. WHILE IT IS TRUE THAT CONGRESS HAS PLENARY JURISDICTION WITH RESPECT TO THE DISTRICT OF COLUMBIA, CONGRESS HAS DELEGATED SUBSTANTIAL LEGISLATIVE AUTHORITY TO THE ELECTED GOVERNMENT OF THE CITY. MR. CHAIRMAN, THIS AUTHORITY HAS NOT BEEN ABUSED. IN FACT, OF MORE THAN 700 PIECES OF LEGISLATION PASSED BY THE COUNCIL, CONGRESS HAS EXERCISED ITS VETO ONLY TWICE.

THERE ARE A NUMBER OF PRACTICAL CONSEQUENCES OF THE POSSIBILITY THAT THE HOME RULE ACT COULD BE FOUND INVALID UNDER CHADHA. BECAUSE OF THE DECISION, THE CITY HAS BEEN SEVERELY HAMPERED IN UNDERTAKING ESSENTIAL FINANCIAL ACTIONS WHICH HAVE BEEN PLANNED FOR SOME TIME.

AS YOU PROBABLY KNOW, A PREREQUISITE FOR MARKETABILITY OF MUNICIPAL BONDS AND NOTES IS THE DELIVERY TO PROSPECTIVE PURCHASERS OF AN UNQUALIFIED LEGAL OPINION OF NATIONALLY RECOGNIZED BOND COUNSEL, STATING THAT THE CONTRACTUAL DEBT OBLIGATIONS OF THE ISSUER ARE VALID UNDER THE EXISTING LAW. IT IS THE VIEW OF THE DISTRICT'S BOND COUNSEL THAT THE LEGISLATIVE VETO PROVISIONS ARE PROBABLY SEVERABLE FROM THE REMAINDER OF THE HOME RULE ACT, BUT THAT AN ULTIMATE JUDICIAL DETERMINATION OF THE SEVERABILITY ISSUE CANNOT BE PREDICTED WITH SUFFICIENT CERTAINTY FOR THEM TO DELIVER THEIR UNQUALIFIED OPINION AT THIS TIME. OUR FINANCIAL ADVISOR INFORMS US THAT THE INABILITY TO SECURE AN UNQUALIFIED OPINION WOULD MAKE SUCH BONDS AND NOTES EFFECTIVELY UNMARKETABLE.

THE DISTRICT HAS WORKED DILIGENTLY TO ACHIEVE THE MUTUAL FEDERAL AND DISTRICT GOAL OF ESTABLISHING ON-GOING ACCESS TO MUNICIPAL MARKET FINANCING, AS CONTEMPLATED BY THE HOME RULE ACT. BORROWING IN THE MARKET WOULD PERMIT THE DISTRICT TO MORE EFFECTIVELY MANAGE ITS DEBT FINANCING, ACHIEVE LOWER OVERALL BORROWING COSTS AND CEASE INTERIM RELIANCE ON U.S. TREASURY FINANCING. WITHOUT THE REMEDY SOUGHT IN THE PROPOSED BILL, SUCH A TRANSITION WILL BE IMPOSSIBLE. OUR FINANCIAL ADVISOR AND BOND COUNSEL FURTHER ADVISE THAT WORK PRESENTLY WELL UNDERWAY ON SEVERAL BOND AND NOTE ISSUES SCHEDULED FOR THE FALL OF 1984 CANNOT BE SUCCESSFULLY COMPLETED UNLESS CORRECTIVE ACTION IS TAKEN.

LAWSUITS ARE PROLIFERATING AT A RAPID PACE AND SUBSTANTIAL STAFF RESOURCES ARE BEING UTILIZED TO DEFEND THE CITY AGAINST THE CONSTITUTIONAL ATTACKS AND TO PRESERVE THE LEGISLATION PASSED BY THE COUNCIL AND CONVICTIONS OF CRIMINALS OBTAINED UNDER DISTRICT ENACTED LAWS. I HESITATE TO SPECULATE ON THE POSSIBLE IMPACT ON THE DISTRICT GOVERNMENT SHOULD SOME LITIGANT BE SUCCESSFUL IN CHALLENGING THE VALIDITY OF THE HOME RULE ACT.

IN CONCLUSION, MR. CHAIRMAN, CHADHA HAS HAD A VERY SERIOUS IMPACT ON THE DISTRICT OF COLUMBIA ALREADY, AND THE FUTURE POTENTIAL IMPACT BOGGLES THE MIND. WE ARE COPING WITH IT AND ARE IN THE PROCESS OF TRYING TO FASHION AN APPROPRIATE LEGISLATIVE REMEDY. WE HOPE THAT WE CAN RESOLVE THIS ISSUE AND ELININATE ITS IMPACT ON THE DISTRICT IN THE VERY NEAR FUTURE.

THANK YOU.

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THE LEGISLATIVE VETO PROVISIONS OF THE DISTRICT OF COLUMBIA HOME RULE ACT IN THE WAKE OF INS v. CHADHA

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July 5, 1983

EXECUTIVE SUMMARY

The Supreme Court, in INS v. Chadha, No. 80-1832 (June 23, 1983), held unconstitutional the provision in the Immigration and Nationality Act by which one House of Congress could disapprove of the action of the Attorney General in suspending the deportation of an alien under the Act. The Court based its holding on the failure of the congressional action to comply with the requirements of bicameral legislative action and presentation to the President contained in Art. 1, §§ 1, 7 of the Constitution. It held that legislative action (with the exception of specifically enumerated instances in the Constitution) which has the effect of altering the legal rights, duties and relations of persons outside the legislative branch must be embodied in actions of both Houses which are then presented to the President for approval or veto, with override of the latter by vote of two-thirds of both Houses. This broad-based holding places in jeopardy all the various legislative veto mechanisms enacted over the years.

The District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act) contains several legislative veto provisons. The most prominent is the ability of both Houses of Congress to disapprove by concurrent resolution legislative actions of the D.C. City Council. Unless the legislative veto in this context can be justified by the broad power of Congress over the District of Columbia and the unique delegation of legislative authority contained in the Home Rule Act, the provision would seem constitutionally suspect in the wake of Chadha. It has been recognized that Congress possesses extensive powers over the District of Columbia and can legislate for the District much as a State does vis-a-vis its citizens and political sub-units. However, the clause in the Constitution delegating this power to Congress speaks in terms of "Legislation," Art. 1, § 8, cl. 17; the power over the District is included among the other powers granted to Congress in Art. 1, § 8 (and not identified in Chadha as an exception to the bicameralism/presentation requirements); and, the case law permitting a breadth to congressional power not available in other contexts, refers to substantive breadth with no indication that the constitutionally prescribed procedures for passing laws can be dispensed with when Congress acts with respect to the District of Columbia.

Assuming the legislative veto provisions are invalid, the question to be determined is whether those provisions can be severed from the other provisions of the Act. The Court in Chadha held the veto provision separable from the remainder of the Act. The INA, however, contains a separability provision which, in the Court's view raised a presumption that Congress did not intend the entire Act to fall if one provision was invalid. The Home Rule Act contains no separability provision. However, courts favor separability and, if the legislative history indicates that Congress would have enacted the valid provisions independently of the invalid provision, then the remainder of the Act will survive.

In the case of the legislative veto attached to Council actions, the veto emerged from the conference on the Home Rule bill as a compromise. The House bill did not contain such a provision; recent Senate bills had contained the veto although the provision had not been in the bills which passed the Senate in the twenty-year period prior to enactment of the Home Rule Act. The veto was deemed by proponents as a means to protect the federal interest and reserve congressional authority over the legislative power delegated to the District of Columbia. Opponents saw sufficient reservation of authority in Congress' ability to pass repealing legislation as well as numerous other controls and limitations into the Home Rule Act. The presence of these other limitations, the history of the use of the veto mechanism in Home Rule proposals, and the political climate as the time of passage of the Home Rule Act would seem to make it far from evident that Congress would have refused to delegate legislative powers to a District of Columbia legislature if told at the time that it could not include the legislative veto. Under such circumstances, a court, faced with a lawsuit challenging the veto in the Home Rule Act, arguably would sever the invalid veto provision from the underlying delegation of authority to the City Council.

THE LEGISLATIVE VETO PROVISIONS OF THE DISTRICT OF COLUMBIA HOME RULE ACT IN THE WAKE OF INS v. CHADHA

This report will discuss the ramifications of the Supreme Court's invalidation of the legislative veto in INS v. Chadha, No. 80-1832 (June 23, 1983) with respect to similar provisions in the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. 93-198, 87 Stat. 774 (1973); D.C. Code § 1-201 et seq. (1981) (hereinafter, Home Rule Act).

I.

Congress reserved to itself in several places in the Home Rule Act the authority to affect actions taken under the Act by means of a legislative veto.[1/] The primary provision is that enabling both Houses by concurrent resolution to disapprove most acts of the D.C. City Council. D.C. Code § 1-233(c)(1) (1981). Acts relating to criminal procedure, crimes, and treatment of prisoners, codified in Titles 22, 23 and 24 of the D.C. Code, are subject to one House disapproval. Id. § 1-233(c)(2). Amendments to the D.C. Charter (Title IV of the Home Rule Act) passed by the Council and ratified by popular referendum can take effect only if both Houses of Congress adopt a concurrent resolution approving the amendment. Id., § 1-205(b). Finally, the President's authority to direct the Mayor to provide for emergency use of the Metropolitan Police Force for federal purposes is subject to termination by adoption of a resolution by either House of Congress. Id., § 4-102(b), (c). Extension of the period of emergency use of the police may be granted by concurrent resolution of both Houses. Id., § 4-102(d). Thus, the Home Rule Act contains different types of legislative vetoes—one and two House disapproval, and two House approval--which operate on the D.C. City Council and the President.

The Court in Chadha struck down the provision in the Immigration and Nationality Act that authorized either House of Congress to reverse the decision of the Attorney General to suspend the deportation of a particular alien. 8 U.S.C. 1254(c)(2). It based its decision on the Presentment Clauses of the Constitution, Art. 1, § 7, cls. 2, 3, and the bicameralism requirement of Art. 1, § 1. These clauses, provide that "all legislative Powers herein granted

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1/ The term "legislative veto" is a shorthand phrase for the devices Congress uses to approve or disapprove executive action or agency regulations by means short of legislation, i.e., one or two House approval or disapproval, committee approval or disapproval.

shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives" and that "Every Bill" as well as "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary" shall be presented to the President for opportunity to approve or disapprove, the latter subject to override by two-thirds of both Houses of Congress. Slip. op. at 25. (Emphasis in original). These "[e]xplicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process." Id. In the Court's view, "the prescription for legislative action in Art. I, §§ 1, 7 represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." Slip op. 31. Whether actions taken by either House are the type of "legislative action" governed by the Presentment and bicameralism clauses," depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.'" (quoting S. Rept. No. 1335, 54th Cong., 2d Sess., 8 (1897)). With respect to the one-House veto of the Attorney General's decision to suspend Chadha's deportation, the Court held that "[i]n purporting to exercise power defined in Art. I, § 8, cl. 4 to 'establish an uniform rule of of Naturalization', the House took action that had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch." Slip op. at 32. Such action by one House of Congress was unconstitutional.

The Court's decision sweeps broadly, rendering suspect all the various legislative veto devices by which Congress has reserved authority to affect agency or presidential action by means short of passing legislation and presenting it to the President. Congressional actions that alter the rights, obligations or relations of persons outside the legislative sphere must comply with the procedures of Art. 1 governing legislation. The Court pointed to the specific and precisely defined exceptions in the Constitution whereby bicameralism and presentment were dispensed with: impeachment, Senate advice and consent to presidential appointments, Senate ratification of treaties, and determination by either House of specified internal matters. The latter internal authority, according to the Court, "only empowers Congress to bind itself and is noteworthy only insofar as it further indicates the Framers' intent that Congress not act in any legally

binding manner outside a closely circumscribed legislative arena, except in specific and enumerated instances." Slip op. at 35 n. 20.

The legislative veto provisions in the Home Rule Act would seem to be embraced by the broad constitutional prescriptions of Chadha. It might be argued that Congress, in enacting the Home Rule Act, was acting under unique constitutional powers over the District of Columbia; that the delegations of authority were not to executive branch agencies or officials, but to the congressionally established legislative body of the District of Columbia, a unique entity over which Congress exercises plenary authority much like that of a state over its citizens and sub-units.[2/] Thus, the argument would proceed, Congress could attach strings to such delegation of authority to an extent not permitted when it acts under other Article 1 powers.

Congress' power over the District of Columbia has been described as plenary and "[n]ot only may statutes of Congress of otherwise nationwide application be applied to the District of Columbia, but Congress may also exercise all the police and regulatory power that a state legislature or municipal government would have in legislating for state or local purposes." Palmore v. United States, 411 U.S. 389, 397 (1973). The power of Congress over the District of Columbia "permits it to legislate for the District in a manner with respect to subjects that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it under Art. 1, § 8." Id., 398. See also, District of Columbia v. Thompson Co., 346 U.S. 100, 108-9 (1953). The unique reach of congressional power over the District of Columbia thus relates to the subjects of legislation, the substantive reach of congressional acts respecting the District.[3/] Congress may create local entities to govern affairs of the District of Columbia and structure District governmental affairs in a manner divergent from the federal model of government and separation of powers. Borders v. Reagan, 518 F.Supp. 250, 266 (D.D.C. 1981) (upholding in-

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2/ This delegation theory, of course, would not serve to justify the legislative veto provision with respect to presidential emergency use of the D.C. police in section 740(b), (c), (d) of the Home Rule Act. D.C. Code § 4-102.

3/ The substantive reach of congressional power vis-a-vis the District is also constrained by the Constitution. As the Court in Capital Traction Co. v. Hof, 174 U.S. 1, 5 (1899) held, Congress, "may exercise within the District all legislative powers that the legislature of a State might exercise within the State; and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, so long as it does not contravene any provision of the Constitution of the United States."

sulation from presidential removal of member of District of Columbia Judicial Nomination Commission, established by Home Rule Act); Halleck v. Berliner 427 F. Supp. 1225, 1233 (D.D.C. 1977) (upholding Commission's powers with respect to reappointment of judges); Hobson v. Hansen, 265 F.Supp. 902 (D.D.C. 1967) (upholding congressional vesting of power to appoint D.C. Board of Education members in United States District Court for the District of Columbia). However, while these entities may be unique and the authority of the local officials unusual when compared with federal agencies and officials, there is no suggestion in the cases upholding these various arrangements that Congress may establish them by means other than legislation. Indeed, the constitutional provision delegating power to Congress over the District, Art. 1, § 8, cl. 17 gives Congress the power "[t]o exercise exclusive Legislation in all cases whatsoever, over" the District of Columbia. (emphasis added). The placement of the clause among the other enumerated delegated powers of Congress in Article 1, § 8 of the Constitution bespeaks an intent that that authority be part of the "legislative Powers herein granted" (Art. 1, § 1) to be exercised in conformance with Article 1, § 7, cls. 2, 3, the Presentment Clauses. Furthermore, the final clause of Article 1, § 8 delegates to Congress the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers....," which include the power over the District of Columbia. (emphasis added). Finally, the Court in Chadha emphasized the very specific exceptions to bicameralism and presentment contained in the Constitution and concluded that as to all other legislative acts compliance with the law making procedures of Article 1, § 1 and § 7, cl. 2, 3 was required. See, Slip op. at 35, discussed, supra. The power over the District of Columbia was not one of the exceptions noted by the Court and, therefore, presumably must be exercised in conformance with the Constitution's procedures for legislation.

The congressional power over the District has been analogized to its power over the Territories (Art. 4, § 3, cl. 2), District of Columbia v. Thompson Co, supra. Justice White, dissenting in Chadha, noted that the First Congress, containing many of the framers of the Constitution, enacted the provisions of the Northwest Territories Ordinance, including language allowing two House disapproval of territorial ordiances, and that resolutions of disapproval were approved by one or the other House in early Congresses. See, Slip op. at 17-18 n. 18 (dissent). He viewed as "significant that this body [the first Congress] did not view the Constitution as forbidding a precursor of the modern day legislative veto." Id.,

19. Implicitly, Justice White deemed such territorial disapproval devices as within the ambit of the majority's holding and therefore invalid. Furthermore, the Territories clause speaks of Congress making "needful Rules and Regulations respecting the Territory or other property belonging to the United States...", Art. 4, § 3, cl. 2, whereas the District of Columbia clause specifically authorizes "Legislation." Thus, even if the legislative veto can somehow be distinguished in the Territory context, any analogy between Congress' power over the territories and the District would not seem to similarly support the legislative veto in the face of the explicit language of the District of Columbia clause. 4/

II.

Assuming the legislative veto provisions of the Home Rule Act are unconstitutional under the reasoning of Chadha, what are the consequences? Of course, only the provision in the Immigration and Nationality Act was struck down in Chadha; the case did not rule on the myriad other veto devices in the law, including those in the Home Rule Act. However, as discussed above, the broad-based reasoning of Chadha is likely applicable to most, if not all, extant legislative veto provisions and, if challenges are brought, courts would seem constrained to apply the Chadha holding to the particular veto provision at issue. An important consideration in resolving a challenge to a legislative veto provision is whether the provision held invalid can be excised from the Act or section of the Act to which it is attached. In the context of a legislative veto attached to a delegation of authority to an officer or agency, the question is whether the invalid veto provision can be severed from the remainder of the Act thereby preserving the underlying delegation of authority or whether the entire Act or section falls with the legislative veto.

Some laws contain separability provisions that provide that if one part of the law is rendered invalid, the remainder will be unaffected. The Immigration and Nationality Act at issue in Chadha contains such a provision. However, even

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4/ In 1978, in the content of amendments to the Home Rule Act deleting the presidential veto provisions and reducing the lay-over period for Council legislation, the Department of Justice expressed its view that the legislative veto provision in the Act was unconstitutional, basically on the same grounds later enunciated in Chadha. See, Hearings and Markups on Home Rule Act Amendments Before a Subcomm. of House Comm. on District of Columbia, 95th Cong., 1st Sess. 106-8. No notice was taken of the opinion by the Committee as it was received after Committee approval of the bill. The constitutionality of the provision also did not appear to play a part in proposals in 1980 to eliminate the veto and lay-over period. Hearings on Home Rule Act Amendments Before a Subcomm. of House Comm. on District of Columbia, 96th Cong., 1st Sess. (1980). No bill was reported by the Committee.

with such a provision, a court that has struck down a portion of a particular statute must still determine, by examining the legislative history, whether Congress intended the remainder of the affected statute to survive.[5/] The Court in Chadha reiterated the basic test of severability, namely, that the invalid portions of a statute are to be severed "[u]nless it is evident that the Legislative would not have enacted those provisions which are within its power, independently of that which is not." Slip op. at 10, quoting, Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932). See also, Buckley v. Valeo, 424 U.S. 1, 108 (1976).

The Home Rule Act has no separability provision. The Senate-passed home rule bill contained such a provision, but it was dropped in the finally enacted conference version of the bill without explanation on the record. See, S. Rept. No. 93-219, 93d Cong., 1st Sess. 13 (1973); 119 Cong. Rec. 22976-7 (1973) (Senate bill as passed). However, the absence of such a provision does not create a presumption against separability and the basic rule enunciated in Champlin and reiterated in Chadha favoring severability would seem applicable, at least in the absence of contrary congressional intent with respect to the reasons for the deletion of the separability provision in the finally enacted version of the Act.

The basic question with respect to severability and the Home Rule Act is whether a court, faced with a lawsuit challenging the validity of the legislative veto provision governing, for instance, City Council legislation, would find the veto provision severable and therefore leave intact the Council's delegated legislative powers to which the veto was attached. See, D.C. Code, § 1-227 (a) (legislative power granted to the Council made subject to certain limitations, including the veto provison of § 1-233(c)). Merely posing the question, with its ramifications for continued viability of the City Council as a legislative body for the District of Columbia prompts caution in examining and resolving the issue of severability.

There is no doubt that reserving sufficient congressional authority and oversight over the District of Columbia was an important consideration in Con-

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5/ The Court viewed the separability provision in the INA as giving rise to a presumption of severability. Slip op. at 11. It went on to independently examine the legislative history, which it found supported the presumption in this case. Id. As the Court in United States v. Jackson, 390 U.S. 570, 585 n. 27 (1968) noted, "whatever relevance such an explicit clause might have in creating a presumption of severability,...the ultimate determination of severability will rarely turn on the presence or absence of such a clause."

gress' decision to delegate legislative (and executive and judicial) powers to a District of Columbia government in the Home Rule Act. The theme is repeatedly sounded in the legislative consideration of the bill. Some even questioned the ability of Congress to make the delegations it made in the Act. See, H. Rept. No. 93-482, 93d Cong., 1st Sess. 113 et seq. (1973) (dissenting views). Questions of the delegability of legislative powers over the District of Columbia and the appropriate strings to attach to such delegations were also a prominent feature of the bills that were considered by and passed the Senate in the 24 years preceeding enactment of a Home Rule Act in 1973. See, e.g, S. Rept. No. 92-390, 92 Cong., 1st Sess. 4 (1971); S. Rept. No. 381, 89th Cong., 1st Sess. 4 (1965); S. Rept. No. 477, 86th Cong., 1st Sess. 3 (1959); S. Rept. No. 1715, 85th Cong., 2d Sess. 29 (1958); S. Rept. No. 253, 84th Cong., 1st Sess. 4 (1955); S. Rept. No. 630, 82d Cong., 1st Sess. 11 (1951); S. Rept. No. 271, 81st Cong., 1st Sess. 35 (1949); 117 Cong. Rec. 35746-9 (1971); 111 Cong. Rec. 17440, 17766 (1965); 105 Cong. Rec. 13403, 13422-3 (1959); 104 Cong. Rec. 16355 (1958); 101 Cong. Rec. 9454-5 (1955).

The role of the legislative veto in the congressional consideration , means to control the delegation of authority in home rule legislation, howeve has a mixed history. The bills considered by the Senate[6/] in the 80th and 81st Congress contained legislative veto provisions. See, S. Rept. No. 630, 82d Cong., 1st Sess. 11 (1959). However, from 1951 to 1971, Senate-passed home rule bills omicted the legislative veto mechanism. The 1951 Senate Report specifically noted that the "present bill omits any congressional veto provision. The sponsors believes there is ample legal authority to support the constitutionality of a direct grant of legislative power over the District to a mayor and a District Council." S. Rept. No. 630, supra at 11. The overriding power to legislate, delays in effective dates of District legislation, presidential veto power and enumeration of substantive limits on the District's legislative authority were various means employed to reserve congressional authority and protect the federal interest in the bills that passed the Senate in this twenty-year period. See, e.g., S. Rept. No. 1715, 85th Cong., 2d Sess. 29 (1958); 105 Cong. Rec. 13423 (1959).

6/ Home rule bills passed the Senate six times between 1949 and 1965, only to be blocked in the House District Committee. The change in leadership of the House Committee in the 93d Congress led to the eventual enactment of the Home Rule Act. See, 1973 Cong. Q. Almanac 735.

The legislative veto reemerged in S. 2652 which passed the Senate in 1971. Presidential veto of council actions was seem as not adequately reflective of the constitutional provisions regarding congressional power over the District 117 Cong. Rec. 35746 (1971). (Sen. Eagleton). The legislative veto was viewed as an "added element" and a "necessary safeguard," providing "an orderly, expeditious way for Congress to carry out its constitutional responsibilities if congressional action should be necessary in a particular case." 117 Cong. Rec. 35749 (1971) (Sen. Mathias). The Senate Report noted the additional oversight provided by the veto:

> Thus, the Congress, under the terms of this bill, retains full residual, ultimate and exclusive legislative jurisdiction over the District in conformity with the constitutional mandate. In addition, the bill makes provision for the non-approval of any act of the City Council by either House of Congress in the same manner as a reorganization act submitted by the President.

S. Rept. No., 92-390, 92d Cong., 1st Sess. 4 (1971).

The legislative veto also appeared in S. 1435, the Senate bill in 1973, the year the Home Rule Act was enacted. The House bill and a substitute offered prior to debate contained no legislative veto over general District legislation but there was a lay-over period for general legislation prior to its becoming effective and proposed amendments to the basic D.C. charter were subject to a one-House veto. See, 119 Cong. Rec. 33408-9, 33681 (1973). A floor amendment to insert a legislative veto over general legislation was defeated 273-138. 119 Cong. Rec. 33643-4. Proponents of the veto argued that it would be impossible to pass legislation within the lay-over period provided in the bill, while opponents feared Congress getting bogged down in detail under a legislative veto mechanism. 119 Cong. Rec. 33642-4 (1973). The bill as passed by the House contained no legislative veto over general legislation passed by the Council.

The two-House veto over general legislation emerged from the conference. The Conference Report merely describes the bill's provisions with no explanation of the process leading to the compromise or the rationale for inclusion of the provision. H. Rept. No. 93-703, 93d Cong., 1st Sess. 72,76 (1973). Representative Diggs, Chairman of the House District of Columbia Committee, in

presenting the conference report to the House, explained the presence of the veto device:

> In the give and take of this conference report also, Mr. Speaker, we note that some of the strongest feelings on the part of some of us have been set aside. For example, on congressional veto, the Senate was very strong on that and as a matter of fact I think I learned for the first time the real reason the Senate has been able to pass home rule in the past so expeditiously is because it was just felt in the other body that as long as there is a veto apparatus, as long as there is a congressional process to correct what they might consider to be a misaction on the part of a local legislative body, then they were inclined to be generous about it. So the veto was retained in the bill despite some misgivings about it from the self-determination purists among us in this body and beyond.

119 Cong. Rec. 42036 (1973).

The question of providing for a legislative veto of general Council legislation was one of the last items to be resolved in the nearly month-long conference committee process. See, Conference Committee materials reprinted in Committee Print, Home Rule for the District of Columbia 1973-1974, Background and Legislative History of H.R. 9056, H.R. 9682, and Related Bills, House Committee on the District of Columbia, 93d Cong., 2d Sess., Chap. V at at 2914-2939 (hereinafter, Legislative History). The House conferees initially held out for no legislative veto. However, staff memoranda and compromise proposals indicated a need to concede "a few big ones" to the Senate and the two-House veto emerged as the compromise position. Legislative History 2931, 2933. The two-House veto compromise was not viewed as a significant change, however, from the original House bill in the Summary of Conference Report by the Majority Whip. Legislative History 2937-8. The provision for partisan elections was instead viewed as the only provision agreed to by the conferees that "substantially differed from the House version." Id., 2937. See also, Dear Colleague letter from Chairman Diggs prior to House debate on Conference Report ("the major provision from the Senate bill which prevailed in Conference was insistence by the Senators for partisan elections)." Legislative History 2041. This view with respect to the partisan elections issue was reiterated on the House floor by Chairman Diggs who stated that the "single most important difference contained in this conference report as far as the final House version is concerned is the matter of partisan elections." 119 Cong. Rec. 42036 (1973).

Thus, while the legislative veto apparently engendered strong feelings on the Senate side and the issue was only compromised late in the conference process, it apparently was not viewed as the most significant sticking point by either side and, indeed, received very little notice in the Conference Report. Furthermore, the legislative veto was only one of numerous reservations of congressional authority and limitations on the District government contained in the Act. See, 119 Cong. Rec. 42037 (1973) (recitation by Chairman Diggs of limits in the bill). The veto reappeared in home rule proposals (after an absence of twenty years) at a time when use of the veto in general was gaining more favor in the Congress. When enacted by the Senate in 1971 and again inserted in the bill that became the Home Rule Act in 1973 at the urging of the Senate, the veto was viewed as a convenient device and likened to the familiar legislative veto in the Reorganization Acts. Its impact was essentially cumulative with respect to the crucial issue of congressional control. Despite its importance as an item of dispute among the House and Senate, to argue that it was the linchpin of congressional reservation of delegated authority in the Act might be overstating its importance and ignoring the many other significant controls Congress retained in the Act.

As the Court in Chadha recognized, determining whether the Congress would have enacted a particular Act or provisions of an Act in the absence of a provision held invalid is an "elusive inquiry." Slip op. at 11. Judges in other legislative veto cases have come to different conclusions regarding the same provision. Compare, McCorkle v. United States, 559 F.2d 1258 (4th Cir. 1977) (veto provision in Federal Salary Act not severable, entire Act falls, and plaintiff therefore has no standing to sue), with, Atkins v. United States, 556 F.2d 1028, 1082 (Ct. Cl. 1977) (dissent) (Federal Salary Act veto provisions severable). See also, Consumer Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982) (veto provision found severable). The Court in United States v. Jackson, 390 U.S. 570 (1968), faced with the question of whether an invalid death penalty provision was severable from the federal Kidnapping Act, noted the continued basic operability of the Act without the stricken provision and the fact that kidnapping would have been made a federal crime, given the political circumstances at the time, even without the death penalty. Under such circumstances, the Court stated that it "is quite inconceivable that the Congress which decided to authorize capital punishment in aggravated kidnapping cases would have chosen to discard the entire statute if informed that it could not

include the death penalty clause now before us." 390 U.S. at 586. Similarly, it might be asked whether Congress would have refused to enact home rule legislation if informed that it could not include the legislative veto. The confluence of political forces at the time, the emergence of the veto as a compromise provision, the history of use of the veto device in home rule proposals, the fact that the veto was only one of many congressional control devices in the Act, and the fact that the Act is workable without the veto provision arguably militate against holding that Congress would not have enacted home rule legislation or delegated the legislative powers it did to a District legislature without the legislative veto mechanism. 7/

In some respects, the veto in Chadha and the severability analysis therein are particularly pertinent in the District of Columbia context. Chadha involved a delegation of authority in an area of traditionally broad congressional power (immigration and naturalization) with a history of congressional concern with unfettered delegations of authority. Slip Op. at 11-13. As in Chadha, a workable administrative mechanism remains after the veto is excised as the Council presumably still must report its actions to the Congress for lay-over period under D.C. Code § 1-233(c)(1) (first sentence). See, also Clark v. Valeo, 559 F.2d 642, 648 n. 5 (D.C. Cir. 1977). Just as "Congress' oversight of the exercise of this delegated authority is preserved since all such suspensions will continue to be reported to it," Slip Op. at 14, so also is Congress' oversight authority retained in the Home Rule Act not only by the lay-over provision but also by the numerous other controls Congress has built into the Act.

7/ Of course, the severability question becomes relevant only if and when litigation is commenced challenging the veto provision. The implications of a holding of nonseverability, however, might induce congressional examination of alternatives to the veto and statutory amendment before a lawsuit is brought.

Whether challenges to Council action (based on the invalidity of the veto and its inseverability from the underlying delgation of legislative power to the Council) in the absence of an exercise of the veto would be ripe for judicial resolution is not clear. The court in Clark v. Valeo, 559 F.2d 642 (D.C. Cir. 1977) found not ripe a challenge to a legislative veto because it had not yet been exercised. However, it did note that a "contention that there are no real considerations of ripeness here can only rest on a view of the merits that a one-house veto is so patently unconstitutional that nothing more is needed to inform the judgment of the court." 559 F.2d at 649 n. 8.

The Court's broad holding in Chadha may resolve the ripeness concerns as expressed in Clark v. Valeo. On the other hand, the uniqueness of the Home Rule Act and congressional authority thereunder may prompt a court to await an actual exercise of the veto before entertaining a challenge to particular Council actions.

In conclusion, the Court's broad holding in INS v. Chadha would seem to render constitutionally suspect the legislative veto provisions in the District of Columbia Self-Government and Governmental Reorganization Act, including the provision for two-House veto of City Council legislation. The question of severability of the presumably invalid provision from the underlying delegation of authority to the Council is less clear. However, the "elusive inquiry" into legislative intent required under separability analysis would not seem to lead to the conclusion that but for the legislative veto, home rule legislation and the delegation of legislation powers to the D.C. City Council would not have been enacted. The veto was viewed as an important device for congressional control, primarily by the Senate, but it was only one of a number of provisions in the Act designed to reserve congressional authority and preserve the federal interest. As such, it would seem unlikely that a court would find the veto inseverable from the remainder of the provisions to which it is attached and thereby jeopardize the underlying delegation of power in the Act.

Richard Ehlke
Specialist in American
Public Law
American Law Division
July 5, 1983

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

15 NOV 1983

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Pursuant to your request, this letter presents the views of the Department of Justice on H.R. 3932, a bill "to amend the District of Columbia Self-Government and Governmental Reorganization Act, and for other purposes," as passed by the House of Representatives on October 4, 1983. We oppose the enactment of this legislation unless it is amended consistent with the discussion set forth below.

H.R. 3932 would amend the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. 93-198, 87 Stat. 774 (1973), as amended, ("Act"). The legislation is in response to the Supreme Court's decision in Immigration and Naturalization Service v. Chadha, 103 S.Ct. 2764 (1983) which struck down as unconstitutional so-called "legislative veto" devices. 1/ The Act contains several such devices 2/ purporting to authorize Con-

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1/ The Supreme Court has also affirmed the invalidity of two other legislative veto provisions. See Process Gas Consumers Group v. Consumers Energy Council or America, 103 S. Ct. 3556 (1983), affirming Consumers Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982), and Consumers Union, Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982).

2/ The Act contains four provisions which may be characterized as legislative vetoes. These are:

(1) Section 303(b) provides that "an amendment to the charter . . . shall take effect only if . . . both Houses of Congress adopt a concurrent resolution . . . approving such amendment."

(2) Section 602(c)(1) provides that with respect to acts effective immediately due to emergency circumstances and acts proposing amendments to Title IV of this Act "no such act shall take effect until the end of the 30-day period . . . and then only if during such 30-day period both Houses of Congress do not adopt a concurrent resolution disapproving such act."

gress to disapprove actions of the District of Columbia Government without complying with the constitutional requirements of legislation.

The Administration generally supports the approach of H.R. 3932, which would correct the constitutionally invalid portions of the Act by requiring Congressional action disapproving acts passed by the D.C. City Council to take the form of legislation passed by both Houses and presented to the President for approval or disapproval. In one narrow area, however, the Administration believes that it would be more consistent with Congress' prior treatment under the Act to require affirmative approval of acts passed by the D.C. City Council rather than opportunity for disapproval. We recommend that H.R. 3932 be amended to provide that City Council laws amending Titles 22, 23 and 24 of the District of Columbia Code -- which relate to criminal law, criminal procedure and prisoners-- only take effect upon passage by Congress of a joint resolution of approval. This approach will cure the constitutional infirmities pointed out by the Chadha decision, while retaining the special treatment accorded Titles 22, 23, and 24 under the existing Act.

Under the Constitution, Congress has the exclusive power to legislate for the District of Columbia. Art. I, §8, cl. 17. Pursuant to this authority Congress has enacted Titles 22, 23 and 24 of the D.C. Code. The Department of Justice, through the United States Attorney for the District of Columbia, has been vested with the prosecutive authority in the United States District Court and the District of Columbia Superior Court. D.C. Code §23-101. Indictments are sought, and prosecutions pursued in the name of the United States of America. Similarly, this Department, through the U.S. Marshal for the District of Columbia conducts the service of criminal process, provides courtroom security, transports prisoners, and returns to the District of Columbia defendants arrested in other jurisdictions and wanted for prosecution in the District of Columbia. The U.S. Marshals Service utilizes its authority under law to serve Superior Court felony subpoenas anywhere in the United States. D.C. Code §11-942(b).

. . . . . .

Footnote 2 continued from page 1

(3) Section 602(c)(2) provides that any Act affecting Title 22, 23, or 24 of the District of Columbia Code "shall take effect . . . only if . . . one House of Congress does not adopt a resolution disapproving such act."

(4) Section 740(a) provides that either the House or the Senate may adopt a resolution terminating emergency presidential authority over the Metropolitan Police Department.

Finally, all persons convicted in the District of Columbia are committed to the custody of the Attorney General, who, through the Department's Bureau of Prisons, designates the place of confinement. D.C. Code §24-425. 3/

The Superior Court of the District of Columbia, where jurisdiction for local offenses rests, is a federal court created pursuant to Article I of the Constitution. Palmore v. United States, 411 U.S. 389, 397 (1973). The judges of the Superior Court and the Court of Appeals are appointed by the President. D.C. Code §§11-101, 11-102, 11-301, and 11-1501(a). A single jury system for grand and petit juries serves both the Superior Court and Federal District Court. A grand jury of one court may return indictments to the other. D.C. Code §§11-1902, 11-1903(a). The federal government is, accordingly, deeply interested in the prosecution of crimes under the D.C. Code, their determination before the courts, and the handling of prisoners convicted under the Code.

The federal government owns approximately 41% of all land in the District. Over 200 buildings are owned or leased by the federal government. Over 445,000 federal employees work in the Washington Metropolitan area. As a result, the District draws both the nation's citizens and those of other countries for purposes ranging from conducting business with the federal government to touring the capital. Moreover, the existence of a sizable diplomatic community underscores the federal interest in the enactment, enforcement and interpretation of the criminal laws governing the District.4/

3/ By agreement with the Government of the District of Columbia most District of Columbia prisoners are sent to the Lorton Reformatory.

4/ Our concerns in these areas do not take place in a vacuum. Presently before the D.C. Council are three bills, Bill 5-16, the Parole Act of 1983, Bill 5-244, the Prison Overcrowding Emergency Powers Act of 1983, and Bill 5-245, the District of Columbia Sentencing Improvements Act of 1983, which raise substantial concern. Bill 5-16 would reduce the minimum period of detention to 10 years and would be applicable to individuals incarcerated for such crimes as rape, murder and armed offenses. Bill 5-244 would permit, as a means of budget control, the release into the community of convicted individuals. Bill 5-245 would expand the time for granting a motion to reduce a sentence from 120 days to one year. While this Department has strongly opposed these proposals (and of course, the Council has yet to act upon them), we believe more importantly, that Congress, through the legislative process, should retain the opportunity to review the wisdom of such proposals.

Special treatment for Titles 22, 23 and 24 is consistent with the existing Act and its legislative history. Specifically, in only one area did Congress reserve to itself to veto by vote of only one House the acts of the City Council - Titles 22, 23 and 24 of the D.C. Code. Act §602(c)(2). See also H.R. Rep. No. 482, 93d Cong., 1st Sess. (1973). In fact the original bill, as passed by the House of Representatives, prohibited the soon to be established Council from legislating in the criminal law area. H.R. 9682, 93d Cong., 1st Sess., §602(a)(8) (1973). The Senate version contained no such prohibition. S. 1435, 93d Cong., 1st Sess. (1973). The conference version represented a compromise by inserting a one house veto. Pub. L. No. 93-198, §602(c)(2), 87 Stat. 774 (1973). 5/

The Supreme Court's decision in Immigration and Naturalization Service v. Chadha, 103 S. Ct. 2764 (1983), now requires this arrangement to be reworked. 6/ Our objection to H.R. 3932 is that the federal government is now asked to surrender permanently its authority in an area of its plenary responsibility. We believe that in light of the historic responsibility of the federal government for criminal law enforcement in the district, the interests of both the citizens of the District of Columbia and the Nation as a whole are better served by continuing the special treatment accorded Titles 22, 23 and 24 and maintaining the primary responsibility of the Congress and the President in this area. This responsibility can be preserved by requiring a joint resolution of approval for D.C. Council amendments to Titles 22, 23 and 24 of the District of Columbia Code. In this

(Footnote Continued from Page 3)

4/ Additionally, in 1981, the D.C. Council passed a Sexual Assault Reform Act. Among its provisions was one which lowered the age of consent for minors in statutory rape cases. Another provision would have reduced the maximum sentence for both forcible and statutory rape from life to 20 years imprisonment. The penalty for incest was reduced. The proposal also reduced the penalty for forcible rape to a 10 year maximum if the victim was physically or mentally incapable of consenting or resisting. The House of Representatives passed a resolution disapproving the proposal. H. Res. 208, 97th Cong., 1st Sess., 127 Cong. Rec. H6762 (1981).

5/ We also note that during the first two years subsequent to the date which elected members of the initial Council took office, the Council was prohibited from legislating in this area while a study of the District of Columbia Criminal Code was undertaken for the Congress. This was later extended to four years. See §602(a)(9) of the Act.

6/ See Statement of Edward C. Schmults, Deputy Attorney General, before the Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, House of Representatives (July 18, 1983).

connection, it should be noted that this proposal will give the District government more authority than it has under present law in every area except the criminal field.

It is important to be aware that the question at stake transcends the issues of the moment and that there is no inherent conflict between the District and federal government. The issues in H.R. 3932 result from the unique federal and district relationship embodied in present law. This Department values its representation of the citizens of the District of Columbia and shares their goal of ensuring that a fair, efficient, and effective criminal justice system be in place. In conclusion, we oppose enactment of H.R. 3932 unless it is amended consistent with the views expressed in this letter.7/

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

(Signed) Robert A. McConnell

ROBERT A. McCONNELL
Assistant Attorney General

7/ We are sensitive to the need of the District of Columbia to have the ability to raise revenues through the municipal bond market. Section (1)(i) of H.R. 3932 is directed toward ratifying previous actions of the D.C. Council with respect to these bonds. We would suggest, however, that §(1)(i) be clarified so as not to imply that actions of the D.C. Council which never became effective, whether because they were subject to Congressional action or otherwise, are ratified.

THE DISTRICT OF COLUMBIA

WASHINGTON D C 20004

MARION BARRY, JR.
MAYOR

November 15, 1983

The Honorable Ronald Reagan
President
United States of America
The White House
Washington, D.C.

Dear Mr. President:

We have been asked to comment on the Administration's draft position statement on H.R. 3932, a bill "to amend the District of Columbia Self-Government and Governmental Reorganization Act, and for other purposes". This legislation is designed to cure possible unconstitutional legislative veto provisions in the District of Columbia's Home Rule Act by changing those veto provisions to joint resolutions of the Congress.

The Administration's position, drafted by the Department of Justice and concurred in by OMB, opposes enactment of H.R. 3932 unless it is amended to provide that laws passed by the Council of the District of Columbia amending Titles 22, 23 and 24 of the D.C. Code, our criminal code, only take effect upon passage of a joint resolution of approval by the Congress.

We are unalterably opposed to the Administration's position. Such an amendment would represent a giant step backward in our quest for Home Rule for the District of Columbia.

The Administration's position is based largely on a theory that the criminal laws of the District would require "special treatment" in any legislation which amends the Self-Government Act to "cure" problems traceable to the decision in Immigration and Naturalization Service v. Chadha 103 S. Ct. 2764 (1983).

Contrary to the Department of Justice's analysis, no reading of the legislative history of section 602(a)(9) of the Self-Government Act or the supporting case law suggests the validity of a theory of "special treatment" of the District's criminal laws under which the jurisdiction and authority of the Council of the District of Columbia over such laws would be curbed drastically or eliminated altogether. The original draft of section 602(a)(9) of the Self-Government Act contained an absolute prohibition on the Council's enacting any law with respect to titles 22, 23 and 24 of the D.C. Code. However, when Public Law 93-198 (the Self-Government Act) was adopted, section 602(a)(9) contained not an absolute prohibition but merely a 24 month postponement of the authority; this was subsequently extended for an additional 24 month period.

Crucial to note, is the fact that the time limitation was just that -- a "time constraint" and not an absolute prohibition. See McIntosh v. Washington, D.C. App., 395 A.2d 744 (1978) and District of Columbia v. Sullivan, D.C. App., 436 A.2d 364, 366 (1981). Congress wanted the Council to have the power to change the criminal laws subject only to a reservation of some time so that it could consider the findings of its Law Revision Commission (for the District of Columbia), which had been asked to examine all the District's criminal laws, before determining whether the Congress itself would amend the District's criminal law. The legislative history and the cases cited above clearly reveal that the Congress of the United States made an affirmative determination that the Council should have this authority, albeit delayed, to enact criminal laws of the District, subject to a one house veto of the Congress.1

1/ See House Committee on the District of Columbia, 93d Cong. Home Rule for the District of Columbia, 1973-1974 (Comm. Print 1974):

1. Rep. Adams (House Floor)

> We have said also that there should not be a change in the criminal statutes. The reason for that is that there is proposed before the Committee on the District of Columbia at the present time a commission to review the criminal code. There will be hearings on that, so that for the present time we know where we are with it and can move on that subject without bringing it into this bill, which basically provides a structure of locally elected government. (P. 217)

(footnote continued on next page)

In developing its "special treatment" position, the Department of Justice relies heavily on the case of Palmore v. United States, 411 U.S. 389. Nonetheless, it is instructive to note that Palmore was decided prior to the adoption of the Self-Government Act. But even under Palmore, the Supreme Court of the United States clearly recognized that Congress in the District of Columbia Court Reform and Criminal Procedure Act of 1970 intended "to establish an entirely new court system with functions essentially similar to those of the local courts

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footnote 1/ continued

2. Conference Committee Report:

The Conference Committee also agreed to transfer authority to the Council to make changes in Titles 22, 23 and 24 of the District of Columbia Code, effective January 2, 1977. After that date, changes in Titles 22, 23 and 24 by the Council shall be subject to a Congressional veto by either House of Congress within 30 legislative days. The expedited procedure provided in section 604 shall apply to changes in Titles 22, 23 and 24. It is the intention of the Conferees that their respective legislative committees will seek to revise the District of Columbia Criminal Code prior to the effective date of the transfer of authority referred to. (pp. 3013-3014).

3. Rep. Diggs ("Dear Colleague" letter)

The House passed bill prohibited the Council from making any changes in Titles 22, 23 and 24 of the D.C. Code. It was felt that since the District criminal code has not been substantially reviewed and revised for more than seventy years, this provision would hamper constructive revision of the criminal code. Since the District Committee is expected to act in the very near future on H.R. 7412, a bill which I introduced to create a law revision commission for the District, the Conference compromise was adopted. The law revision commission will be given a mandate to turn initially to revision of the D.C. Criminal Code and report its recommendations to the Congress. The Congress will then have a chance to make the much needed revision of the criminal code. This should take no longer than two years. Subsequent to that action, it seems appropriate and consistent with the concept of self-determination that the Council be given the authority to make whatever subsequent modifications in the criminal code as are deemed necessary. (pp. 3041-3042).

found in the 50 states of the Union with responsibilities for trying and deciding those distinctively local controversies that arise under local law, including local criminal laws having little, if any, impact beyond the jurisdiction." 411 U.S. at 409. Therefore, Congress created local courts designed to handle matters of local concern, including local criminal law.

More importantly, in a later case - clearly decided after the effective date of the Self-Government Act - the Supreme Court of the United States in Key v. Doyle, 434 U.S. 66 (1977), not only clarified its decision in Palmore, but also clearly recognized the District's courts as "local courts" which invariably pass on "a law of exclusively local application," and that such a law cannot be construed as a "statute of the United States." See 434 U.S. at 66, 67 and 69. See also NOTE, "Federal and Local Jurisdiction in the District of Columbia, 92 Yale Law Journal 292 (1982), which states in inter alia:

> In the Home Rule Act, Congress did in fact delegate to the current District local government the power to define local offenses, and there is little doubt that this delegation is constitutional. The nondelegation justification for continuing to categorize local offense as "crimes against the United States", therefore has been removed. 92 Yale Law Journal at 303.
>
> ...Congress acts as a state-like sovereign when enacting local law. D.C. Code matters, therefore, do not "arise under" the "laws of the United States" and D.C. Code offenses are crimes against the District of Columbia, not against the United States. Since the real party in interest in local prosecutions is the District of Columbia, in prosecuting local crimes in the District's United States Attorney acts not in his capacity as a federal officer, but in a local capacity. 92 Yale Law Journal at 294-295.

Finally, one of the arguments advanced for the Adminstration's position is protection of the federal interest. With all due respect, enactment of H.R. 3932 in no way lessens Congress' inherent authority under Article 1, section 8, clause 17 of the Constitution.

What is also disturbing about the Administration's position is that it comes at the last possible moment. The District has actively sought to resolve the issues raised by the Supreme Court decision in INS v. Chadha since August, because the questions about the constitutionality of our Home Rule Charter have effectively precluded the city from issuing revenue bonds. We wanted to have this matter resolved before the Congress adjourned.

In October the House passed legislation, H.R. 3932. Initially, OMB advised the House District Committee that it had no objection to the legislation. On the day of the floor action, it withdrew its no objection, but did not oppose the legislation at that time nor did the Administration object when the Senate Governmental Affairs Subcommittee on Government Efficiency and the District of Columbia considered virtually identical legislation. Upon hearing from OMB about ten days ago that the Administration had problems with the legislation, we repeatedly sought to obtain a clear statement of its position. Quite frankly, Mr. President, I am distressed to say that members of your Administration were less than candid. They misled me and my staff and it was not until last evening at about 6:45 p.m. that I finally received the Administration's position.

As Mayor of the District of Columbia and an ardent supporter of full home rule for the city, I must state unequivocally that I cannot support your Administration's position. I must note also, that because we will be unable to go to the bond market without some legislation, it will be necessary for the city to continue to borrow from the U.S. Treasury to meet our obligations.

In sum, the Administration's position effectively revokes substantial authority granted the city under the Home Rule Act and, at the same time, significantly undermines the financial independence of the District.

I urge you to reconsider the Adminstration's position and to support H.R. 3932.

Sincerely,

Marion Barry, Jr.
Mayor

The CHAIRMAN. Mr. Mayor, we are very pleased to have you come before us and present this problem to us.

Mr. Frost?

Mr. FROST. I am not sure I understand everything the mayor has said.

Let me ask a few questions.

My lack of understanding may be because of the unique status of the District of Columbia. I have never served on the District of Columbia Committee or, quite frankly, paid a great deal of attention to the structure of the District.

Are you saying that because the congressional veto appears in the Home Rule Act and because that act could be challenged in the courts as having an unconstitutional provision, that anything that the D.C. Government does under that act is subject to question because of the questionable status of the act itself, and that is the reason you are having trouble with the bond counsel?

Mayor BARRY. Congressman, I think the big problem is there is not a severability clause in the act at the time the act was passed in 1974. It was the view of the Supreme Court and others that you do not necessarily have to have a specific provision of severability in order for an act to be severable.

So, bond counsel's biggest problem outside of the legislative veto in light of *Chadha,* is the lack of severability clause in the act itself. In fact, we tried to compromise with the administration on this matter. We got all eight bond counsel of the various agencies of government indicating if Congress would ratify prior acts, just to be safe, which would be an affirmative part of this whole question and enact the severability clause, that would be sufficient and legal enough for them to go forth with an unqualified opinion.

Prior to home rule, the District did not enter the bond market in any circumstances. They now have the authority to go out for industrial revenue bonds and the housing finance agency bonds and also long-term general obligation bonds and revenue anticipation notes.

So, it is lack of severability, intent of the specific section, that is causing us a problem.

What brought me to the table was the bond counsel not issuing an unqualified opinion. We were quite happy to go along with it until Congress resolved it, but bond counsel indicated last August or September they would not give an unqualified opinion. The District of Columbia operates under the 1974 Self-Government Reorganization Act which is our constitution and charter, similar to a State.

Mr. FROST. The bill you referred to, specifically, H.R. 3932, does what?

Did that bill provide there would be severability under the charter?

Ms. SCHNEIDER. The bill provided in each case in our charter where there was a veto provision, those were converted to joint resolutions of disapproval which, obviously, would have to be passed by both Houses of Congress and presented to the President.

In addition, it provided for ratification of prior acts of the Council of the District of Columbia and it did include a severability clause.

Mr. FROST. From what you said, is that what is hung up in the Senate?

Ms. SCHNEIDER. That is correct.

Mayor BARRY. It is hung up because the Department of Justice, in a letter to the chairman of the Senate Government Operations Committee, Senator Roth, objected to not having some way to affirmatively deal with titles 22, 23, and 24 of the District of Columbia Code, which is our Criminal Code. There was no objection offered by the House.

Frankly, I do not think they were paying a great deal of attention until they found out about this movement, and they moved fast at the last moment to involve themselves in it.

The administration has always been concerned about the Criminal Code. We think it is not a valid concern in the sense that we have local judges appointed by the President trying cases, local jurors who are District of Columbia residents making decisions about cases, and our local laws are prosecuted in most cases by the U.S. attorney, so there is ample opportunity for the U.S. attorney to interpose himself or herself in prosecutions.

Mr. FROST. Would not the answer to your problem be for the District of Columbia Committee to come out with something dealing with the severability issue and not anything else and get that passed?

Mayor BARRY. We tried that approach and the District of Columbia Committee was probably willing in conference to compromise on H.R. 3932. However, in the Senate, there are several Senators who want this whole question put together in a package as opposed to the bond situation. At one point, we thought we had agreement with the Department of Justice that we would just deal with the bond question and deal with *Chadha.*

Now, they know we want $400 million of authority and, quite frankly, they are using that leverage, in my view, as a way of getting us to agree to taking away some home rule authority. I think they are using that leverage to force us into something.

Mr. FROST. Mr. Chairman, I guess what I am really asking or heading toward is, I don't know that their problem is something we can do anything much about anytime soon. It is good to hear about it and understand that there is a problem like that, but I am not sure that the Rules Committee can help these folks anytime soon.

The CHAIRMAN. If the gentleman will yield, I wonder if it would be possible by joint resolution of Congress, to correct your situation.

Ms. REID. Joint resolution of disapproval.

The CHAIRMAN. If we put the veto back in as it is, it would be by joint resolution which would meet the requirements of the *Chadha* case.

Would that make it easier for you?

Mayor BARRY. That is what the House version does just for the District of Columbia. The problem is, all of you are busy on other matters, and I take every opportunity I can to explain the District's case to broaden it out so you get a good feeling for it. Obviously, the problem is in the Senate and, obviously, the problem is in the Department of Justice, and OMB, and I doubt that you will have much influence on how they operate.

The CHAIRMAN. You do not think that would give you relief if the Senate enacted it?

Mayor BARRY. That would be perfect.

If that would happen, we would not have to be here speaking about the problem. But the problem is, there are several Senators and they have different rules in the Senate and they have put a hold on any legislation out of the committee.

The CHAIRMAN. Several Senators?

Mayor BARRY. Yes.

Senator Helms has been the leader of this movement.

The CHAIRMAN. Can't you have them all apprehended for traffic violations?

Mayor BARRY. They vote on our police department budget.

Mr. FROST. As a part of dealing with this question, if our committee were to report out any legislation that just dealt with the severability issue and nothing else and at least got that passed in this Congress, would that solve your problem?

Mayor BARRY. It may help. It depends on what the Senate is going to do.

I think this committee could be helpful in the sense that you looked at the whole range of options for other options on the report and wait and a number of other items I heard today.

Maybe, if the committee cannot be helpful, maybe the staff who works on these things every day could talk to Ms. Reid and Ms. Schneider and they may have some unique ideas.

Mr. FROST. You are saying, because of the unique status of the District of Columbia, you would need ratification of your prior acts to fully solve your problems?

Mayor BARRY. Our position is, *Chadha* does not apply. However, bond counsel are hired to protect the bondholders, as you very well know, and they give an unqualified opinion. In order to be safe and shielded from any courts or liability, they have suggested prior acts of Congress be ratified to be very, very safe as a minimum.

We like the House version of the bill. If the Senate would pass that, that in fact would be our position. On the other hand, we try to approach the severability in prior acts but we cannot get that through the Senate either because they wanted to deal with the Criminal Code in one package or because of the court suits, and they may soften up a little bit.

The CHAIRMAN. If the gentleman will yield——

Mr. FROST. Certainly.

The CHAIRMAN. As I understand it, there is not a severability clause in your constitution.

Mayor BARRY. That is right, and there is a section that allows us to issue bonds, and that is the problem. The problem we have now is we have Congressman Dellums of the District Committee who would be the chairman of any conference on this bill. Congressman McKinney, the ranking minority, would be opposed to any version that came out of the Senate requiring affirmative action on the part of the Congress on titles 22, 23, and 24, so we are stalled there. Maybe as time goes on, we might be able to get a compromise out of the Senate if that can be bought in the House.

Mr. FROST. Mr. Chairman, maybe this was pointed out earlier today.

Do we know how many of these bills do not have specific severability clauses?

The CHAIRMAN. I do not know.

I have not heard any committee chairman say.

Mr. FROST. Does the staff know?

The CHAIRMAN. The staff has not seen a breakdown.

Mr. Mayor, I was going to say what was said by Mr. Frost. We could have our people look into your situation. We are all very proud of our District of Columbia, and we want to further its interests and protect its interests in anyway we can.

We will give some consideration to it and see if there is anyway we can be of help to you. If not, we might see if we can get the other body to look more definitely upon a joint resolution for the resolution of your particular problem. It is a matter of weighing public interest that you are here today.

Mayor BARRY. Let me thank you for that statement.

Senator Mathias is supportive of this House approach as is Senator Eagleton, the ranking minority member, but when it comes to District affairs, they do not usually enjoy the highest priorities because there are other things going on, and the chairman is reluctant to try to work out something that does not draw the opposition of the Department of Justice.

On the other hand, as you know, the House and Senate leadership could schedule this as a regularly scheduled matter, but then it is subject to filbuster and, quite frankly, with budget matters and other things going on here on the Hill, the District perhaps does not warrant their time and attention.

The CHAIRMAN. We will certainly give earnest consideration.

Mr. Wheat, do you have any questions?

Mr. WHEAT. No questions, Mr. Chairman.

The CHAIRMAN. Thank you very much for coming, and we will concern ourselves with your problems and try to be as helpful as we can in anyway that we can.

Mayor BARRY. Thank you very much, Mr. Chairman.

The CHAIRMAN. Our next witness is Mr. Terrence M. Scanlon, Commissioner of the Consumer Product Safety Commission.

Mr. Scanlon, we would be pleased to hear from you.

STATEMENT OF TERRENCE M. SCANLON, VICE CHAIRMAN, U.S CONSUMER PRODUCT SAFETY COMMISSION

Mr. SCANLON. Mr. Chairman and distinguished members of the House Rules Committee, I welcome this opportunity to testify on the legislative veto issue and the impact that the June 23, 1983, U.S. Supreme Court decision, *Immigration and Naturalization Service* v. *Chadha* (103 S. Ct. 2764 (1983)) will have on independent regulatory agencies such as the Consumer Product Safety Commission. These views are my own and not those of the Commission.

When first contacted on the day the Supreme Court decision was announced in *Chadha,* I said in response to a media inquiry and will repeat

> * * * to the extent that Congress more accurately reflects the mood of the American people than the regulators, the review that has been eliminated—that is, the legislative veto—is one that I feel was a very important balance and restraint on regulation.

I also stated that, with the elimination of this additional revie of the regulator's action and the resulting increase in power gran ed to us, our level of responsibility increases as well.

I stand by those preliminary remarks and, on further reflectio I think they adequately reflect my views now after several montl have passed. The added responsibility placed upon regulators, i absence of the legislative veto, is one I take seriously and view wit some concern; and I am sure all those in a similar position do so, a well.

Unfortunately, self-policing and self-restraint have hardly bee the forte of most regulatory bodies. A need for adequate checks an balances on regulators is not only essential, but self-evident. An ex ternal check on the power of regulatory authorities is necessary important and welcomed if we are to provide the maximum benefi to the public.

Judicial review is, of course, always available on any propose regulation. But, all of us familiar with the costs and delays inher ent in the judicial process as it exists in the United States toda would hardly look to this method of review as one last resort fo those to be regulated. Often those affected by such regulations are small businesses or minority-owned enterprises, an area I special- ized in for 13 years prior to my appointment to the CPSC. These individuals and groups are least able to turn to the costly and often-delayed judicial review process when faced with regulation that may adversely impact on their businesses or even place their economic survival in jeopardy.

Since the 1981 amendments added the legislative veto to our stat- utes—the Consumer Product Safety Act, Flammable Fabrics Act, and Federal Hazardous Substances Act—the veto has not been ex- ercised by Congress. The only effect these provisions have had was merely to delay the effective date of CPSC rules promulgated.

I may be in a minority among regulators by favoring congres- sional review and authority to disapprove regulatory actions. My work with small business development compels me to this conclu- sion, particularly with regard to the legal cost question that small businesses might be faced with in any challenge to the proposed rule. My call is for a shared responsibility with Congress, the elect- ed Representatives of the American people. This is one of the best barometers I know of, along with the President, of citizens' hopes, fears, and aspirations. Accordingly, I favor a legislative response to the challenge posed to all of us by the loss of the legislative veto as a result of the *Chadha* decision.

The form such a response takes is, of course, a difficult question and one that only Congress can address. It is not easy to say what method Congress should use to supervise the exercise of delegated powers to regulators such as myself. Two proposals have been added on the House side to our reauthorization bill—H.R. 2668. They have served to put this particular Commission on notice that we cannot expect an unabridged power to regulate, and this is how it should be. The Waxman amendment would give both the legisla- tive branch and the President 90 days—continuous days of the con- gressional session—to disapprove a final rule or regulation by joint resolution or the rule would go into effect.

The Levitas proposal provides that both legislative bodies and the President must affirmatively approve any regulation before any appropriated funds may be used to place safety rules in effect. No time limit for congressional approval is set out in that particular proposal. This is the more stringent check on regulatory conduct. Mere inaction by either congressional body or, more importantly, a single committee of the House or Senate would effectively kill any safety rule or regulation. Such inaction would, I suspect, be the norm rather than the exception. Also, I fear that under the Waxman proposal such inaction is possible and Congress needs to consider expedited provisions with a time certain for action. Disapproval with the necessary expedited provisions seems to be the more practical approach.

Regardless of which proposal is ultimately adopted, the public good—in our case at the CPSC, the specific well being and safety of consumers in the complex and diverse marketplace of America—will best be served by congressional and Executive action on any proposed regulation, as well as the ultimate judicial review. Such shared responsibility, I believe, is the best chance to produce a consensus that is possible to be reflective of a very diverse and complex society. I am sure Congress, as well as the executive branch, can and will be able to meet the challenge posed by this Supreme Court decision. Not only will the traditional separation of powers be maintained, but also the process will be such that all of us can fulfill the mandate with which we are charged—to provide for the common good.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Mr. Scanlon, do you feel that there is any distinction between the exercise of the legislative veto with respect to commissions which have delegated authority and executive branches of the Government?

Mr. SCANLON. I think so, Mr. Chairman.

I think in all cases regulatory agencies and Commissions such as the one I represent, the Consumer Products Safety Commission, should have a legislative veto. Congress should be able to veto rules that we promulgate.

The CHAIRMAN. In other words, it is hard for Congress to legislate again on every matter they might like some review on and, at the same time, it is quite unreasonable to expect Congress to abdicate entirely any review of Commission action.

Mr. SCANLON That is correct.

The CHAIRMAN. I was just thinking as you were giving your excellent testimony, that I will ask the staff whether we can get a list of all of the bills that are subject to legislative veto with a statement of what the legislative veto was in each case.

I know, in general, I have read some of the cases and reviewed some of them, but I want us to look at each one of them, and we have encouraged the committees of the Congress to take the bills that have been enacted out of that committee and take another look at the bills that had a legislative veto that were put on by that committee generally, and then let them ask the question, if we had that bill before us again, would we put that legislative veto back in the bill.

Do we think it is necessary for the proper exercise of our authority?

In cases where they did not think it was necessary, or where they thought they could take care of the subject matter in some other way, they would not wish to reenact it, as it were.

Those bills that they thought should have the legislative veto, if they could find a way other than the joint resolution, then they would just have to act through the joint resolution.

Mr. SCANLON. I would say the 1981 congressional amendments to our Consumer Products Safety Act provided for a legislative veto. To my knowledge, that was never exercised.

The CHAIRMAN. Mr. Frost?

Mr. FROST. I do not have any questions.

The CHAIRMAN. Mr. Scanlon, we thank you very much for coming and giving us the benefit of your excellent testimony. You have given us a good statement.

Mr. SCANLON. Thank you, Mr. Chairman.

The CHAIRMAN. The Chair would like to announce that we have for the record statements of Hon. Ron Dellums, chairman of the Committee on the District of Columbia; Hon. Stewart McKinney, ranking minority member of the Committee on the District of Columbia; and Hon. Peter Rodino, Chairman of the House Judiciary Committee.

We also have several CRS reports.

Without objection, these statements will be made part of the record, as though read, of today's hearing.

[The statements referred to follow:]

STATEMENT OF HON. RONALD V. DELLUMS, CHAIRMAN, COMMITTEE ON THE DISTRICT OF COLUMBIA

Mr. DELLUMS. Mr. Chairman, I am pleased to have this opportunity to share with you and the members of this committee my perspective of the impact on the District of Columbia of the decision by the U.S. Supreme Court in *Immigration and Naturalization Service* v. *Chadha.*

Last June when *Chadha* was handed down by the Court, many in the District of Columbia hailed the decision as a new beginning. It was believed that the District's legislative process would be free from the burden of the congressional veto.

Instead, since *Chadha,* the District has become a manacled government. All D.C. laws passed since home rule stand in a shadow of doubt which has prompted a proliferation of lawsuits, each case implying that the current government is lawless. The District is unable to access the private bond market and must continue to borrow long term from the Federal Treasury, a state of affairs which is both expensive and unwanted by the District as well as the Federal Government. Some criminal cases are not being prosecuted because of the *Chadha* cloud over District Laws. And, the situation promises to get worse unless legislative action is taken to excise the District from the taint of *Chadha.*

Following the decision, members of the Committee on the District of Columbia met with city officials, constitution experts, staff from the Senate and from this committee, and there was a consen-

sus that *Chadha* applied to the District of Columbia and that its impact could be uniquely troublesome. This view, that *Chadha* affects the District was reinforced in the opinion of one of the justices of the Supreme Court. In his dissent, Justice White listed 56 acts of Congress which would be invalidated by the Court's decision, and the D.C. Home Rule Act was among them. A more comprehensive list of 207 congressional *veto* provisions which the Department of Justice submitted to Congress as failing the test for constitutionality also included the Home Rule Act. And, the Congressional Research Service in a special report issued July 5, 1983, concluded that the legislative veto provisions of the D.C. Home Rule Act were suspect under *Chadha.*

Because of the weight of opinion that *Chadha* affected the District and because of the unique and troublesome burdens the decision presented, the Committee on the District of Columbia acted quickly to provide legislative relief. We passed, and the House ultimately passed, H.R. 3932, a straightforward proposal containing basically technical amendments to the D.C. Home Rule Act, designed to conform to the mandates of *Chadha.*

As we developed H.R. 3932, we were careful to stay in close communication with this committee, sending regular correspondence to the chairman and consulting with staff. We are especially grateful for the kind assistance and advice and counsel of Mr. John J. Dooling and Ms. Cynthia Brock-Smith.

The basic thrust of H.R. 3932 is as follows: In each instance in the D.C. Home Rule Act where resolutions of disapproval are provided for, whether simple or concurrent, they are stricken and in their place is inserted the requirement for joint resolutions. The import of this change is that to reject an act of the D.C. Council and Mayor, the Congress must do so by and affirmative act which must then be presented to the President.

H.R. 3932 does not eliminate congressional oversight of District legislation! It does not reduce the time for congressional review! Indeed, with presentment to the President, it has the potential of increasing the time for congressional review. And it does not change the manner in which the Committee on the District of Columbia functions in the event the Congress chooses to involve itself in acts of the D.C. Government.

Despite quick action by the House and introduction of a bill similar to H.R. 3932 in the Senate, legislative relief from *Chadha* for the District has yet to be realized. The Senate bill, S. 1858 is still in committee. While discussions continue about S. 1858, I am unable to state when that bill will pass the Senate.

Mr. Chairman, H.R. 3932 has never been viewed as the final reform to the District's legislative process. It is, at best, a Band-Aid remedy aimed at providing immediate relief to a pressing problem.

It seems to me that because the focus of this committee's work is designed to produce a comprehensive *Chadha* response, it may be useful to probe more deeply the flaws in the present system of congressional review of D.C. Government acts. I should add that these are matters properly within the jurisdiction of the District of Columbia Committee and are raised here principally by way of background. Congress has been referred to as the largest city council in the United States. Any one Member in this mammoth body of 535,

on any day of the week, for any reason or for no reason—arbitrarily or capriciously—and even on whim—can decide that he or she wants to intervene or interfere in the affairs of the District, and the present process allows and indeed encourages this kind of activity.

While a stated purpose and the real underlying goal of the Home Rule Act was to "relieve the Congress of the burden of legislating upon essentially local matters," as recently as the last Congress, the House spent amost 6 hours debating a District act that sought to mainstream its laws so as to conform to the laws of at least 40 of the States. The act that the city passed was based upon recommendations of the D.C. Law Revision Commission which was created by Congress.

The primary grant of legislative authority to the District of Columbia is found at section 302 of the Home Rule Act. That section extended to the local government "legislative power (over) all rightful subjects of legislation within the District" Congress, however, reserved certain rights and powers for itself and restricted the District in several ways. The chief restrictions are embodied in sections 601, 602, and 603 of the act.

Section 601 provides for retention by the Congress of the ultimate authority to legislate for the District, restating article 1, section 8, clause 17 of the U.S. Constitution.

Section 602 of the Home Rule Act prohibits the D.C. Council from legislating in certain enumerated areas, and section 603 limits the District's power regarding borrowing, spending, and the budgetary process.

In addition to the restrictions embodied in sections 601, 602, and 603 of the act, Congress set forth a crooked legislative path for the District to follow in enacting its laws. Acts of the D.C. Council may be vetoed by the Mayor within 10 days of passage. The council may override the Mayor's veto by a two-third vote of these members present and voting. However, unlike the typical legislative process, acts passed by the D.C. Council do not become effective immediately should the Mayor sign them or upon the expiration of the 10-day mayoral review. Such acts must be submitted to the Speaker of the House and the President of the Senate for a 30-day period of congressional review. Any act may be vetoed by the Congress in both the House and Senate pass a concurrent resolution of disapproval. Originally, only days in which both Houses of Congress were in session were counted for purposes of calculating the 30-day congressional review period. We amended that provision during the 95th Congress and established the less stringent, but equally cumbersome current provision requiring at least one House to be in session. Also, the House Rule Act in its original form allowed the President of the United States a 30-day period in which to sustain the veto of the mayor if such veto was overridden by the council. We repealed that provision too during the 95th Congress. These intricate and complex procedures for the District's legislative process were adopted at various stages during our discussions and debate over the Home Rule Act. Initially, the District of Columbia Committee did not provide for a 30-day congressional review period. We did, however, establish rules to regulate floor debate on resolutions of disapproval. Those rules are found at section 604 of the act. The

30-day review period was accepted by supporters of the act just prior to the floor debate and was subsequently agreed to in conference.

Mr. Chairman, I should note at this point that pursuant to the Home Rule Act, the D.C. Council adopted certain rules and regulations governing its legislative process. I have provided the committee with a chart entitled "District of Columbia Government—Flow of Legislation." It is clear from the chart that the Council and mayor follow a deliberate path in enacting laws * * * a path which allows for thorough analysis and consideration of proposals, and—most importantly—a path which allows ample time for the public and indeed the Congress to be aware of what the local government is planning in the way of new or modified laws. I believe when you add this deliberative process to the broad media attention the council and mayor receive, no citizen nor any Member of Congress can sincerely claim surprise.

On the other hand, the current system is confusing, causes uncertainty and is terribly unpredictable. Once the local government has done all that it must or can, no one knows when one of its acts will finally become law. It is not unusual for the 30-legislative-day review period to actually stretch to 90 calendar days. On occasion, it has stretched to as many as 120 calendar days. And when the Congress adjourns sine die, even if the D.C. Government Act has been up here for as many as 29 legislative days, it has to be resubmitted during the next Congress, and the count starts all over again. That has happened before and it has taken as much as 9 months before the District knew that one of its acts was law. Mr. Chairman, that is simply no way to run a government.

I would propose that the congressional review period be eliminated altogether, and that acts of the District become law immediately upon transmittal to the Congress. Short of that, I would propose that there be a straight 30-calendar-day delay between submission to the Congress and the D.C. Act becoming law. It should be noted that after nearly a decade of experience under home rule, the Congress has reejected only 2 of the more than 800 District acts.

I would further propose, if H.R. 3932 for some reason does not become law, that the one-house veto for criminal laws passed by the District be eliminated and that we standardize the discharge process for the Committee on the District of Columbia by eliminating the expedited discharge provisions in the Home Rule Act.

Under these proposals, the article 1, section 8, clause 17 mandate in the U.S. Constitution that Congress maintain ultimate legislative authority over the District is met by Congress acting when it deems it necessary to act. The *Chadha* problem is also solved by these proposals.

You will note that I have not proposed that the sections 601, 602, and 603 limitations be removed, nor have I proposed at this time that the process of review of D.C. Budget Acts be changed.

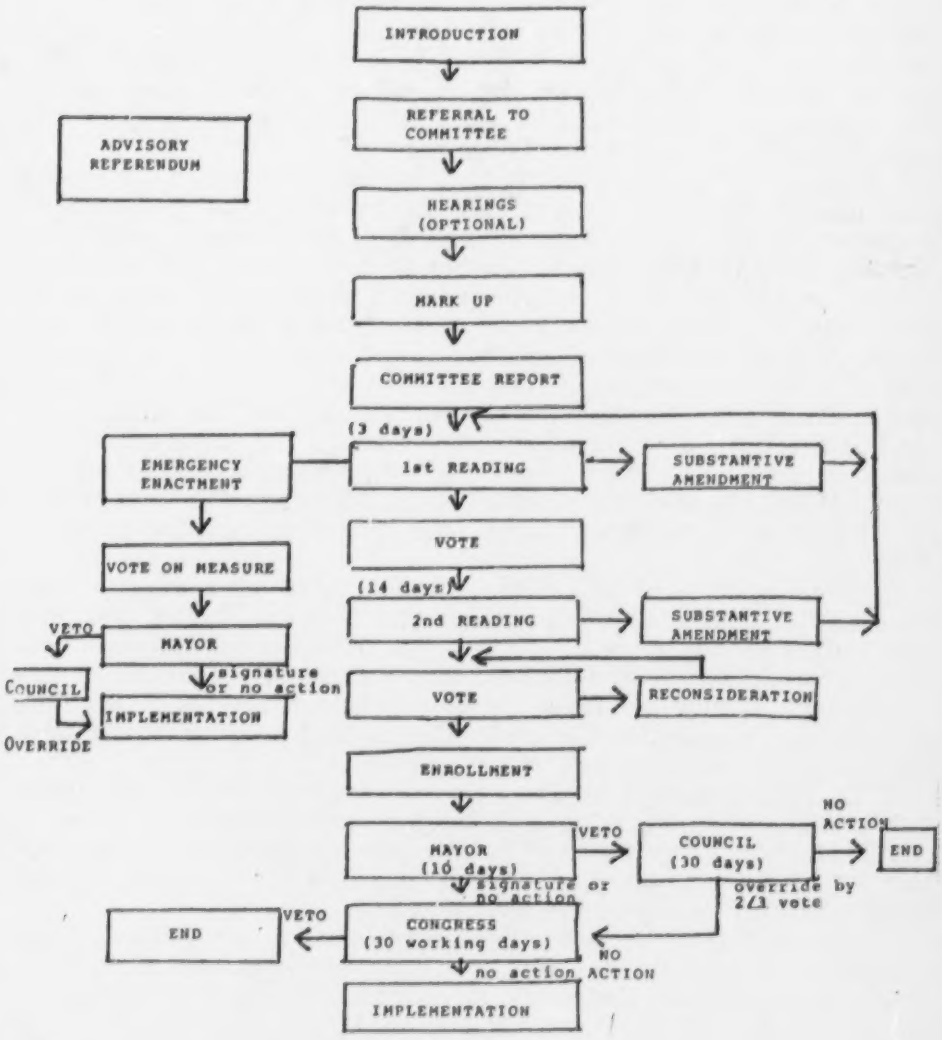
These proposals are modest from the point of view of congressional power but will produce major improvements and increased efficiency in the District's legislative process.

Chadha has meant many things to many people. Initially, for the

District of Columbia it was a breath of fresh air, but it has become a stranglehold, threatening to choke the District's lifeline.

Congress can prevent that by acting soon.

DISTRICT OF COLUMBIA GOVERNMENT - FLOW OF LEGISLATION



STATEMENT OF HON. STEWART B. McKINNEY, RANKING MINORITY MEMBER, COMMITTEE ON THE DISTRICT OF COLUMBIA

Mr. McKINNEY. Mr. Chairman and members of the committee, I appreciate the opportunity to offer testimony today concerning the impact the Supreme Court decision in *Immigration and Naturalization Service* v. *Chadha* on the operations of the Committee on the District of Columbia, and perhaps more importantly, on the government of the District of Columbia.

I would mention at the outset that our committee and the House of Representatives has already addressed this problem and come to a resolution with the passage of H.R. 3932 on October 4, 1983. Unfortunately, our colleagues in the Senate have not seen fit to enact similar legislation, even though an identical bill was introduced in that body. The committee may be aware from accounts in the local press, that the administration has expressed concern over one portion of H.R. 3932, and is pushing for an amendment in the Senate. But I would note that there is no opposition from the administration to the basic purpose of H.R. 3932, that being eliminating the potentially suspect congressional review provisions of local legislation. Rather, the concern revolves around how that process should be changed with respect to local legislation involving the criminal code.

It is my opinion, and I believe a majority of my committee colleagues agree, that the Supreme Court decision should not, and hopefully does not apply to the dealings between Congress and the District of Columbia. We do not have a situation where an executive branch agency is having its regulations or policies questioned, and at times rejected by Congress. The District of Columbia is more a creature of Congress than anything else.

If the laws proposed by the city were transmitted to the executive branch for approval, or even only for forwarding to Congress, I could see a valid case for the *Chadha* decision being applicable. But the executive branch is involved only with the city's annual budget, not in the day-to-day local legislative activity.

Assuming this to be the collective opinion of a majority of our committee, one might ask why we then saw fit to pass H.R. 3932. That legislation was the result of countless hours of meetings between House and Senate committee staff, representatives of the District of Columbia government, representatives of the House and Senate Legislative Counsel and Legal Counsel Offices, and those from the American law division of the Congressional Research Service. While it was deemed likely that by including such a wide range of interested parties we could expect individuals to push for changes beneficial to their interests, I am pleased to say the resulting legislation does not exhibit this bulkanization. Rather, it constitutes what was decided to be the fewest possible changes to the existing review process while accomplishing the goal of bringing that process into compliance with the Court decision.

Quite simply, H.R. 3932 changes the current one-House veto of local changes to the criminal code and two-House veto of all other local legislation and charter amendments in a completely even-handed manner by requiring two-House action with the signature of the President. Local actions could thus be overturned before

being allowed to become effective by a joint resolution of disapproval, rather than the current simple or concurrent resolution of disapproval.

This type of change was deemed to be the best available manner in which we could appease those who decided the Court action applied to the District, and at the same time preserve some form of congressional review of local acts. There was good reason for Congress, our committee, and the city to work together for expeditious enactment of H.R. 3932.

First we were concerned about the status of the Home Rule Act (Public Law 93–198, as amended) if nothing were done. The Home Rule Act does not have a severability clause, and assuming the Court intended its decision to apply to the congressional review of local government actions, it was possible that the entire Home Rule Act would fall. Even if the Court ultimately ruled that the sections concerning congressional review of local government actions were severable, Congress and our committee would then find itself in a situation of having no prior review of local actions. If that did indeed occur, we would be forced with passing bills to repeal local actions, or more damaging yet, we would return to the pre-Home Rule days when Congress enacted all the laws and ordinances dealing with the city.

Of equal concern was the impact this problem has had on the city. Regardless of how it might finally be determined, the fact that *Chadha* may impact congressional review of local actions has caused the city's financial advisors to note that sale of bonds by the city would be impossible under such a cloud of uncertainty. The local press has already reported on the number of cases filed in local courts which are a result of the impact of *Chadha* on the local government.

Together, these problems dictated the need for action. I trust that our colleagues in the Senate can come to understand the need to act and to do so very soon.

I have come before various committees in an attempt to justify the District of Columbia as a special case, and I expect some of my colleagues are a little tired of hearing that old argument. But the fact of the matter is that the District of Columbia is indeed unique. It exists as a quasi-autonomous government only because the Congress delegated certain of its constitutionally mandated authority to a locally elected government. It is an anomaly. And as such it merits separate and special consideration. I would repeat that we are not dealing with an executive branch agency, but rather with a creature of the Congress.

I mention this in the hopes that whatever action your committee may choose to recommend to the House of Representatives acknowledges this uniqueness, and that some special mechanism be established with respect to dealings between Congress and the District of Columbia. If we are to do something about the city, it should be as we did in 1973. Not something which is a part of an overall procedure, but something in the law governing the District of Columbia.

In closing, I hope the action of our committee and the full House of Representatives will be sustained, and that the provisions of H.R. 3932 eventually become law. Until that comes to pass, I would

hope that your committee would not include the dealings of Congress and the District of Columbia in any omnibus legislation you propose.

STATEMENT OF HON. PETER W. RODINO, JR., CHAIRMAN, HOUSE COMMITTEE ON THE JUDICIARY

Mr. RODINO. Mr. Chairman and members of the committee, I appreciate the opportunity to appear before you today.

As you are probably aware, the Judiciary Committee of the House, of which I am chairman, has also held hearings on the impact of the Supreme Court decision in *Immigration and Naturalization Service* v. *Chadha.*[1]

I have with me a copy of these hearings, which I would like to submit for your records.

In your invitation to testify today, you requested that I address three particular areas: why Congress developed legislative veto; how legislative veto affects the jurisdiction of the Judiciary Committee; and whether I would recommend an alternative to legislative veto.

WHY CONGRESS HAS ADOPTED LEGISLATIVE VETO

During the 20th century, the role of the Federal Government, particularly in domestic affairs, has changed dramatically. It is now involved in many matters, such as health, welfare, and safety, that were once the sole province of State and local governments. As a result of this expanded role, Congress has faced a tremendously growing workload. Yet under the Constitution it could deal with these new responsiblities only through the legislative process—as you well know, an often cumbersome, time-consuming, and frustrating task.

Because of the sheer size and complexity of this Federal role, Congress increasingly found it necessary to delegate authority to the executive branch, which, with its greater manpower and resources, seemed best adapted to handling the detailed implementation of laws.

Often these statutory delegations included only the most generalized standards for implementation of the delegated authority. The executive branch became more powerful as its delegated authority grew.

The executive branch, of course, exercised the power Congress gave it—at times in ways some, or even most of us, did not like. Congress often felt frustrated by this exercise of power by the executive branch. Some Members felt we were incapable of assuring that the laws we pass were "faithfuly executed." In addition, we were expected by our constituents to do something or prevent something about whatever problem concerned them. At times we were powerless to produce what our constituents wanted. Congress began to feel it was sitting on the sidelines while the executive branch ran the Government.

The original legislative vetoes, such as the first one in 1932 which applied to a statute authorizing executive reorganization by

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[1] 103 S. Ct. 2764 (1983).

the President, consisted of accommodations of the overlapping constitutional responsibilities of the legislative and executive branches. The Congress agreed that the President would have the authority to make certain decisions in these areas of shared authority. At the same time, however, the President's decision would be subject to a veto by one or both Houses of Congress.

By the 1970's, however, legislative veto began to be extended to areas quite distinct from its original arena of overlapping powers. Two circumstances propelled this development.

First, during Watergate, the period which covered the last years of the Nixon administration, there was tremendous tension and distrust between then President Richard Nixon and the Congress. As a result, numerous veto provisions were enacted in order to assure that the laws would be properly executed. These vetoes were not limited to areas of overlapping responsibility under the Constitution.

The second circumstance that led to the extension of legislative veto was the enactment in the 1960's and early 1970's of many new environmental and safety laws. These laws frequently contained broad delegations of authority, with only vague standards for agency action. They often dealt with complex issues that required technical and scientific findings as a basis for implementation. Agencies were directed to implement these laws through the issuance of detailed regulations. Businesses, State and local governments, and others that had to comply with the regulations complained that they were faulty, excessive, and unnecessarily burdensome. Congress, which had delegated regulatory authority to the agencies, began to be held politically accountable for these regulations. Many in Congress felt a need to demonstrate that Congress was the preeminent lawmaking branch of Government, and they saw legislative veto as the convenient response to this problem of political accountability.

Legislative veto did create the appearance of congressional control. Therefore, more and more frequently such provisions were added to all types of statutory delegations. Congress increasingly used legislative veto to control the executive branch in its most "executive" activity: The daily management of government.

Congressional efforts to expand legislative veto provisions reached their peak in nearly successful efforts in 1975 and again in 1982 to enact legislation that would apply legislative veto to all agency regulations. These efforts failed, but by 1983, more than 200 laws containing more than 350 separate legislative veto provisions had been enacted, and 126 veto provisions applying to 207 types of Executive action were in effect.

THE EFFECT OF THE "CHADHA" DECISION ON JUDICIARY COMMITTEE JURISDICTION

The *Chadha* decision affects Judiciary Committee jurisdiction in several ways.

First, the Judiciary Committee has jurisdiction over amendments to the Constitution of the United States. The committee currently has before it House Joint Resolution 313, introduced by Congressman Andrew Jacobs, Jr. This resolution would amend the Constitu-

tion to allow for the one-House legislative veto of any executive agency rules and regulations. In addition to considering specific proposals to amend the Constitution, the committee would be concerned with the constitutionality of any proposed alternatives to legislative veto, since they might well raise constitutional questions as did the original forms of the device.

Second, the Judiciary Committee has jurisdiction over two statutes which currently contain forms of legislative veto that are unconsitutional under *Chadha.*

The first of these is, of course, the Immigration and Nationality Act of 1952 [2] which contains the deportation provision which was ruled unconstitutional in the *Chadha* decision. This act has a separate veto provisions which applies to the adjustment of aliens to permanent resident status.[3] The legislative veto provision contained in this section is identical to that which was ruled on in the *Chadha* decision, and therefore is also unconstitutional.

The committee also has jurisdiction over the National Emergencies Act,[4] which sets forth the procedures for the declaration of a national emergency and provides that one method for termination of such an emergency is through a concurrent resolution. Since this device avoids presentment to the President, it is also unconstitutional under *Chadha.*

There are two other acts within the jurisdiction of the committee which provide that a decision cannot take effect until a certain period of time after that decision is reported to Congress. These acts are the Rules Enabling Acts,[5] and the Classified Information Procedures Act.[6] However, the "report and wait" provisions of these acts simply require that the decision of the Court or the Attorney General be reported to Congress and that any congressional veto be undertaken by the regular legislative process. They are therefore constitutional under the *Chadha* decision.[7]

Third, and finally, the Judiciary Committee has jurisdiction over the Administrative Procedure Act [8] and a number of regulatory reform proposals which have been before the committee since 1975. Various forms of legislative veto have been proposed over the years as part of these regulatory reform bills. The committee has been and continues to be involved in seeking improvements to the regulatory process. As I noted before, it is in the area of Federal regulation that most proponents of legislative veto have sought increased congressional control.

SHOULD ANY ALTERNATIVES TO LEGISLATIVE VETO BE ADOPTED

In my view, the importance of legislative veto as a device for controlling the implementation of law has been vastly overstated. While legislative veto provisions reflect an understandable frustra-

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[2] 8 U.S.C. 1254(c)–(d).
[3] 8 U.S.C. 1255b(c).
[4] 50 U.S.C. 1622.
[5] Rules of Civil Procedure 28 U.S.C. 2072, Rules of Evidence 28 U.S.C. 2076, Rules of Criminal Procedure 18 U.S.C. 3771.
[6] 18 U.S.C. App.
[7] See *I.N.S.* v. *Chadha,* footnote 9, p. 14.
[8] 5 U.S.C. 553 et. seq.

tion with the legislative process, they are not a very effective response to the changing nature aof the Federal Government.

Despite the large number of statutes which contain a legislative veto provision, the mechanism itself has not been frequently used. Since 1932, legislative vetoes overturning Presidential or regulatory actions have been adopted approximately 125 times. Sixty-six of these vetoes have been requests for deferrals of spending authority under the Congressional Budget and Impoundment Control Act of 1974; 24 were disapprovals of Executive reorganization plans; and only 25 involved agency regulations. The remainder addressed policy or other matters not regulatory in nature.[9]

Before addressing whether we should seek alternatives to legislative veto, I must first state that I have long opposed the adoption and use of this device. My opposition is based on several factors and would apply to most other "quick-fix" mechanisms that would somehow seek to short circuit the regular constitutional legislative process.

First, such alternatives encourage Congress to avoid setting clear national policy when it delegates statutory authority in the first place. The tough political choices are simply avoided and pushed to the end of what is often a long and complex decisionmaking process. I believe Congress should make these choices, and make them clearly, at the time the statutory authority is originally delegated.

Second, the proliferation of alternatives to legislative veto will necessarily result in an increase in congressional staff. If the Congress seeks to perform the functions of the Executive, it will find it necessary to duplicate the staff of the Executive. Rather than creating greater political accountability, one of the stated goals of legislative veto, such duplication actually reduces political accountability. With both the executive branch and Congress involved in a particular decision, neither branch will be truly responsible for that decision. Moreover, a congressional bureaucracy will not necessarily be more expert or enlightened than the executive bureaucracy that already exists.

Third, the original purposes of most delegations of statutory authority, particularly in the area of regulations, were to assure that a decision would be made only after expert evaluation of the facts, and to assure that due process would be afforded to affected groups and individuals. Legislative veto and its alternatives threaten the integrity of this process by opening it to special interest pleading and political pressure. They invite closed-door dealings with Members of Congress or their staffs, with decisions being made on the basis of power, not facts.

Fourth, legislative veto and its alternatives necessarily plunge an already overburdened Congress into a morass of Executive and administrative decisions, ranging from such matters as the amount of pulp required for lemon juice to the safety procedures for nuclear powerplants. While each of these issues is important in its own context, one of the main reasons for delegations of authority in the first place was that Congress lacked the time to deal with the complex and necessarily detailed matters involved in implementing the

[9] "Data on and examples of Congressional Disapproval of Rules and Regulations," Clark F. Norton, Congressional Research Service, Library of Congress, July 8, 1983.

law. Congressional involvement in all such decisions will deny Congress the time it needs to concentrate on the broad domestic and foreign policy issues which only it can address.

Fifth, legislative veto type devices add another time-consuming step to the decisionmaking process. Such delay can itself impose significant burdens. For example, the failure to promptly issue regulations can prevent businesses from making vital decisions on such matters as redesignating products or making capital investments to modernize facilities. Delay can also make it difficult for State and local governments to administer federally mandated programs effectively.

Finally, legislative veto type devices make it difficult to implement laws advancing the common good. While the beneficiaries of a law are generally dispersed through the population, those who must directly comply with the law are often a clearly identifiable group with a specific interest in how a law is implemented. Such groups frequently have a strong incentive to prevent aggressive implementation. For example, under a statute which mandates a decrease in air pollution, an agency might issue regulations that require costly capital investment to install smokestack scrubbers. Manufacturers would like to avoid these expenditures. They might bring pressure on Congress to veto the regulation—raising every objection from increased unemployment to balance-of-payment problems. Each of these is a legitimate concern for Congress to consider in setting national environmental policy. However, if Congress responds serially to each such concern, the law that was enacted for the common good can be gutted by congressional rejection of any specific implementation.

Legislative veto was aimed at the end point of the decisionmaking process. It short circuited the regular legislative process. It did not require a careful balancing of facts, interest, and equities—it simply said "no" to whatever the Executive had decided. It did not require any clear assessment of the situation or any choice of contending policies, but it did give Congress the appearance of decisiveness and control.

In view of my position on legislative veto, it come as no surprise that I generally oppose adopting new devices or mechanisms to replace the original forms of legislative veto. However, I do believe that Congress must address with the situation resulting from the *Chadha* decision.

Congress must first concern itself with statutory delegations that are subject to unconstitutional legislative veto provisions. The major problem involved here is that of severability. Each statutory provision subject to legislative veto must be examined to determine whether the Congress wishes to continue the delegation without the limitation of a legislative veto.

This process should be undertaken as expeditiously as possible, because there now is doubt as to the validity of the legal obligations imposed by these statutes. Congress must determine whether to continue these delegations, perhaps with specific limitations and guidelines, or whether to entirely rescind the authority.

Only when this immediate and rather urgent task is accomplished should Congress consider alternatives to legislative veto.

It is my view that before searching alternatives, Congress should carefully examine the modern relationship between the executive and legislative branches in the light of separation of powers and effective Government process. I believe this examination will demonstrate that it is unnecessary to adopt new mechanisms of congressional control. The political clout and legislative authority of Congress have not been measurably diminished by the loss of a mechanism that, perhaps with the exception of the areas of overlapping constitutional responsibilities, was very poor policy in the first place. Congress already has effective, constitutional means to insure that the laws are fully implemented.

What is needed is for Congress to exercise more effectively the power it currently possesses.

First, Congress should be more careful with the laws it enacts. In new statutes, Congress can legislate with greater specificity and clearer standards, making in the beginning the hard political choices that it has often avoided through broad delegations with vague standards. Congress can also reexamine existing statutes from a more exacting perspective. If the purposes of these statutes are not being met, or if delegated authority is being improperly used, Congress can legislate to clarify, limit, or, if necessary, withdraw the delegation.

Second, Congress can delegate authority to the executive branch for limited periods of time. This will require the executive branch to justify the renewal of statutes or programs otherwise scheduled for termination. It will also give Congress an opportunity to require a change in executive implementation of the delegated authority, if experience shows that change is necessary.

Third, Congress can direct that certain Executive decisions may not go into effect until it has had a set time to review the decision. This would allow Congress to pass legislation to override Executive decisions before they take effect. These "report and wait" provisions have been used effectively in the past, and in the Rules Enabling Act to which I referred earlier. However, in my view, this approach should be limited to major decisions that need not go into effect immediately and that occur only occasionally, such as executive branch reorganizations.

Fourth, Congress has final say over the Government's pocketbook. Congress can use the appropriations process to direct or prohibit the expenditure of funds for a particular purpose. This is a powerful tool because the President and agencies are unlikely to risk consistently incurring wrath by the controller of the pocketbook. Experience has shown that accommodations with the executive branch are often possible before direct action through the appropriations process is necessary.

Fifth, the Senate must confirm the appointment of high-level Presidential appointees (article II, section 2, clause 2.). Under the Constitution, this is a final, unreviewable power. In a confrontation with the President over the execution of the law, the Senate can disapprove an appointment until a certain condition is satisfied or it can withhold its approval until it extracts a commitment that the law will be executed in a specified manner.

Sixth, Congress can impeach executive branch officials. The House of Representatives and the Senate together hold the power

to remove from office executive branch officers who fail to carry out the duties of office in a proper manner. This is a drastic remedy, but it can be used if necessary.

Finally, Congress must face the defects in its own organization, where numerous committees and subcommittees have overlapping jurisdiction that makes effective legislative oversight weak, fragmented, and, at times, contradictory. Reform of the committee system could lead to enhanced congressional power and more efficient government.

Ultimately, if the Executive is acting in an unauthorized or excessive manner, Congress can restrain and redirect it. The question is not one of power, but one of will. Congress has the power to shape national government and policy; the question is whether it has the will to do so.

The CHAIRMAN. Our hearings in the Rules Committee on this subject will resume on February 29, when we will examine the effects of the *Chadha* case on the appropriations and authorizations process in the Congress.

I hope note will be taken of that.

Is there anything you would like to add, Mr. Frost?

Mr. FROST. I would be interested if the staff could give us an analysis reasonably soon as to how many of the statutes do not have severability clauses so that we know what the situation is.

The CHAIRMAN. I will ask the staff to try to get that information.

Thank you, Mr. Frost.

Mr. Wheat, do you have any questions or comments?

Mr. WHEAT. No, Mr. Chairman.

The CHAIRMAN. If not, that concludes the hearing for today.

Thank you all very much.

[Whereupon, the committee was recessed at 3:40 p.m., to reconvene on Wednesday, February 29, 1984.]

LEGISLATIVE VETO AFTER CHADHA

WEDNESDAY, FEBRUARY 29, 1984

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RULES,
Washington, D.C.

The committee met, pursuant to notice, at 2 p.m., in room H-313, the Capitol, Hon. Claude Pepper (chairman) presiding.

Present: Representatives Pepper, Moakley, Derrick, and Wheat.

The CHAIRMAN. The committee will come to order, please.

We are continuing our hearings on what the Congress should do in response to the decision of the Supreme Court in the *Chadha* case. We have today some outstanding citizens who—I am sure—will give us some very valuable suggestions.

We are honored to have the Honorable Silvio Conte and the Honorable James T. Broyhill.

Mr. Broyhill, would you please proceed? We appreciate your coming.

STATEMENT OF HON. JAMES T. BROYHILL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

Mr. BROYHILL. I do have a formal statement which I would ask be made a part of the record.

The CHAIRMAN. Without objection, it will be received.

Mr. BROYHILL. I would like to take a few moments to summarize my remarks on this important subject. I certainly do appreciate the opportunity to come here and testify.

It is my understanding that you are taking an overall look at what the response of Congress should be to the Supreme Court's ruling in *Chadha*.

The need for extensive regulatory reform legislation is something that we should all recognize.

The size of the Federal bureaucracy has grown and grown over recent years, and it is continuing to do so. Of course, that means so does the number and the complexity of Federal regulations that the bureaucracy is putting out. The cost of such regulations are enormous. The cost to the consuming public is $100 billion or more a year. With these kinds of estimates of economic impact, it is apparent that duplicative or unnecessary regulations exist, which continue to inhibit economic growth. It seems to me that we should have a system of rational regulation. That is, regulations that are more efficient and less costly.

Congressman Levitas and I have argued in the past that we have delegated this rulemaking authority to the bureaucracy and should therefore retain the ability to review their work product. It is actu-

ally the Congress' authority to write the law. So, our argument is that the Congress has a responsibility, and a duty, to look over the shoulder of the rulemakers, the regulation writers, in order to review their end work product.

The *Chadha* decision has effectively eliminated the use of the legislative veto as we have utilized it in the last few years. I am not going to argue with that decision, which, of course, you are fully familiar with.

It seems to me that we need to put something in the place of veto. That is why I am advocating the type of approach which was included in the bill introduced by Congressman Lott, H.R. 3939. I am a cosponsor of that bill. H.R. 3939 contains what is called a hybrid review mechanism. That is, it provides that major rules—that is, those that by definition have a substantial impact on the economy—cannot take effect unless they are expressly approved by Congress.

All other rules that are not so defined as having a substantial impact could take effect without congressional involvement, unless Congress chooses to intercede and expressly disapprove them. That is what we mean when we say a hybrid approach.

The approach which Mr. Lott put into his bill is what I am recommending. I know one criticism of the approval approach is that enactment of a joint resolution approving the substance of a regulation would somehow shield that regulation from judicial review under the Administrative Procedures Act. In my judgment, this criticism is without merit for two reasons.

First, as a matter of legal interpretation, the joint resolution of approval does not enact the text of the regulation itself into law. All it merely does is indicate congressional approval of the substance of the regulation, which has been recommended by the particular agency or department.

Second, there is legislative language included in H.R. 3939 which says, and I quote:

> The enactment of an appropriate resolution approving a major rule shall not be construed to create any presumption of validity with respect to such rule and shall not affect the review of the rule under chapter 75 of title 5, United States Code.

I think this language leaves little doubt as to what congressional intent is. We do want to leave the ability of the courts to review regulations after they have been approved by the Congress.

I would like to submit, Mr. Chairman, for you and the members of the committee, and ask at the end of my statement this be made a part of the record—a legal memorandum prepared by the Congressional Research Service—which confirms this analysis which I have briefly given you. This is much more extensive, so I do not need to go into a lot of details here today.

The CHAIRMAN. Without objection, the document will be received for the record.

Mr. BROYHILL. Mr. Chairman, I feel very strongly that when a regulation is issued by one of these agencies, that has a substantial effect on the economy, Congress has a constitutional responsibility to play a role in determining not only whether the regulation is necessary, but whether or not it should even go into effect.

I feel strongly that legislation similar to that which has been introduced by Mr. Lott, H.R. 3939, should be given the green light to get to the floor. I know there are other committees involved, too, not just this committee itself, but H.R. 3939 does a lot more than just address the legislative review process.

It also requires agencies to conduct regulatory analyses of major rules. That is, to consider the alternatives to the rule, and to also attempt to measure the costs and the benefits of the rule.

All of these items are necessary as well. In general, I believe that the legislative review, and regulatory reform provisions contained in H.R. 3939 are not only sensible and workable, but I think they respond to this void or vacuum that has been left by the *Chadha* decision.

Thank you. If you have any questions I will try to respond.

[Mr. Broyhill's prepared statement, with additional material referred to, follow:]

PREPARED STATEMENT OF HON. JAMES T. BROYHILL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

I would initially like to thank the chairman and members of the committee for the opportunity to testify this morning on the response of Congress to the Supreme Court's ruling in *Chadha*. It is a pleasure to be here.

The urgent need for comprehensive regulatory reform legislation is something we all recognize. As the Federal bureaucracy continues to grow, so does the number and complexity of Federal regulations. It is estimated that the cost of Federal regulation on the economy amounts to more than $100 billion a year. Unnecessary or duplicative regulation inhibits economic growth and enhances inflationary pressures. If an economic recovery is to be truly achieved, the system of regulation must be simplified and made more efficient.

As we all know, regulations issued by independent and executive agencies have the full force and effect of law. The implications of this are enormous. Congress has given this "fourth branch" of Government, as it is often called, the authority to promulgate regulations which can apply to entire industries across the board—from small business to large conglomerates—and can reach into matters of State concern and even override State statutes.

To ensure regulations of such magnitude are designed in a way that is consistent with congressional intent, we must have a mechanism to review and, if necessary, control whether they will take effect. The legislative veto device gave Congress that ability. It was a quick and simple way for Congress to check the exercise of the unbridled authority of regulatory agencies. It was an effective tool to ensure agency accountability and responsiveness to the Congress.

The Supreme Court's decision in *Immigration and Naturalization Service* v. *Chadha* has effectively eliminated any further use of legislative veto. The Court's strict construction of the bicameral and presentment requirements of the Constitution ignores the needs of a modern and complex Federal Government. It is somewhat ironic that now, without the veto device, appointed officials can issue regulations which have the effect of law, while the elected Congress, with the constitutional role of lawmaker, is powerless to review those regulations in a timely fashion.

Accordingly, it is critical that Congress act expeditiously to fill the void that has been left by this decision and to resume our proper role of overseeing the regulatory activities of these agencies.

It is for this very important reason that I am here today to express my strong support for Congressman Trent Lott's bill, H.R. 3939, the Regulatory Oversight and Control Act, of which I am a cosponsor.

H.R. 3939 contains a "hybrid" review mechanism. It provides that "major rules", which by definition have a substantial economic impact, cannot take legal effect until expressly approved by Congress. All other rules can take effect without congressional involvement, unless Congress intercedes and expressly disapproves them.

Meaningful congressional review of regulations, which would have a substantial impact on the economy, is best accomplished by means of an approval process. Regulations which could lead to a substantial increase in costs for consumers, or could have an adverse effect on competition, the environment, or the public health or

safety are properly within the purview of Congress, as lawmakers, to review and approve.

Under this type of approach, a regulation is treated as a "recommendation" of the agency, developed after careful consideration by the agency with expertise in the area in question. Congress would still be utilizing the expertise of regulatory agencies, but would simply be able to review its regulatory "end product", before it can take the force and effect of law.

Congress would be given a fixed time period in which to review the regulation and pass a joint resolution approving its substance. Expedited procedures are provided to ensure prompt and timely consideration of these resolutions. These procedures will lend certainty to those in the industry who are potentially subject to the requirements of the regulation. Additionally, such procedures prevent delay and hasten the point at which the rule can take effect.

When signed by the President, or passed by a two-thirds majority of the Congress, the regulation could then take the full force and effect of law.

This type of process would be constitutional, since it satisfies the constitutional requirements of bicameralism and presentment, enunciated by the Supreme Court in the *Chadha* decision.

One criticism that has been voiced in opposition to the approval process is that enactment of a joint resolution approving the substance of a regulation will shield that regulation from judicial review under the Administrative Procedure Act (APA). This criticism is without merit for two reasons.

First, as a matter of legal interpretation, the joint resolution of approval does not enact the text of the regulation itself into law. It simply indicates congressional approval of the regulation's substance.

Secondly, section 807(B) of H.R. 3939 explicity states:

"The enactment of an appropriate resolution approving a major rule shall *not* be construed to create any presumption of validity with respect to such rule and shall not affect the review of the rule under chapter 7 of title 5, United States Code. (Emphasis added.)

This language leaves little doubt as to the continued ability of the courts to review regulations after they are approved by Congress.

On this issue, I would like to submit a legal memorandum prepared by the Congressional Research Service which confirms this analysis.

The effect of the Supreme Court's decision in *Chadha* was to alter the delicate balance that was struck between the Congress and the regulatory agencies made possible by legislative veto. The approval process will correct that "imbalance" and will reestablish the status quo that existed before veto was found to be unconstitutional.

Now that the President must necessarily be involved in the legislative review process, an approval device more closely tracks what a disapproval device previously accomplished—placing Congress in control of the review of regulatory activities.

Under H.R. 3939, regulations which are not of the "major" type can take effect, unless Congress acts to disapprove them within a specified time frame. These regulations would have, by definition, less of an impact on the economy, consumers or the environment. Again, expedited procedures are included to ensure the timely consideration of disapproval resolutions. In the context of a disapproval procedure, expedited procedures are key to a smooth and efficient review process.

Some criticism has been voiced that the generic review procedure for all agency regulations will impose a large workload on Congress. The answer to this criticism is threefold.

First, a hybrid scheme, such as that contained in H.R. 3939, will not impose an unworkable burden since affirmative action by Congress would only be required for those regulations which would have a substantial impact. It has been estimated that roughly 50 major rules are issued a year by independent and executive agencies. All other regulations will take effect without congresssional action.

When a regulation has the potential of having a substantial effect on the economy. Congress, in carrying out its constitutionally prescribed legislative responsibilities, should have a signficant role to play in determining that regulation's effectiveness.

Second, absent a legislative review device, Congress would be saddled with the endless task of designing legislation which sets forth specific and detailed policy directives to regulatory agencies. Such an alternative makes no use of the developed expertise of the agency and transforms Congress into the regulator.

Third, section 301 of H.R. 3939 creates a regulatory review calendar in the House providing for the orderly consideration of approval and disapproval resolutions.

Mr. Chairman, my remarks here this morning have focused primarily on the need for a quick congressional response to the *Chadha* decision. As important as this is, a legislative review device such as the approval mechanism, will not be, in and of itself, enough. There is still an overriding need for comprehensive regulatory reform legislation to ensure full agency accountability and responsiveness. The *Chadha* decision came at a time when the momentum in Congress to act on regulatory legislation was ever increasing. That urgency continues to exist.

It is well recognized that the reform of internal agency procedures for rulemaking, and the enactment of such reforms into statutory law, will improve the wisdom of the regulatory end product.

H.R. 3939 does much to accomplish that goal. It requires agencies to conduct regulatory analyses of major rules and the alternatives which were considered. This will help to ensure that the most cost effective approach is selected. H.R. 3939 requires agencies to publish a semiannual regulatory agenda listing rules it intends to promulgate, amend or repeal. Provisions are also included in the bill which provide for systematic review of existing regulations by agencies, and make reforms to the rulemaking process to provide greater notice and opportunity for public comment.

One topic that will be discussed and examined at length today is the appropriations process. As I stated on the floor during the special order on legislative veto, in June, 1983:

"Without the authority to reverse Executive decisions on agency rulemakings, Congress could well become increasingly frustrated with their lack of ability to ensure that congressional intent is followed through the use of limiting language on appropriations measures. The House rule which makes this avenue of approach practically impossible may well become a deeply regretted one by its proponents".

H.R. 3939 addresses this problem. As you know, the current House rule prevents the offering of limitation amendments to appropriations bills, unless a motion to rise from the committee has been defeated. H.R. 3939 would amend this rule to permit such amendments with respect to nonmajor rules which have not been considered by the House or which have been considered but the resolution had not been enacted into law within the specified review period. Using the appropriations route would be a "last resort" under H.R. 3939. This procedure expressly defers to the authorizing committees and protects the proper input of the Senate and the President.

In general Mr. Chairman, I believe legislative review and regulatory reform provisions contained in H.R. 3939 to be, on balance, not only a sensible and workable approach, but also one that responds well to the void left by the *Chadha* decision.

I am hopeful that it will be considered by the Congress expeditiously.

Thank you.

[Additional material submitted by Mr. Broyhill follows:]

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APPROVAL AND DISAPPROVAL RESOLUTIONS PASSED BY CONGRESS, 1977-1983

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APPROVAL AND DISAPPROVAL RESOLUTIONS PASSED BY CONGRESS, 1977-1983

In the seven years since the beginning of the 95th Congress, a total of 60 resolutions (23 Senate and 36 House) approving or disapproving proposals submitted according to law, either by the President or by various departments and agencies, have been passed by Congress--18 by the Senate only, 29 by the House only, and 13 by both chambers. However, because each adopted 3 sets of simple resolutions applying to the same executive branch proposals, the actual number of separate requests that were approved or disapproved totaled only 57. The specific reasons for this apparent discrepancy are explained in more detail in the accompanying tables.

During the same period 455 approval or disapproval resolutions were introduced in Congress, 136 in the Senate and 319 in the House. Although a considerable number of these were duplicates or applied to the same proposals, the rate of adoptions was still quite low. On an annual basis the average number of introductions was about 65, but the average adoption rate was little more than 8. Despite some variations year by year, the general trend in the number of introductions has been downward as the following list indicates: 1977--119; 1978--97; 1979--80; 1980--52; 1981--52; and 1983--27.

In contrast, the number of resolutions adopted has remained fairly steady and, compared to the annual number of introductions, has shown some increase the

last few years: 1977--9; 1978--6; 1979--5; 1980--8; 1981--9; and 1983--13. A similar pattern can be seen in the totals for each Congress: 95th--216 introductions with 15 adoptions; 96th--132 introductions with 13 adoptions; 97th--80 introductions with 19 adoptions; and 98th (one year only)--27 introductions with 13 adoptions.

One factor which apparently has reduced to some extent the number of such introductions and adoptions in recent years has been the practice of including disapprovals of some proposed deferrals of budget authority in appropriation bills rather than acting upon individual resolutions of disapproval as provided by the Budget and Impoundment Control Act. At least 26 separate deferrals proposed by the President have been incorporated in and enacted as part of public laws since 1980. If each of these had been introduced and passed as separate disapproval resolutions, the totals listed above would have been increased substantially.

Although more than 300 congressional veto provisions dealing with a variety of governmental areas have been enacted by Congress in over 200 statutes since 1932, a sizable majority of the resolutions of approval and disapproval introduced or passed under those acts were based on comparatively few laws and were concerned with a limited number of matters. For example, an earlier CRS analysis by this writer found that this was true of the great bulk of the approval and disapproval resolutions introduced or passed between the years 1960 and 1975. Over 300 of the 351 resolutions introduced, as well as nearly all of those passed in that 16 year period, pertained only to five subjects: Federal employee pay levels; deferrals of budget authority; executive reorganization plans; foreign assistance; and disposal of materials from the

national stockpile. Likewise, 53 of the 63 resolutions passed by Congress involved only three matters: budget deferrals (40); stockpile material releases (8); and reorganization plans (5). 1/

Similarly, a fairly small number of public issues have been subjected by Congress in the past seven years to such congressional review procedures. Over half (33) of the 57 approval and disapproval resolutions put into effect by congressional action since 1977 have been Presidential proposals for deferral of budget authority. About one-sixth (11) were for the purpose of rejecting proposed rules, regulations or plans submitted by the Executive branch. The only other matters for which resolutions were passed in any appreciable number were concerned with District of Columbia Charter amendments and Council actions or with proposals for Federal employee pay increases, each of which accounted for 4 resolutions. Two resolutions acted upon involved other kinds of Presidential recommendations, while proposals for consolidation of an advisory council, appropriations for the MX missile, and nondiscriminatory tariff treatment led to one resolution each.

Data from these studies and other evidence does not seem to support the view that there has been an excessive or wide-ranging exercise by Congress of its statutorily granted authority to approve or disapprove certain executive branch proposals. The power has been used most frequently in the past three decades for one purpose--to reject proposed deferrals of budget authority. In the nine years between enactment of the Congressional Budget and Impoundment Control Act of 1974 and the decision by the Supreme Court in June, 1983 holding

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1/ U.S. Congress. Senate. Committee on Government Operations. Study on Federal Regulations. Vol. II. Congressional Oversight of Regulatory Agencies. "Interim Report on the Exercise of Congressional Review, Deferral and Disapproval Authority Over Proposed Executive Actions, 1960-75," by C.F. Norton. 95th Cong., 1st sess. Washington, U.S. Govt. Print. Off., 1977. Appendix H, p. 161-167.

the so-called "one-house veto" to be unconstitutional, a total of 73 such disapproval resolutions were passed (out of 211 introduced) by either the Senate or the House. The only other type of resolution passed in greater numbers since 1932 were the 111 concurrent resolutions adopted from 1949 through 1959 approving the suspension by the Attorney General of the deportation of certain aliens. The third most numerous usage of this authority has been to reject reorganization plans. During the half century (1932-1981) that the President was authorized to submit such plans to Congress, only 24 of the total of 116 such plans transmitted were disapproved by Congress. Most of the other instances in which Congress has not approved executive branch proposals are scattered among several different public issues, but in no case have there been more than a few rejections and their overall total is not large.

Approval and disapproval resolutions made effective through passage by one or by both Houses of Congress from 1977 through 1983 are listed in the appendix to this report.

TABLE 1. Number of Approval and Disapproval Resolutions Passed by Congress, 1977-1983

Type of resolution	Congress				Total
	95th	96th	97th	98th	
SENATE					
Senate Resolutions	3	5	8	2	18
Senate Concurrent Resolutions		2	1	1	4
Senate Joint Resolutions	—	—	1	—	1
TOTAL	3	7	10	3	23
HOUSE					
House Resolutions	8	3	8	10	29
House Concurrent Resolutions	3	3	1		7
House Joint Resolutions	1	—	—	—	1
TOTAL	12	6	9	10	37
TOTAL, BOTH CHAMBERS	15	13	19	13	60 (57)*

*Although the Senate and the House passed 60 resolutions of approval or disapproval during this period, the overall total of effective actions was actually 57. Two sets of duplicate resolutions of disapproval (S. Res. 18 and H. Res. 90, and S. Res. 49 and H. Res. 74) were adopted by the House and Senate on the same day—March 10, 1983. Although all four resolutions are listed as passed, only two Presidential proposals for deferral of budget authority were disapproved by their almost simultaneous passage. Likewise, separate resolutions (S. Res. 122 and H. Res. 209) were passed in 1979 by the two chambers to approve the same Department of Energy standby conservation plan #2 for emergency temperature restrictons, as required by the Energy Policy and Conservation Act of 1975 (P.L. 94-163).

TABLE 2. Subjects of Approval and Disapproval Resolutions Passed by Congress, 1977-1983

Subject	Number of effective resolutions
Presidential proposals for deferral of budget authority	33
Proposed rules, regulations and plans	11
Presidential proposals for pay increases	4
District of Columbia Charter amendments and Council actions	4
Other Presidential recommendations and proposals	2
Advisory council consolidation	1
MX missile appropriations	1
Nondiscriminatory tariff treatment	1
TOTAL	57

APPENDIX: APPROVAL AND DISAPPROVAL RESOLUTIONS MADE EFFECTIVE THROUGH PASSAGE BY ONE OR BY BOTH HOUSES OF CONGRESS, 1977-1983

95TH CONGRESS (1977-1978)

A. Passed by Senate Only

1. S. Res. 282. Disapprove deferral of budget authority for acquisition, construction and improvements by the Coast Guard for certain purposes. Passed Nov. 1, 1977.

2. S. Res. 429. Disapprove Energy Action No. 1 of the Department of Energy proposed for the Strategic Petroleum Reserve. Passed April 17, 1978.

3. S. Res. 525. Disapprove deferral of budget authority for Garrison Diversion Irrigation project. Passed Aug. 8, 1978.

B. Passed by House Only

1. H. Res. 305. Disapprove deferral of budget authority for magnetic fusion research. Passed March 3, 1977.

2. H. Res. 306. Disapprove deferral of budget authority for Energy Research and Development Administration program support for certain community operations expenses associated with ERDA. Passed March 3, 1977.

3. H. Res. 307. Disapprove deferral of budget authority for biological and environmental research. Passed March 3, 1977.

4. H. Res. 851. Disapprove deferral of budget authority for ERDA for gas cooled thermal reactor program. Passed Nov. 2, 1977.

5. H. Res. 852. Disapprove deferral of budget authority for ERDA for magnetic energy fusion program. Passed Nov. 2, 1977.

6. H. Res. 853. Disapprove deferral of budget authority for ERDA for magnetic energy fusion program. Passed Nov. 2, 1977.

7. H. Res. 854. Disapprove deferral of budget authority for ERDA for high energy physics program. Passed Nov. 2, 1977.

8. H. REs. 1072. Disapprove Commissioner of Education proposed consolidation of certain advisory councils. Passed (269-10), May 22, 1978.

C. Passed by Senate and House

1. H.J. Res. 621. Approve the President's decision on transportation system for Alaska natural gas. Passed both Houses on Nov. 2, 1977.

2. H. Con. Res. 464. Approve an amendment to the District of Columbia Charter relating to the initiative and referendum. Passed House (321-24) on Feb. 27, 1978; Senate agreed March 10, 1978.

3. H. Con. Res. 471. Approve an amendment to the District of Columbia Charter on the recall of elected officials. Passed House (350-4) Feb. 27, 1978; agreed to by Senate March 10, 1978.

4. H. Con. Res. 555. Approve the extension of nondiscriminatory treatment with respect to the products of the Hungarian People's Republic. Passed House May 22, 1978; agreed to by Senate June 27, 1978.

96TH CONGRESS (1979-1980)

A. Passed by Senate Only 2/

1. S. Res. 50. Disapprove deferral of budget authority for promotion and development of American fishery products and for research. Passed March 13, 1979.

2. S. Res. 449. Disapprove deferral of a portion of budget authority for Young Adult Conservation Corps. Passed June 30, 1980. (OMB claimed resol. not legally binding as applied only to portion of deferral).

3. S. Res. 464. Disapprove deferral of budget authority for Cumberland Gap Tunnel. Passed Aug. 1, 1980.

4. S. Res. 470. Disapprove deferral of budget authority for E.P.A. grants for waste treatment works. Passed Aug. 1, 1980.

2/ The Senate passed two other simple resolutions of approval in May, 1979 (S. Res. 120 and S. Res. 153) that are not counted here because, in order to become effective under Sec. 552 of the Energy Policy and Conservation Act of 1975 (P.L. 94-163), the House of Representatives also would have had to pass "affirmative" resolutions approving the proposals within 60 calendar days. The House rejected both proposals on the same day, May 10, 1979, by record votes. The first (H. Res. 212), which was to approve the Department of Energy standby gasoline rationing plan #1, was defeated by a vote of 159-24; the second (H. Res. 266), to approve the Department of Energy contingency plan #6 on gasoline rationing, lost by a vote of 159-246. The Senate also passed one other simple resolution (S. Res. 122) to approve the Department of Energy standby conservation plan #2 on emergency temperature restrictions, but this is recorded here under the list of resolutions passed by both Houses because, to be effective, the law (P.L. 94-163) required affirmative resolutions adopted by the Senate and the House of Representatives.

B. Passed by House Only 3/

1. H. Res. 239. Disapprove deferral of budget authority for petroleum exploration in Alaska. Passed (409-3) June 19, 1979.

2. H. Res. 655. Disapprove proposed rule under the Natural Gas Policy Act of 1978 on incremental pricing of natural gas. Passed (369-34) May 20, 1980.

C. Passed by Senate and House

1. S. Res. 122 and H. Res. 209. To approve Department of energy standby conservation plan #2 on emergency temperature restrictions. Passed Senate (89-3) May 2 and passed House May 10, 1979. Tabulated as only one resolution because of requirement for passage of duplicate but separate resolutions in the Energy Policy and Conservation Act of 1975 (P.L. 94-163).

2. S. Con. Res. 63. Disapprove the District of Columbia Council passage of the Location of Chanceries Amendment Act of 1979. Passed Senate Dec. 19, 1979; passed House Dec. 20, 1979.

3. S. Con. Res. 91. Disapprove proposed regulations on grants to state educational agencies for educational improvement. Passed Senate May 20, 1980; passed House May 21, 1980.

4. H. Con. Res. 318. Disapprove proposed final regulations pertaining to the Education Appeals Board. Passed House May 13, 1980; passed Senate May 15, 1980.

5. H. Con. Res. 319. Disapprove proposal final regulations pertaining to the arts in education program. Passed House May 12, 1980; passed Senate May 15, 1980.

6. H. Con. Res. 332. Disapprove proposed regulations pertaining to law-related education program. Passed House May 19, 1980; passed Senate May 20, 1980.

3/ The House also passed H. Res. 209, to approve the Department Energy standby conservation plan #2 on emergency temperature restrictions, but it is counted here as a resolution passed by both Houses for reasons explained above.

CRS-10

97TH CONGRESS (1981-1982)

A. Passed by Senate Only

1. S. Res. 89. Disapprove President's recommendation for pay increase for Members of Congress. Passed (93-0) March 12, 1981.

2. S. Res. 90. Disapprove President's recommendation for pay increases for Comptroller General, Assistant Comptroller General, General Counsel of GAO, Librarian and Deputy Librarian of Congress, Public Printer, Deputy Public Printer, and Architect and Assistant Architect of Capitol. Passed (91-3) March 12, 1981.

3. S. Res. 91. Disapprove President's recommendation for increases in pay for justices, judges and other judicial branch personnel. Passed (87-8) March 12, 1981.

4. S. Res. 92. Disapprove President's recommendation for increase in pay for offices and positions in the Executive Schedule. Passed (86-7) March 12, 1981.

5. S. Res. 120. Disapprove deferral of budget authority for Veterans' Administration medical care. Passed June 2, 1981.

6. S. Res. 256. Disapprove proposed needs analysis formula for student aid under the Higher Education Act. Passed Dec. 10, 1981.

7. S. Res. 260. Disapprove deferral of budget authority for Office of Justice Assistance, Research and Statistics in the Department of Justice. Passed Dec. 15, 1981.

8. S. Res. 409. Disapprove plan by Secretary of Interior for distribution of judgment funds awarded to Gros Ventre Tribe. Passed June 16, 1982.

B. Passed by House Only

1. H. Res. 208. Disapprove District of Columbia Council adoption of the D.C. Sexual Assault Reform Act of 1981. Passed (281-119) Oct. 1, 1981.

2. H. Res. 411. Disapprove deferral of budget authority for Department of Energy fossil research and development program. Passed April 29, 1982.

3. H. Res. 474. Disapprove deferral of budget authority for the Department of Interior historic preservation fund. Passed July 29, 1982.

4. H. Res. 475. Disapprove deferral of budget authority for the Department of Interior land and water conservation fund. Passed July 29, 1982.

5. H. Res. 476. Disapprove deferral of budget authority for the Department of Interior urban parks and recreation program. Passed July 29, 1982.

6. H. Res. 479. Disapprove deferral of budget authority for the Strategic Petroleum Reserve. Passed July 29, 1982.

7. H. Res. 493. Disapprove deferral of budget authority for land acquisition for the Department of Interior (Fish and Wildlife Service). Passed July 29, 1982.

8. H. Res. 494. Disapprove deferral of budget authority for construction and anadromous fish in the Department of Interior. Passed July 29, 1982.

C. Passed by Both Houses

1. S.J. Res. 115 (P.L. 97-93). Approve the President's recommendation for a waiver of law under the Alaska Natural Gas Transportation Act of 1976. Passed Senate (75-19) Nov. 19, 1981; passed House (230-188) Dec. 10, 1981; approved by the President, Dec. 15, 1981.

2. S. Con. Res. 60. Disapprove final rule of the Federal Trade Commission on used motor vehicles. Passed Senate (69-27) May 18, 1982; passed House (286-133) May 26, 1982.

3. H. Con. Res. 388. Disapprove Secretary of Education proposed regulations under the Education Consolidation and Improvement Act of 1981. Passed House (363-0) Aug. 10, 1982; passed Senate Aug. 10, 1982.

98TH CONGRESS (1983)

A. Passed by Senate Only

1. S. Res. 18. Disapprove deferral of budget authority for the dairy indemnity program. Passed March 10, 1983. (Duplicates H. Res. 90 passed same day by House—see below).

2. S. Res. 49. Disapprove deferral of budget authority for economic assistance programs. Passed March 10, 1983. (Duplicates H. Res. 74 passed same day by House--see below).

B. Passed by House Only

1. H. Res. 73. Disapprove deferral of budget authority for the business loan and investment fund of the Small Business Administration. Passed March 10, 1983.

2. H. Res. 74. Disapprove deferral of budget authority for economic development assistance programs. Passed March 10, 1983.

3. H. Res. 75. Disapprove deferral of budget authority in the Department of Commerce for operations and administration of the International Trade Administration. Passed March 10, 1983.

4. H. Res. 76. Disapprove deferral of budget authority for the pollution control equipment contract guarantees revolving fund in the Small Business Administration. Passed March 10, 1983.

5. H. Res. 77. Disapprove deferral of budget authority for the surety bond guarantees revolving fund in the Small Business Administration. Passed Mach 10, 1983.

6. H. Res. 80. Disapprove deferral of budget authority for the Strategic Petroleum Reserve. Passed March 10, 1983.

7. H. Res. 90. Disapprove deferral of budget authority for the dairy indemnity program in the Department of Agriculture. Passed March 10, 1983.

8. H. Res. 177. Disapprove deferral of budget authority for energy conservation in the Department of Energy. Passed (280-107) May 26, 1983.

9. H. Res. 178. Disapprove deferral of budget authority for fossil energy research and development in the Department of Energy. Passed (265-121) May 26, 1983.

10. H. Res. 181. Disapprove deferral of budget authority in the Department of Interior for construction of Northern Mariana Islands hospital. Passed (266-116) May 26, 1983.

C. Passed by Both Houses

1. S. Con. Res. 26. Approve obligation and expenditure of funds appropriated in P.L. 97-377 for MX missile procurement and development of a basing mode. Passed Senate (59-39) May 25, 1983; passed House (223-167) May 26, 1983.

The CHAIRMAN. Thank you for your excellent statement. You just summarized by saying you believe that the Congress in order to function in the delegation of authority since it cannot personally supervise everything, will have the veto power if it is going to have the right to delegate, because it needs to examine what others do in its name.

Mr. BROYHILL. We are saying that we would actually have to approve those recommended rules. These rules that have a major effect would actually become recommendations of the agencies. For all other rules we would retain a disapproval authority. This would comply with the *Chadha* decision. That is, a resolution would have to be passed by both Houses, and be signed by the President.

The CHAIRMAN. Thank you very much, Mr. Broyhill. We appreciate your coming and your excellent statement.

Now, we have Hon. James R. Jones. We are pleased to have you, and we welcome you.

STATEMENT OF HON. JAMES R. JONES, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OKLAHOMA

Mr. JONES. I have a statement for the record.

The CHAIRMAN. Without objection, it will be received.

Mr. JONES. Let me briefly summarize from the statement.

As chairman of the Budget Committee, I am specifically concerned about the impact of the *Chadha* decision on the congressional budget process. If the authorizing and appropriations bills are used as the vehicles for controlling the delegation of authority to the executive branch, congressional action on budget matters may be significantly slowed. I think this would be unfortunate in the light of the growing consensus that the process should be completed in a more timely manner.

The ruling may also raise questions about the provisions of the Impoundment Control Act of 1974, especially the deferral decision. Most authorities believe the recission authority contained in the Impoundment Control Act is valid under the *Chadha* decision.

Both Houses of Congress must affirmatively pass a bill or resolution which requires the President's signature before taking effect. The deferral authority does not appear to meet these standards as set forth in *Chadha,* since the deferral may be overturned by one House. The Appropriations Committee has dealt with this by overturning deferrals in regular appropriations bills.

Just as an aside, as a shorthand answer to what we should be doing, I think we should have legislative veto. I questioned all along whether the single House resolution would be preferable, but I think we can regain the balance that was sought in the Impoundment Budget Control Act and in the legislative veto of regulations.

I go on in the statement and discuss the various things that were suggested to give both Houses some control over matters previously subject to a one-House veto, how it will slow down the process, could lead to more riders on appropriations bills, which we have dealt with in the past, and do not necessarily improve the process. The sum and substance is that most of these things are going to slow down the process, and I do not think that is in anyone's best interest.

So I come to outlining the different institutional responses that have been made to sunset legislation requiring periodic review of programs and positive congressional action to continue them. The sunset legislation, I think, has some merit, but I think from the initial fad of both sunshine and sunset legislation, there is a little less enthusiasm in some of the States that use them now. So I am not sure that is the answer.

The biennial process requiring 2-year budget resolutions, authorizations and appropriations, including an oversight session of Congress, dedicated to authorizing language, I think sounds good in principle. The fact is, if you cannot get a quorum of committee members for an oversight meeting now, when you are dealing with appropriations bills and other things, it would be very hard to do when that is all you are devoting a year to.

We need informal accommodation between branches of mutual concern and interest, and increased use of committee oversight duties to monitor and control the executive branch. All of these things will be considered.

I think some attention should be given to what Mr. Moakley advocates: A wide-ranging framework for the coordinated review of administrative, congressional and judicial aspects of regulatory reform.

I find especially interesting the proposal to establish a select committee with authority to review proposed and existing rules in a manner not currently possible. The role of the select oversight committee with jurisdictional rulemaking authority would be similar to that of the Budget Committee, which is to consolidate in one place a forum for debate of the broad fiscal and economic issues before Congress, and to aid Congress in the formation of its spending and revenue priorities. A constitutional amendment is another thing that is being proposed. It is the most far-reaching proposal resulting from the *Chadha* decision.

Frankly, I always initially shy away from a constitutional amendment. Some of our colleagues would have rewritten the Constitution in a way that our Founding Fathers never contemplated, so I shy away from that.

In the final analysis, you can strengthen the whole framework by using the two-House veto provided in the Rescission and Budget Impoundment Act.

The CHAIRMAN. In other words, you feel the right in certain cases to exercise a veto is essential to the proper and full discharge by the Congress of its legislative duties?

Mr. JONES. I think that is very much the case, and I think for the protection of the public it is essential. I came to this conclusion in the late 1960's when I was Chief of Staff at the White House. I felt that the one institution, the Congress, could, indeed, control the so-called bureaucracy and keep the power for the people. I think the legislative veto is a very important part of that whole process. I do not think the one-House veto was ever constitutional, and I think that within the framework of the two-House veto we can retain that balance which I think is very important.

[Mr. Jones' prepared statement follows:]

Prepared Statement of Hon. James R. Jones, a Representative in Congress From the State of Oklahoma

INTRODUCTION

"[The] history of the separation of powers doctrine is also a history of accommodation and practicality." I believe that statement from Justice White's dissent in the *Chadha* case, sets the tone for what Congress attempted to do with the legislative veto and must now reattempt with other available powers.

Since 1932, when the first legislative veto provision was enacted into law, through the 1970's Congress and the Executive Branch viewed the veto as an effective compromise and accommodation of interests. The use of the veto flourished from 1970 through 1975 when at least 163 such provisions were included in 89 laws.

The majority opinion recognized that the "sharing" with the Executive by Congress of its authority ". . . [is] an appealing compromise. In purely practical terms, it is obviously easier for action to be taken by one House without submission to the President" (p. 38). Justice White's dissent recognizes the accommodating nature of the legislative veto and believes the majority opinion understates its importance by viewing it only as "efficient, convenient, and useful":

"It is an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress' control over lawmaking. Perhaps there are other means of accommodation and accountability, but the increasing reliance of Congress upon the legislative veto suggests that the alternatives to which Congress must now turn are not entirely satisfactory."

Congress must develop alternatives which preserve its control over lawmaking but allow flexibility to the executive branch responsible for carrying out our laws. Many proposals are being raised to fill the void left by the *Chadha* decision. Some would continue the concepts of flexibility and control, others are more rigid in their application. We must now determine which proposals or ideas are appropriate to a particular set of circumstances. One lesson to be learned from the 50 years of experience with the legislative veto is that for all the legal controversy it engendered, it most often was used in a discrete, situation-oriented manner and often succeeded in facilitating interbranch accommodation in areas of great political sensitivity.

I am wary of trade-offs with the executive branch which may be too rigid a response and not developed with accommodation in mind. In particular, I am thinking of the suggestion that Congress trade line-item veto power to the President in exchange for legislative veto power. Each change may be a desirable addition to the Constitution based upon its own merits, but I do not think Congress should balance its sharing control over the purse by granting line-item veto power to the President with its ability to delegate authority to the executive branch while retaining a system of checks through a legislative veto. Such a trade would not, in my opinion, be a measured, institutional response to the *Chadha* ruling.

As Chairman of the Budget Committee, I am specifically concerned with the impact of the decision on the congressional budget process. If the authorization and appropriation bills are used as the vehicles for controlling delegation of authority to the executive branch, congressional action on budget matters may be significantly slowed. This would be unfortunate in light of the growing consensus that the process should be completed in a more timely manner. The ruling may also raise questions as to the provisions of the Impoundment Control Act of 1974, especially the deferral procedures. I will develop these thoughts in more detail after a brief overview of the legislative veto.

OVERVIEW

The legislative veto has been used as a means of accommodation between the branches of government. Through its use, Congress has been able to afford flexibility to the Executive while retaining safeguards against an abuse of delegated authority. In 1932, the legislative veto was first initiated as Congress added to the fiscal year 1933 legislative appropriations act a provision enabling either house of Congress to block President Hoover's executive branch reorganization proposal by voting to disapprove it before it could go into effect.

Since that time, the legislative veto mechanism has been used to delegate broad legislative authority to the executive and administrative agencies "with strings attached". Congress afforded flexibility to the Executive by setting broad parameters in delegating authority with the confidence that should actions be taken under that delegation overstepping the bounds of the policy intended by Congress, the Congress could act quickly to negate that action. The safeguard of the legislative veto allowed

Congress to rely more heavily on agency expertise, allowing professional bureaucrats to paint in the picture for which Congress has sketched the outline, eraser in hand.

Justice White, in his dissent in *Chadha* listed fifty-six statutes identified in the Brief for the United States Senate which include provisions for a legislative veto by one or both Houses of Congress. The statutes run the gamut from foreign affairs to budgeting, international trade to Federal employee pay, and energy to home rule in the District of Columbia. That list, however, is not exhaustive in that it does not include the numerous statutes providing for a veto by congressional committees to block an agency action.

IMPACT OF CHADHA ON ICA

In response to disputes over the President's inherent power to impound appropriations, particularly during the Nixon era, Congress enacted the Congressional Budget and Impoundment Control Act of 1974. Under that law, impoundment control was united with a general reform of the congressional budget process.

Under the Impoundment Control Act (ICA), two mechanisms are provided to deal with impoundments. Rescission authority, the power of permanent impoundment, under the Act requires approval by Congress within 45 days. That approval takes the form of a bill or joint resolution which affirms, in whole or in part, the President's proposal to rescind budget authority for a particular program.

The ICA also confers upon the President deferral authority, the power to temporarily impound, wherein the President can propose to delay the spending of funds. Under the Act, either House of Congress can disapprove the deferral at any time by passing an "impoundment resolution", a simple resolution expressing the house's disapproval of a proposed deferral of budget authority. Inclusion of the deferral mechanism was seen as aiding the legislative process, since it provided time for a legislative decision on whether to change previous decisions on appropriations.

Because of the existence of a legislative veto mechanism in the deferral authority facet of the ICA, the power of the President to defer budget authority is now in question. The *Chadha* decision appears to have invalidated the type of one-House legislative veto contained in the ICA. That being the case, the validity of the President's power to defer budget authority under the Act lies in the severability of his authority to submit deferral messages to Congress from the (unconstitutional) provision of a legislative veto as Congress' means of response to disapprove those messages. In my opinion, the legislative veto mechanism involved in Congress' response is not severable from the President's ICA deferral authority. Congress would not have granted such broad power to the President to alter programmatic spending without some oversight recourse short of having to overturn deferrals by enacting another statute. The deferral mechanism was set out to provide the President with flexibility while preserving the constitutional balance. It was devised as a means of accommodation between the branches of government: Congress maintained its legislative integrity while affording the Executive branch the power to propose modifications in programs based upon its expertise in seeing that the laws are faithfully executed. The practical effect of the *Chadha* decision on deferrals has been a continuation of business as usual, but without the one-House veto. The President continues to submit deferral messages to Congress and the Comptroller General continues to review and comment on them.

Taking severability one step further raises the question of whether the rescission mechanism of the Impoundment Control Act falls in the wake of deferral authority being unconstitutional. In *Chadha*, the Court held that the INS provision in question (involving the one-House veto) was intended by the Congress to be severable from the remainder of the statute. Since the INS statute contained a clean-cut severability clause, congressional intent was relatively clear. The Congressional Budget and Impoundment Control Act, however, contains no such clause. Absent such a clause, the courts will normally sever the invalid portions of a statute "unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976). In the second hurdle of the two-pronged test of severability, the court will presume a provision severable ". . . if what remains after severance is fully operative as law." *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932).

In my opinion, the rescission provisions of the ICA are severable from deferral authority under the Act. When Congress enacted the ICA it was addressing a constitutional controversy between the executive and legislative branches of government. The Congress sought to enforce comprehensive reporting by the executive branch

and review of actions by Congress. The rescission provisions of the ICA do just that. The impoundment abuses of the early 1970's are addressed in a powerful and constitutional manner under the rescission mechanism. The scheme requiring action by both Houses and (sending) a bill or joint resolution to the President for signature clearly comports with the bicameralism and presentment requirements enunciated in *Chadha*.

In a similar vein, the deferral mechanism should be considered severable from the balance of the Budget Act. Congress, in enacting the Congressional Budget and Impoundment Control Act of 1974, saw the opportunity to put its own system of budget-making in order while at the same time dealing with the impoundment problem. The internal rules and procedures encompassed in the Budget Act were intended to instill in the Congress a system under which budgetary decisions could be rendered in a timely and efficient manner. And, the Budget Act over the last decade has, for the most part, fulfilled its enumerated purposes. It has assured effective congressional control over the budgetary process. It has resulted in the congressional determination each year of the appropriate level of Federal revenues and expenditures. It has helped the body establish national budget priorities. And it has promoted the furnishing of information by the executive branch, and by its own support agencies, in a manner that has assisted the Congress in discharging its duties.

Whether the President has the constitutional power to defer spending in the absence of Congress' legislative veto power is unclear at this point. The Antideficiency Act (31 U.S.C. 1512) requires apportionment of appropriations at a rate calculated to avoid creating the need for a deficiency appropriation. That Act also specifically authorizes a spending plan establishing reserves for contingencies or "to achieve savings made possible by or through changes in requirements or greater efficiency of operations." 31 U.S.C. 1512(c)(1)(B). Reserves so established must be reported to Congress either as deferrals or rescissions, as the case may be, under the Impoundment Control Act. The cloud on the President's deferral authority under the ICA should not be construed as affecting the President's duty to report his actions under the Antideficiency Act.

The President also has some deferral authority under his inherent powers flowing from his constitutional duty to take care that the laws be faithfully executed. The limits on that temporary impoundment authority can best be explained through an examination of caselaw involving impoundments prior to enactment of the ICA.

The basic premise underlying court decisions on presidential impoundments prior to enactment of the ICA was the determination of whether the legislation considered was discretionary or mandatory in nature. Where the court found a measure mandatory, it followed that the Executive had no discretion to control obligations, allotments, etc. once the measure is enacted into law. The central issue in an impoundment case was whether the Executive had discretion under the authorizing or appropriating statute in question to withhold funds. As Professor Winter put it in a 1971 congressional hearing on Executive Impoundment of Appropriated Funds: "As long as the President has a 'colorable argument' that the statute does not mandate spending, he is free to exercise his discretion as to whether to impound or not." I interpret the pre-1974 caselaw to mean that any power the President may have had to defer mandatory spending under the ICA no longer exists. His power to defer discretionary spending, however, is limited to the strictures of the Antideficiency Act and similar measures.

Despite the unconstitutionality of the legislative veto as a response to presidential deferrals, Congress is not without recourse to respond to deferral actions. In fact, Congress has tended, in recent years, toward use of a bill as the appropriate legislative response to the President's deferral messages. A "Summary of Actions on Deferrals" prepared by the House Committee on Appropriations shows that from fiscal year 1975 through fiscal year 1979, all congressional responses to Presidential deferral messages took the form of House or Senate impoundment resolutions. In fiscal year 1980, House bills were used in 3 instances to disapprove deferral messages and consequently mandate spending of $1,833,120,473 by the Federal Highway Administration and the Urban Mass Transportation Administration. In fiscal year 1981, a House bill was used in response to 15 deferral messages to reinstate obligations of $367,359,000. In fiscal year 1982, House bills are shown to have disapproved 7 deferral messages. In fiscal year 1983, 6 deferral messages were disapproved through use of 3 House appropriations measures. To date, in fiscal year 1984, one deferral message involving administrative expenses for the United States Railway Association was disapproved in H.R. 3959, subsequently approved as Public Law 98-181.

Should the President continue to submit deferral messages, as has been the case since *Chadha*, the Congress would not be powerless to act. Absent any other form of mutual accommodation between the branches of government, Congress may resort

to use of bills or joint resolutions to disapprove a deferral. The real risk we run under such a system is the time delay such a rejection technique would mean. During that time, the will of Congress would not be carried out.

BEYOND THE BUDGET ACT: IMPACT ON THE CONGRESSIONAL BUDGET PROCESS

In light of the fact that Congress is unwilling to lose control of authority delegated to the executive branch, i.e., rulemaking process, defense sales, energy areas, it may attempt to exert control through the authorization and appropriations process.

The Supreme Court recognized that the *Chadha* decision would greatly alter the way Congress conducted its business. In one decision, over 200 statutory procedures for congressional oversight of delegated authority were struck down. Noting the hardship which this might present to Congress the Court stated that:

". . . the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives or hallmarks of democratic government and our inquiry is sharpened rather than blunted by the fact that Congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies." (*INS* v. *Chadha*, 103 S. Ct. 2764 (1983) p. 23–24.)

In footnote 19 (p. 34) the Court suggested that,

"The Constitution provides Congress with abundant means to oversee and control its administrative creatures. Beyond the obvious fact that Congress ultimately controls administrative agencies in the legislation that creates them, other means of control, such as durational limits on authorizations and formal reporting requirements, lie well with Congress' constitutional power."

In my opinion, resorting to such methods of control will further tangle up and delay the congressional budgeting process. Such a result would be totally inconsistent with the growing concern in Congress to streamline and accelerate the process. By attempting to control the delegation of authority, Congress will have to rely more on annual or short/term authorizations. The burden will then be on agencies to secure legislative support rather than on Congress to stop agency actions.

Supporters of biennial budgeting believe that Congress must move towards a two-year cycle of authorization, appropriations, and budget resolutions. Even individuals who are not strong proponents of biennial budgeting regard the move away from annual authorizations as a necessary step to speed up the budget and appropriations process. However, without the one-House veto tool available, Congress could well be forced to move further away from the goal of multi-year authorizations, in order to keep agencies in check. This increase in legislative activity will increase the congressional workload and take valuable legislative time away from other issues warranting our attention.

A growing concern in the budget process is timely reporting and enactment of authorizations. Committees are being encouraged by the Beilenson Task Force on the Budget Process to report multi-year authorizations to reduce the annual workload of committees and Congress. Multi-year authorizations could also aid in speeding up the appropriations process. But the *Chadha* ruling may run counter to this trend, by tying committees and Congress up in knots with specific policies and rulemaking decisions which may have been delegated, subject to checks, in the past.

Additionally, a proliferation of "report and wait" type statutes allowing for privileged or expedited procedures for resolutions to approve or reject an agency's action may crowd the floor schedule, further tightening the available time for other legislation.

The Court's decision could also impact on the approriations process as committees grapple with legislative ways to oversee the authority delegated in the past to the executive branch.

The use of mandatory appropriations language in authorization bills may increase as a result of the Court's ruling. In recent years, authorizing legislation has provided less discretionary authority to the executive branch in its use of appropriated funds thereby limiting the executive branch's discretion in carrying out one program as opposed to another. If an appropriation is made pursuant to the authorizing legislation then it must be spent or allocated in the manner prescribed by such legislation. Appropriations bills also may become more mandatory and specific in nature in order to check the discretion of the executive branch in its implementing the congressional intent of programs.

The ruling could increase the use of riders to appropriation bills. In the past few Congresses, legislation dealing with abortion, school prayer, and busing has been of-

fered to general appropriation bills delaying their passage and sometimes causing the defeat of an entire bill.

Legislating on appropriation bills circumvents the regular committee process of hearings, report language and authorizing legislation. The debate on important issues is not focused in the authorizing process where it belongs, but instead is injected into the appropriations process. To stem the proliferation of limitations on appropriations, House Rule 21 was amended to discourage limitations on general appropriation bills by allowing the motion to rise to cut off such amendments. This procedure could become very cumbersome if limitations increase as a response to the loss of the legislative veto. An issue is being raised as to the Appropriations Committee's primary control over language in appropriation bills that limits the use of appropriated funds.

Some argue that the power of the purse is the crucial legislative tool for controlling the executive branch and that any member of Congress should be able to offer limitations at any time. Limitation amendments are not the most effective way to control the executive branch since to be in order they must be very specific in nature rather than a broad sweeping policy statement. If limitations become a primary method of filling the legislative veto void, consideration of appropriation bills may well take much longer than is currently the case. Additionally, the Appropriations Committee's internal deliberations may also take longer as authorizing committees press their need for limitation language to be included in the reported bill.

Another kink in the appropriation/authorization process which the *Chadha* ruling may contribute to is the use of review provisions which would be characterized as an exercise of legislative rulemaking authority affecting only internal congressional concerns. A suggested provision might authorize a certain Executive action but allow for passage of a concurrent resolution urging administrative modification or cancellation of the action. The adoption of such a resolution would make it out of order under House/Senate rules to consider an appropriation which would fund the disapproved activity. Since this would be within the rulemaking authority of the Congress to regulate legislation, it would appear to be in line with *Chadha*.

Such a provision would be difficult to apply to an appropriation bill since particular activities are not usually funded with line-item specificity. Since the point of order could apply to a general appropriation for a department or agency responsible for the activity, it would be too broad to be effective. Also, once the appropriation bill is considered the provision would be inapplicable so it is not difficult to foresee the executive branch timing its activities to occur after the appropriation bill is passed.

WHAT HAPPENS NEXT? CONGRESSIONAL RESPONSE

Now Congress must face the difficult task of restructuring a system to maintain the flexibility and control which the legislative veto provided or of creating new concepts and practices to achieve the same ends. Possible responses range from simple accommodation between the branches to constitutional amendments.

Many statutory approaches have been suggested in response to the *Chadha* decision. The House adopted conflicting amendments to H.R. 2688, Consumer Product Safety Amendments of 1983 addressing the one-house veto issue. Mr. Waxman's amendment permits Congress to disapprove commission rules within 90 days by joint resolution. Mr. Levitas' amendment requires Congress to approve commission rules by joint resolution before they can go into effect.

A Senate bill, S. 1650, would provide for a joint resolution of disapproval for all agency rules. Mr. Lott has introduced a bill (H.R. 3939) under which a major rule would not take effect unless Congress enacts a joint resolution of approval within 90 days. Minor rules could take effect unless disapproved by a joint resolution within 90 days.

Senator Bumpers has proposed a noncongressional response, S. 1766, which would increase the Courts' role in determining the appropriateness of agency rules in light of congressional intent.

Report-and-wait provisions will probably increase as a form of congressional control since their constitutionality was affirmed in *Chadha*.

Congress is also looking at broader institutional responses to the void created by *Chadha*. Justice White's view that the doctrine of separation of powers has developed with accommodation and practicality in mind should offer us guidance in our charge.

The Committee on Rules is in the best position to consider possible institutional responses to the Court's decision. These hearings provide a forum for shaping ideas to be discussed and will establish the framework for an institutional response.

Various suggestions for institutional responses are:

Sunset legislation requiring periodic review of programs and positive congressional action to continue them;

Biennial budget process requiring two-year budget resolutions, authorizations, and appropriations, including an oversight session of Congress dedicated to oversight of authorizing language;

Informal accommodation between the branches in area of mutual concern and interest;

Increased use of committee oversight duties to monitor and control the executive branch.

The latter two suggestions merit some further comments. In the wake of the *Chadha* ruling, Congress and the Executive branch have sought to not rock the boat in the affected areas but informally have accommodated each other. In the appropriations area the potential exists for including language in appropriation Acts prohibiting certain funds from being subject to the deferral process. Committees are also using report language to express their intent as to the use of funds, agency actions, proposed regulations, etc. Although such language is not binding on the Executive branch, it is a clear expression of congressional intent and notice of potential subsequent congressional action if unheeded.

Strengthened congressional oversight would be a valuable contribution in this area as well as other areas of concern. It is often suggested as a method for Congress to better control its budget, authorization, and appropriations process. Mr. Moakley has proposed a wide-ranging framework for the coordinated review of administrative, congressional, and judicial aspects of regulatory reform. I find especially interesting the proposal to establish a select committee with the authority to review proposed and existing rules in a manner not possible under the current committee jurisdictional situation. The role of the select committee with oversight of cross-jurisdictional rulemaking authority is similar to that of the Budget Committee, which is to consolidate in one place a forum for debate of the broad fiscal and economic issues before Congress and to aid Congress in the formation of its spending and revenue priorities.

The proposed select oversight committee would serve as a coordinator of congressional intent on agency authority and the promulgation of rules. Its role would be to focus on the congressional intent behind the delegation of authority and monitor agency rules to ensure that such intent is carried out.

A constitutional amendment is the most far-reaching congressional response to the Court's ruling. Besides the fact that is unlikely that such an amendment would be quickly adopted, I do not think it is the best response. I would prefer a less rigid method to reestablish the accommodation between the branches which the legislative veto provided. As I mentioned earlier, I would be especially wary of any "trading" of authority with the Executive branch in the form of a constitutional amendment, e.g., providing a line-item veto to the Executive branch in exchange for a legislative veto for the Congress.

I hope my remarks have been helpful to your committee. I would suggest that all members interested in this area read a CRS publication, "The Legislative Veto After *INS* v. *Chadha*," Fall 1983. It is a very good overview of the areas affected by the decision which I found helpful in formulating my remarks for today.

The CHAIRMAN. Mr. Moakley?

Mr. MOAKLEY. I apologize for being late. The new mayor of Boston paid his first visit to Washington and I was one of the speakers, and heard my dear friend Congressman Jones' testimony.

Mr. JONES. I just agree.

Mr. MOAKLEY. I agree.

The CHAIRMAN. Thank you for coming and making your valuable contribution.

The next witness is the Honorable Silvio Conte.

Mr. Conte, we will be pleased to hear from you.

STATEMENT OF HON. SILVIO O. CONTE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. CONTE. Mr. Chairman, and members of the committee, I am grateful for the opportunity to appear before you today to speak on

the impact of the legislative veto decision, *Immigration and Naturalization Service* v. *Chadha*, on the appropriations process.

The *Chadha* decision was handed down on June 23 of last year. On July 14, I requested that the Congressional Research Service prepare for me an analysis of the impact of that decision on the appropriations process. On August 16, CRS responded in the form of an analysis by Richard C. Ehlke, specialist in American Public Law.

CRS and Mr. Ehlke are to be commended for the prompt preparation of an excellent analysis, which includes a clear and concise Executive summary. I would like to quote from that summary.

> The Supreme Court in *INS* v. *Chadha* invalidated a one-House legislative veto in the Immigration and Nationality Act in terms so sweeping as to render suspect all such legislative veto devices. The Congressional Budget and Impoundment Control Act provides that Presidential Deferrals—temporary withholdings of budget authority—can be disapproved by one House of Congress. Under the *Chadha* rationale, the one-House disapproval of Presidential deferrals of budget authority would likely be held unconstitutional.
>
> Legislative veto devices also appear in relation to reprogramming and transfer of funds.
>
> To the extent that reprogramming authority is specifically delegated with the condition of committee approval, it would seem to run afoul of *Chadha's* prohibition on the alteration of delegations of authority by means short of legislation.
>
> A similar result would obtain with respect to transfer authority conditioned on the legislative veto.
>
> To avoid constitutional problems in the impoundment control process, Congress could replace the one-House disapproval of deferrals with a joint resolution of disapproval. With respect to statutory reprogramming and transfer authority, report-and-wait provisions could be enacted providing Congress with time to consider such proposals.

I fully concur in the CRS analysis. The Committee on Appropriations can control reprogrammings, transfers, and other Executive actions such as reorganizations, through simple limitations, or report-and-wait provisions.

The only area where additional legislation appears necessary is in the disapproval of proposed deferrals.

Under title 10 of the Congressional Budget and Impoundment Control Act of 1974, the President must notify Congress by special message whenever he proposes to defer the obligation of budget authority. A proposed deferral can be disapproved by, first, an act of Congress or, second, passage by either House of a deferral resolution which, under title 10, is highly privileged for consideration in either House.

The *Chadha* decision suggests that the deferral resolution is no longer available to the Congress for the disapproval of proposed deferrals.

While a proposed deferral of budget authority provided in an appropriation act can still be disapproved in a subsequent appropriation act, appropriation bills move through the Congress on a schedule which is determined by the Executive budget cycle and the congressional appropriations process. The pertinent appropriation bill may not be available as a vehicle when action is required on a specific deferral.

Accordingly, to replace the deferral resolution, Congress needs a form of legislation which is highly privileged and can be brought to the floor when circumstances require action, and which is presented to the President for his signature.

To meet this requirement, on August 3, 1983, I introduced H.R. 3754, which amends title 10 to create a deferral bill.

A deferral bill would be highly privileged for consideration, and would only disapprove, in whole or in part, one or more proposed deferrals which have been transmitted in one or more special messages.

The bill would make three changes in existing procedures under title 10.

First, it would allow a rescission bill to include rescissions from one or more special messages. A literal reading of the current title 10 allows a rescission bill, as defined in that title, to include rescissions from only one special message.

Second, it would allow a deferral bill to include one or more deferrals from one or more special messages. The current title 10 requires that a deferral resolution be limited to one proposed deferral.

Third, it would allow disapproval of a deferral in whole or in part. The current title 10 requires that a deferral resolution disapprove a proposed deferral in entirety.

The bill was jointly referred to the Committees on Rules and on Government Operations (Congressional Record, Aug. 3, 1983, H 6473).

OMB has recommended one technical change in H.R. 3754. The bill has been redrafted accordingly, and was reintroduced yesterday as H.R. 4959.

I should also point out that Senator Hatfield and I have reached an agreement with OMB that they will continue to report deferrals under title 10, and will accept congressional action on deferrals, including simple resolutions of disapproval.

However, given the highly questionable legal status of the simple resolution of disapproval, the Committee on Appropriations has chosen instead to use appropriations bills for the disapproval of deferrals.

You have also asked me to comment on a constitutional amendment that would give Congress the legislative veto, and give the President the item veto.

I oppose both of these proposals.

The Constitution vests all legislative powers in the Congress. And as the Court reminded us in *Chadha*, the Constitution provides a formal and orderly process to which legislative action must conform if it is to have the legal force and effect of law.

However, the legislative process is a political process as well as a legal one. It is not enough for the law to have force, it also must have the respect of those whose rights and obligations are affected by it. And for the law to have respect, the legislative process must be regarded as fair, equitable, and fully representative.

The procedures set forth in section 7 of article 1—particularly the procedures for bicameral consideration and presentment to the President—are political as well as legal procedures.

They insure that any law will have had the full prior consent of the people's Representatives in the House and the Senate, and the President, in the exact form in which it became law.

We have survived and prospered as a democracy under this Constitution for almost 200 years. Amendments to the Constitution

have dealt with rights and powers within the original legislative procedures established by section 7 of article 1. Through two world wars, and the complexities of government in the 20th century, the fundamental procedures of that section have never been amended.

I believe we can effectively discharge our legislative responsibilities within the Constitution as it is written, and as the Court has interpreted it.

In fact, where control of Federal spending is concerned, we have demonstrated that we can act in a prompt and responsible manner.

During the 4 fiscal years, 1981–84, the President has proposed rescissions totaling $27.9 billion. Congress has approved $20.6 billion, or 74 percent. During that same period, the President proposed deferrals of $29.5 billion.

Congress let stand $24.6 billion, or 83 percent. In fiscal year 1980, discretionary appropriations for domestic programs—excludes CCC, subsidized housing, $20 billion one-time appropriation for alternative (synthetic) fuels, and one-time forward funding for employment and training programs—were $125.7 billion. Appropriations enacted in fiscal year 1984 for those programs were $126.4 billion, an increase over 4 years of $746 million, or six-tenths of 1 percent, far below the rate of inflation.

Given these facts, can the distinguished members of this committee tell me why we are told we need an item veto?

One answer, of course, is legitimate concern over Federal deficits and debt. But the solution to that problem will be found, if at all, in a political agreement on defense spending, taxes, and entitlements. The facts simply do not support the conclusion that the size or growth rate of discretionary domestic spending is a major factor in current and future Federal deficits.

In conclusion, I believe we should retain the fundamental constitutional relationships between the executive and legislative branches that have served this country well for nearly 200 years. The legislative veto and the item veto are gimmicks that will only distract our attention from the business at hand—which is legislative action to reduce the deficit.

Thank you, Mr. Chairman.

Mr. MOAKLEY. The Appropriations Committee has a very informal arrangement that skirts the legislative program device; exchanging letters and consultations between the White House and the Appropriations Committee to reprogram money. It never really does get beyond the confines of those two parties, so you are never in jeopardy of violating the veto, but other committees just do not have that authority.

Mr. CONTE. That is exactly right.

Mr. MOAKLEY. I think it is probably necessary. If both are not satisfied, reprogramming never happens.

Mr. CONTE. Exactly right.

Mr. MOAKLEY. As far as the legislative veto goes, I was not a fan of it, but I think the *Chadha* decision really clarified it. The presentment to the President has to be necessary in order for it to be effective. I think no matter how we look at it, that is just a fact of life, and I think the Supreme Court has made that very, very plain in its decisions. So I think you people on Appropriations have a little different situation.

Mr. CONTE. That's right.

The CHAIRMAN. Mr. Derrick, do you have any questions?

Mr. DERRICK. I do not think so, thank you.

The CHAIRMAN. You do agree to the principle that it is essential for the proper legislative exercise of the Congress that we have the right of a legislative veto?

Mr. CONTE. I certainly do.

The CHAIRMAN. The fact that we delegate so much responsibility, we cannot possibly, unless we have some way to limit what they do under our delegation, we obviously would have to curb the delegation.

Mr. CONTE. Yes, sir.

The CHAIRMAN. Thank you very much. We appreciate your valuable testimony.

We next have Prof. Arthur Maass.

Professor, we are pleased to have you with us.

Mr. MOAKLEY. Before the professor testifies, I would point out that the professor is a constituent of mine, and held in very high regard. Not only is he very aware of the legislative veto, but he is aware of the public works programs going on in Boston. This morning we did not discuss the central lottery, or the third tunnel.

The CHAIRMAN. We are very grateful to you for coming. This is a very important matter to us, as you have heard our distinguished Members here say, and we appreciate your comments.

STATEMENT OF ARTHUR MAASS, PROFESSOR OF GOVERNMENT, HARVARD UNIVERSITY

Mr. MAASS. As Government programs have become more numerous and complex, both the Executive and Congress have looked for new techniques to implement and control them. For the Executive there have been legislative clearance, program budgeting, systems analysis, and the like.

For the Congress, there has been new budgetary techniques, short-term authorizations, and the legislative veto.

Thus, the legislative veto, as a technique for exerting congressional influence over governmental programs, must be considered in the light of other techniques that are available to Congress for the same purpose.

The legislative veto has proved to be a powerful technique in a number of situations where the more usual techniques, for example, appropriation, authorization and investigation procedures, fall short of insuring what Congress has believed to be an adequate degree of oversight or control.

In this context, Congress has used the veto to control Executive discretion; to protect the internal integrity of complex programs; occasionally to break stalemates in the legislative process; and to resolve conflicts where there is considerable congressional distrust of executive agencies. Let me elaborate very briefly on the first and last of these prototypical units.

The legislative veto has been used most frequently where guidelines for the administrator cannot be defined clearly in the authorizing statute, and where, at the same time, appropriation procedures are unlikely to be effective in controlling the administrator

because money is not significant. That is, it costs as much to carry out one policy as it does to carry out a very different one. Where these conditions prevail, the administrator would have wide discretion, unchecked by the legislature, were it not for a device like the legislative veto.

There may be several reasons why guidelines cannot be defined clearly in the authorizing legislation, among them insufficiency of data and uncertainty regarding future events.

Mr. MOAKLEY. Also, Professor, I think many times legislation is passed through the committee purposely with the ambiguities in there in order to get the legislation out of committee; and then we expect the people downtown to understand exactly what we meant when some of the people on the committee did not know what we meant. So we in Congress are as much at fault in giving false signals to the agencies as a result of the legislation we are passing.

Mr. MAASS. That does happen, and it does not involve necessarily an illegitimate use of the veto. It may be the only way you can sometimes get legislation passed when there is a dire need for it.

Use of the veto to oversee and control agency rulemaking fits squarely into the first category for which the veto is so well adapted—where administrators have been given broad discretion because guidelines cannot be defined clearly in authorizing statutes, and where appropriation and other procedures are ineffective in controlling this discretion.

For agencies with broad discretion, their rules and regulations are important policy instruments. As such, the rules should be subject to congressional oversight to determine if they are consistent with the intent of the legislation that they purport to implement.

A procedure for legislative veto of proposed rules and regulations, when structured to require that the President transmit the rules to Congress, has had the additional advantage of firming up the President's control over the bureaucracy in rulemaking.

I should like to respond briefly to several criticisms of Congress' use of the legislative veto to control Executive discretion, because the information thus provided may be useful in considering how Congress should adapt to operating without the veto.

The late Judge Harold Leventhal of the Circuit Court of Appeals for the District of Columbia testified before this committee in October 1979, opposing legislation to subject administrative rules and regulations to congressional veto. He said, in effect, that the examination of rules and regulations to determine if they are in accord with legislative intent is more properly a function of the courts than of the legislature. But how can this be? Is the Congress not likely to have a more accurate and policy-relevant view of legislative intent than a random judge?

In opposing the legislative veto, Judge Leventhal argued that the veto would, by its nature, tend to reduce judicial scrutiny of arguments that agencies' actions exceed legislative contemplation. Perhaps it is not unwise to supplement a judge's opinion of what the legislature contemplated with the legislature's opinion of its own contemplation.

At these same hearings, Richard Bolling, then chairman of this committee, expressed his concern that legislative veto of agency rules and regulations would lead to excessive influence by special

interests and that the agencies would become too sensitive to the current preferences of certain legislators, especially those on the committees that review Executive proposals that are subject to veto.

Bolling's concern was similar to that of certain academic critics who had argued that the legislative veto encourages a pathological form of bureau-committee relations. Iron triangles and whirlpools involving bureaus, committees and interest groups derive advantages from broad legislative standards coupled with a legislative veto. These criticisms and apprehensions are misplaced or exaggerated.

As Joseph Cooper of Rice University said in the paper that he submitted for the record when he testified before the same hearing of this committee:

> The overall result of veto usage is not unresponsive and unaccountable control by committees, but rather extension of the political processes that lie at the heart of representative government into areas of administrative policymaking where they are weak and attenuated. If reliance on committees in the veto process impairs representative government, this constitutes an unanswerable indictment of the regular legislative process as well.

Some critics of the legislative veto have complained that it introduces unnecessary political considerations into administrative rulemaking, reducing the fairness and objectivity of the process as it is conducted in the agencies under notice and comment provisions of the Administrative Procedures Act. But these critics' views of agency rulemaking are a fiction; the record is clear that interest groups, frequently those with the greatest financial resources, have tremendous influence on the rulemaking process under the Administrative Procedures Act.

Finally, certain critics of the legislative veto have argued that Congress could fall into a habit of opting for future control through the veto in place of present control through the definition of clear statutory goals.

Presumably this could happen, but the facts are clear that it has not happened, and there are no reasons to believe that Congress was likely to use the veto as a device for avoiding its duty to define goals in lawmaking. At the same time, we must remind ourselves that for many good reasons, broad delegations of authority to the Executive and generalized statements of purposes are inevitable consequences of the legislative process.

Turning briefly to use of the legislative veto to resolve conflicts involving congressional distrust of executive agencies, distrust of an agency may be so profound that the legislature is hesitant to grant its administrators the type of discretion that would normally be granted and that is necessary to carry out the agency's program. In such cases, the legislative veto has been a conflict-resolving measure that enabled a program to move forward while Congress keeps its administrators on short rein.

Thus, when used with restraint in the types of cases I have indicated, this new technique of legislative control, the veto, has had great significance as a device for improving congressional oversight and, at the same time, improving Presidential leadership.

A State Department official responsible for arms sales, has said of the veto:

It focuses executive branch decisionmaking in a way no other thing can. It makes the executive branch think about the real purpose of selling weapons in the first place—rather than just giving in to a good friend—because you know you're going to be confronted with those questions when you get to the Hill.

If, on the other hand, Congress had used the veto widely and without discrimination, then it would have served neither purpose well.

I have discussed at this length on some of the advantages of the legislative veto because the Congress, and most especially this committee, are now confronted with finding alternatives to prohibited forms of the veto, if we are, as a nation, to have sufficient popular control over governmental programs. As I have said, the legislative veto is one of several techniques that the Congress has developed in recent years for the purpose of maintaining legislative control. With the ever-greater quantity and complexity of governmental programs, Congress would have lost influence vis-a-vis the Executive had it not devised such techniques as the legislative veto. The Supreme Court has now deprived Congress of this technique. What can be done?

First, there are several categories of the legislative veto that remain available to Congress. Second, there are certain alternatives to the legislative veto for control of Executive discretion.

Foremost among the forms of the legislative veto that remain available to Congress is the joint resolution. It is not prohibited by the Supreme Court decisions because a joint resolution is presented to the President.

With respect to the joint resolution, I should like to comment on the relative advantages of its affirmative and negative forms. In the affirmative form, a proposed Executive action goes into effect when approved by a joint resolution; in the negative form, it goes into effect at a specified time, unless negated by a joint resolution.

It is frequently said that the affirmative form is the more powerful for Congress, but I believe that this is not necessarily the case. The point is this: Under the affirmative form, the Congress must act on all Executive proposals that are subject to the veto, especially the least controversial ones, for without congressional action, the proposals would not be executed.

Under the negative form, Congress can focus on the controversial proposals. It can devote its time and attention to salient and important policies, and ignore the others, since the Executive's proposals for these will be executed unless vetoed. The cost to Congress of the negative form is, of course, the need for a two-thirds majority if the President vetoes a joint resolution.

Thus, the affirmative form is more powerful formally, but realistically, the negative form may give Congress greater control and influence over governmental programs by enabling it to spend its limited time and efforts on important rather than routine issues, and by signaling to Members that when joint resolutions of veto are on the legislative agenda they are likely to concern important issues.

Now, an alternative method for dealing with this problem was suggested to you by Congressman Broyhill, when he supported the Lott-Grassley bill, which would divide all legislative vetoes into two classes: important and unimportant. For the important ones the

law would call for an affirmative veto, and for the unimportant ones, there would be a negative veto.

This does attempt to deal with the problem, but I should point out the difficulty of establishing criteria for putting veto actions into one or the other of the two classes. I think that might be so difficult that it would be better for the committee and the Congress to focus on the negative form, and to just be prepared for the possibility that the President might veto your joint resolution, which would then require two-thirds if you wanted to overrule him.

The waiting period form of the veto is equally unaffected by the *Chadha* decision. Under this form Congress authorizes the President to prepare and submit plans. The plans go into effect after they have lain before Congress x days. Formally, the only way Congress can prevent a plan from going into effect at the conclusion of the waiting period is to pass a law prohibiting it.

Informally, by developing a record of objections in hearings and on the floor, Congress can frequently get the Executive to withdraw a plan to which a significant number of Members take exception, and possibly resubmit it with modifications. The waiting period, as Cooper has said, "Institutionalizes opportunities for congressional intervention and negotiation."

Another category of the veto that may remain available to Congress is related to the appropriation process and was suggested to this committee by Professor Cooper when he testified on November 10, 1983. If Congress believes that a legislative veto type of control over Executive actions is desirable, it can include in an authorization bill a waiting period requirement—that is, the proposed Executive action would have to be submitted to Congress x days before it could go into effect.

During the waiting period the House and/or Senate could pass a simple resolution disapproving a proposed Executive action as contrary to congressional intent. Such a resolution, of course, would be an expression of intent, and would have no force in law.

At the same time, the Appropriations Committees could be instructed to add statutory provisos to appropriation bills barring the expenditure of funds for implementing any proposed Executive action that has been disapproved by such a resolution, and any Member would be permitted to raise a point of order against an appropriation bill that did not include such a proviso.

To effectuate this type of legislative veto, House and Senate rules would be revised to provide for expedited consideration of the resolutions so that they could be acted on within the waiting period, and for the procedures proposed for the consideration of appropriation bills. Given each House's control over the procedures by which it fashions appropriation measures, it is likely, but not certain, that the Supreme Court would not strike down this form of legislative veto. In any case, I think Congress should try it.

The CHAIRMAN. Would that kind of resolution be passed by both Houses, or one?

Mr. MAASS. Whichever you wish. It could be either a concurrent resolution or a simple resolution.

The CHAIRMAN. Thank you, Professor Maass.

Mr. MAASS. Turning next to alternatives to the legislative veto—since Mr. Frederick Kaiser of the Congressional Research Service

has made available to this committee his compilation of alternatives to the legislative veto (CRS Report 83-227 GOV), I shall comment only on several of them that are of special interest in relation to the authorization and appropriation processes which are the principal focus of your hearings today.

Annual and short-term authorizations, which have grown remarkably, extraordinarily, in recent years, can be seen as another technique devised by Congress to enable the legislature to continue to be effective in exerting influence over governmental programs. Thus, if the veto is less available, Congress may wish to make even greater use of short-term authorizations, for they provide a routine for periodically reviewing an agency's discretionary actions and modifying or overruling those that are objected to.

But the two techniques are not entirely substitutable. The legislative veto has certain advantages that are not so easily realized in short-term authorizations. Where, for example, Congress has granted discretion to the Executive to issue rules and regulations in a given area, and where Congress believes that the Executive has used this discretion improperly, it could be costly and raise problems of equity if Congress can respond only by annuling in a reauthorization act the rules that have already been put in effect. This would not be the case if Congress could veto the rules before they go into effect.

The general rule that there should be no legislative provisions in an appropriation bill and no appropriations in an authorization bill is long standing and supported by many good reasons that I need not elaborate here. To reinforce this rule Congress has recently been concerned with reducing the opportunities for placing legislative riders in appropriation bills. There have been a number of proposals to ban or restrict such riders.

The most radical proposal would change House rules to prohibit the Appropriations Committee and the House from including in any appropriation bill any provision which would impose a limitation not contained in existing law.

Another proposal would apply the above prohibition to House floor amendments only, leaving the Appropriations Committee free to offer provisos.

A third proposal would prohibit provisos unless the authorizing committees in each case approved them, or, alternatively, unless these committees had been given an opportunity to consider proposed provisions and make recommendations to the House on whether or not they should be approved.

At the beginning of this Congress, the House adopted, as you so well know, a new rule restricting riders offered from the floor. They can be offered only after the Committee of the Whole has completed work on an appropriation bill, and then only if the House rejects a motion to rise from the Committee and report to the House.

Loss of the legislative veto as a technique of congressional control over governmental programs could lead to a reversal of this recent and in many ways admirable effort to reinforce the general rule that distinguishes authorization from appropriation bills.

Where Congress cannot overrule an Executive regulation that is offensive by means of the legislative veto, it will inevitably make

efforts to override the action in the next relevant bill before the whole House, which is likely to be an appropriation bill. Indeed, I have just recommended a proposal that would tie the legislative veto to the appropriation process.

Congress' use of nonstatutory controls over Executive discretion—principally by means of instructions in committee reports on authorization and appropriation bills and procedures for reprogramming appropriated funds—has also increased markedly in recent years as Congress has struggled to maintain its influence over governmental programs. Absent the legislative veto, Congress may find it opportune to make greater use of nonstatutory instructions in committee reports. Such instructions cannot be challenged successfully under the Supreme Court's doctrine in the *Chadha* case, for they are not legally binding. The Executive can ignore them if it wishes to do so.

At the same time, nonstatutory controls, unlike the one- and two-House forms of the legislative veto, raise questions in terms of control by the whole House over its parts—over its committees. The whole House cannot normally revise the wording of a committee report.

Thus, for important policy issues where the legislative veto would have been used were it not for the Supreme Court decision, nonstatutory controls may not be an adequate alternative from the point of view of Congress as a whole.

In 1974, both the House and Senate agreed that the President should be required to report any proposed impoundments to the Congress, but they disagreed on the specifics of an enforcement procedure. The House bill provided that the proposed impoundments would be sanctioned unless either House of Congress disapproved them within 60 days; the Senate bill, that the impoundments would be sanctioned only if both Houses approved them within 60 days.

In the end, the Budget Control Act of 1974 included both procedures. Impoundments were divided into two categories, rescissions and deferrals. In the first category, the President proposes that appropriated funds not be spent, that they be rescinded, but they must be spent unless Congress passes a rescission bill within 45 days following notification by the President.

In the second category, the President defers the obligation of appropriated funds, and his action remains in effect unless or until either House vetoes it by passing a simple resolution.

The first procedure, rescission by a joint resolution, is not affected by the Supreme Court decision. The second procedure is now unconstitutional. But the first procedure may be too weak a control because it is in the affirmative rather than the negative mode. It requires Congress to act on every impoundment proposed by the President, rather than to focus on the controversial ones. The Congress may wish to revise the Budget Control Act in this regard.

Thank you.

The CHAIRMAN. Thank you very much.

Mr. Moakley?

Mr. MOAKLEY. Thank you very much, Professor, your testimony is well received, and it will be read very thoroughly.

The chairman sent me a note and asked me if the professor was from Harvard Law School. He is not from Harvard Law School. He is from Harvard. The professor has written a book, and a section on legislative veto should be made available to the committee.

Mr. MAASS. The book is available for purchase, published by Basic Books, 1983.

Mr. MOAKLEY. I have one. You gave me yours.

The CHAIRMAN. Professor, if you have no objection, we will incorporate, following your testimony, that chapter of your book.

Mr. MOAKLEY. I will make the chapter available. Thank you very much.

Your testimony was very interesting.

Mr. DERRICK. Thank you very much.

The CHAIRMAN. Professor, I would like to ask you a question or two.

There are some of us at least who strongly agree with the position taken by Mr. Justice White in the *Chadha* case. We think the Court rather precipitously acted in a matter, as he said, it struck down more acts of Congress in one decision than has been invalidated in all of the history of the Court and all of the history of the country.

I have a feeling that the Court had a general sense that the legislative veto was being abused, was subject to abuse, and they should just strike it down.

Now, you engage in serious matters when you do that. For example, what is the status of the War Powers Act? In view of the sweeping nature of that decision, is the War Powers Act will in effect? Does it mean anything or not? It is a tremendously important matter to our country.

I feel that as the Court has done in many other cases, the Court will in time modify that decision. As new situations arise, as new deeds develop perhaps, generally new circumstances appear. Therefore, I do not think it is wrong for the Congress to enact legislation that contains continuing use of a legislative veto or appropriate alternative to the veto in instances where, first, the Congress feels conscientiously it can only dutifully exercise its power by the exercise of the veto.

And, second, we make some distinctions, for example, we put in the bill that this bill is not separable. They use the separability clause, as you know, very effectively in that decision.

If Congress had put in the bill, and we have exercised the legislative veto after giving great consideration to the matter, and because we feel it is necessary to the exercise of our legislative function and, furthermore, we do not include consciously a severability clause in this legislation. That would present a different technical situation from what was presented in the *Chadha* case. Let it go up through the mill. Let the court of appeals look at it and let the Supreme Court consider it. They might want to change or moderate their previous decision. They may limit somewhat the broad language they used. Two of the Justices thought they might well do that.

I would appreciate it if you think that is a wrongful course on the part of Congress to approach the matter in that way.

Mr. MAASS. In a sense, my proposal that Congress use a special form of the legislative veto, the waiting period tied to the appropriation process, is just such a challenge to the Court. I think you would get back before the Court and the Court would have to decide whether or not Congress can use the legislative veto when it derived from its internal rules governing the appropriation process. I am suggesting that you try this.

The CHAIRMAN. It was suggested to me when you said the Congress might—either House express an opinion about a rule of some Executive action and then let the Appropriations Committee act upon that resolution even if it were one.

Mr. MAASS. That is what I am suggesting and it is, in a sense, a challenge to the Court. I am sure it would get back before the Court in some manner. And I would hope, like you, that the Court would be willing to take another long and sober look at the subject in the light of the inpact of its previous opinion.

The CHAIRMAN. We are tremendously indebted to you for your consideration.

Mr. MOAKLEY. I believe the Supreme Court never wanted to rule on the legislative veto. It was only because that they saw what was happening in Congress with the generic legislative vote. I think it really turned the balance of power around and, in my opinion, that is what precipitated the Supreme Court in acting the way it did.

Mr. MAASS. They are not supposed to act on their estimates of future conditions.

Mr. MOAKLEY. They see a legislative veto in the House with 260 Members on it. I think it is time they sounded that warning bell before we get ourselves in more severe trouble.

Mr. MAASS. Certain critics of the veto, and I think you have been among them in this regard, have argued that Congress could fall into a habit of opting for future control by means of the veto in place of present control by means of legislation. Presumably that could have happened. But if you examine the record, the facts are clear that it did not happen. And I do not think there are reasons to believe that Congress was likely to use the veto to avoid its duty.

Mr. MOAKLEY. It would be transferring the duties to the regulatory agencies, and we would both be doing the work we are least able to do. We would have to put people on our staff reading every report in the Federal Register. By our nonaction we would be approving all these things coming through the regulatory agencies, and that would cause a great deal of problems.

Mr. MAASS. As I look down the Halls of Congress, I see that there are already more than enough people on your staffs to do that. Quite apart from that, you need focus on only the important actions of the regulatory agencies.

Mr. MOAKLEY. Congressman Derrick believes, too, there are enough people around.

Mr. DERRICK. I also need one more.

The CHAIRMAN. May I observe also, professor, it seemed to me the Court went too far in limiting the capacity of the Congress to function. They held that the only way that the Congress can function is in full dress, white tie, joint resolution submitted to the President—that they have no authority to function in their capacity as a Congress.

I made the illustration—it may not be apt—but the only function they can perform is to have a baby.

The other thing they said was that the only way we can act at all is by a joint resolution submitted to the President. They do not have to tell us that we can do that. That is our legislative power. So they did away with any function that we could exercise of an oversight character except passing another law to counteract one we do not really favor.

Mr. MAASS. That is correct except, of course for the nonstatutory means which are not binding.

In that context, I do not think the Court's decision was at all realistic in terms of legislative and executive relations. Congress has every right to develop new techniques to try to keep some sort of influence and control over governmental programs. Short-term authorizations is one such technique. Many years ago, most programs were authorized without limit of time. That is no longer the case.

The legislative veto is another one. I happen to think it is a terribly useful technique, and I would like to, in some way, have its advantages preserved even though the Court has said you cannot now use it.

The CHAIRMAN. You have been very helpful. Thank you very much.

[The chapter from Professor Maass' book on legislative veto, referred to earlier, follows:]

11

The Legislative Veto

IN RECENT YEARS Congress has developed a new technique, the legislative veto, for controlling public policy. By this means Congress enacts authorizing legislation that gives discretion to the President to take certain actions —greater discretion in many cases than it would be willing to approve otherwise—and reserves the right to subsequently approve or veto these actions. Congress, that is, subjects the President's use of the discretion granted to a further legislative check. A familiar example is the law that authorizes the President to prepare plans to reorganize the executive bureaus—to consolidate agencies and shift bureaus from one department to another. These reorganization plans are submitted to Congress, and they go into effect unless either the House or the Senate votes to veto them within a short period of time that is specified in the law—sixty days, for example. Congress can either accept the President's plans by failing to act on them within the prescribed period or reject them if either House adopts a veto resolution. It cannot amend them, however, and there is good reason for this. If Congress could amend the President's plans, it could, in effect, legislate without the President having an opportunity to use his constitutionally provided right of veto. Also, the reorganization law, like all laws that use the legislative veto, amends normal parliamentary procedure, providing that if a resolution of disapproval is introduced in either House, that House will have the opportunity to vote on it before the fixed time expires. If this were not the case, friends of the President would be able to filibuster and use other tactics to delay congressional action until the plans had gone into effect.

The reorganization law, adopted initially in 1939, was an early use of the legislative veto. Beginning in the 1950s, Congress began to elaborate and

perfect the technique for several purposes, and since then it has provided for use of the veto in legislation authorizing a number of major programs—for example, disposal of government-owned synthetic rubber-producing plants (1953), atomic energy (1954), space (1958), railroad reorganization (1973), war powers of the President (1973), sale of arms to foreign nations (1974), impoundment of appropriated funds (1974), rules and regulations of certain agencies, including but not limited to those of the Department of Education (1974), Federal Elections Commission (1975), Department of Energy concerning oil allocations, allotments, and other matters (1970s), Federal Trade Commission (1980). A survey by Joseph Cooper and Patricia A. Hurley has identified 273 veto provisions enacted between 1932 and 1976. Fifty-eight percent of these were passed between 1970 and 1976, eighty-three of them in the two-year period 1974–1975, which was in part a legislative response to Watergate. These provisions for congressional review of executive actions covered a broad range of policy areas. Of those enacted between 1970 and 1976, approximately 23 percent related to energy and natural resources programs, 17 percent to national defense and military construction, 15 percent to foreign affairs, 11 percent to education and research, 11 percent to public works and transportation, and the remainder to several other areas of public policy.[1]

Forms of the Legislative Veto

The veto has several forms. In the *negative form* Congress authorizes the President to prepare and submit plans. The President initiates. The plans go into effect in x days, depending on the specific law, unless Congress vetoes them. The law can provide that the veto be in the form of a concurrent resolution of disapproval to be voted on by both Houses—a two-House veto; a House or Senate resolution to be approved by a simple majority (or in a few cases a constitutional majority) of either House—a one-House veto; a House or Senate resolution to be approved by a simple majority of one House, unless the other House votes to approve the President's plan—a modified one-House veto; or committee resolutions of disapproval to be voted by committees that have jurisdiction over the subject matter in both the House and Senate—a two-committee veto—or by the committee in either House—a one-committee veto.

In the *affirmative form* Congress authorizes the President to prepare and

submit plans. The President initiates. The plans go into effect when they are approved by Congress, either by a concurrent resolution of both Houses or by committee resolutions in either or both Houses, depending on the specific law.

There is also a special type of the affirmative form, which is designed to terminate a presidential action rather than, as in the other cases, to authorize one to begin. The impoundment control provisions of the 1974 Budget Act illustrate this unusual form of legislative veto. The President impounds funds that have been appropriated and reports to Congress that he has done so. To make the President's actions stick, both Houses of Congress must within forty-five days pass a concurrent resolution approving the President's action and rescinding the funds. If Congress fails to pass such a resolution, the President's impoundment ceases and the money must be spent.

Another example of the special affirmative form is the War Powers Resolution of 1973. The President's action in committing U.S. troops to combat is to cease within sixty days unless within that period Congress has passed and the President has signed a joint resolution declaring war or specifically authorizing the President's action. But Congress can by concurrent resolution, which does not need the President's signature, require that armed forces be withdrawn before the sixty-day period.

Finally in the *waiting period form*, Congress authorizes the President to prepare and submit plans. The President initiates. The plans go into effect after they have lain before Congress x days. Formally, the only way Congress can prevent a plan from going into effect at the conclusion of the waiting period is to pass a law prohibiting it. Informally, by developing a record of objections in hearings and on the floor, Congress can frequently get the Executive to withdraw a plan to which a significant number of members take exception and possibly resubmit it with modifications.

Among these many alternative forms, Congress selects in each case the one that corresponds to the degree of control over the Executive that it believes to be desirable. Between 1970 and 1976 the three most frequently used forms were waiting period, which is also the least restrictive on the Executive (45 percent of all cases), one-House veto, the most restrictive of the non-committee forms (21 percent); and two-House veto (11 percent). The dominant form in each of the policy areas for which the veto was used most frequently during this period was the one-House negative form for energy and natural resources (35 percent of cases in this area), waiting period for national defense and military construction (59 percent), two-House negative for foreign affairs (32 percent), waiting period for education and research (59 percent), and committee veto for public works and transportation (36 percent).

Executive and Judicial Objections to the Legislative Veto

All presidents since Harry S Truman, except John F. Kennedy, have been in conflict with the Congress over use of the veto, holding the veto procedure to be unconstitutional. In essence they argue that if Congress delegates authority to the President, it cannot subject the exercise of this authority to a subsequent veto or control by Congress, except by the enactment of another law which the President can then veto. This argument has not impressed many members of Congress as valid for several reasons, principally because Congress, all the time and in many ways, subjects authority that it has by legislation given to the Executive to subsequent legislative control.

Despite the claims by several Presidents that the legislative veto is unconstitutional, the Supreme Court as of January 1983 has not ruled on the matter. In December 1980, the Ninth Circuit Court of Appeals in San Francisco ruled unconstitutional the legislative veto as used in the Immigration Act of 1952, which grants the Attorney General discretion on whether or not to deport certain aliens who have violated immigration laws. The statute allows either House by legislative veto to overturn Department of Justice orders to suspend the deportation of individual aliens, and the court ruled that this violated the constitutional separation of powers. The statute in this case is an unusual use of the veto for it relates to quasi-judicial administrative proceedings involving individuals, whereas normally the legislative veto is used in connection with broader questions of legislative policy. The immigration case has been appealed to the Supreme Court. If the Court upholds the Ninth Circuit, it is possible that its decision will be based on the special circumstances of the statute, rather than on the broader question of the veto as a technique for congressional control over public policy.

In January 1982, a three-judge panel of the Circuit Court of Appeals for the District of Columbia ruled that the legislative veto provision of the Natural Gas Policy Act of 1978, which provided for deregulation of natural gas, was unconstitutional. The law authorized either House to veto proposed rules of the Federal Energy Regulatory Commission. The court held that this violated the separation of powers and also the constitutional requirement that all laws be passed by both Houses of Congress and then presented to the President for his signature or veto. The Circuit Court held that the legislative veto "contravenes the constitutional procedures for making law," but congres-

sional supporters of the technique do not consider veto actions to be legislation. In October 1982, the same circuit court held that the legislative veto provision of the Federal Trade Commission (FTC) Improvements Act of 1980, which required that FTC rules be subject to a two-House veto, was unconstitutional on the same grounds. These opinions, too, have been appealed to the U.S. Supreme Court. Although it would be unwise to predict how the Court will decide these two cases, one can agree with Joseph Cooper that it is highly probable that the legislative veto will survive in some form. Certainly Congress could make the appropriation of funds for a program or agency contingent upon compliance with the veto procedures.[2]

Let us, then, put aside the question of constitutionality as unresolved and, instead, analyze the legislative veto as a technique for congressional oversight of policy and administration and evaluate it in terms of our model of executive–legislative relations.

Evaluation of the Legislative Veto: Its Special Advantages

The legislative veto has proved to be a powerful technique in a number of situations where the more usual means of congressional control over executive conduct—appropriation, authorization, and investigation procedures—fall short of insuring what Congress believes to be an adequate degree of oversight or control. In this context, Congress has used the veto to control executive discretion, protect the internal integrity of complex programs, and, occasionally, to break stalemates in the legislative process.

CONTROL DISCRETION

The legislative veto is used most frequently where guidelines for the administrator cannot be defined clearly in the authorizing statute and where, at the same time, appropriation procedures are unlikely to be effective in controlling the administrator because money is not significant; that is, it costs as much to carry out one policy as to carry out a very different one. Where these conditions prevail, the administrator could have wide discretion unchecked by the legislature were it not for a device like the legislative veto. There may be several reasons why guidelines cannot be defined clearly in the legislation, among them insufficiency of data and uncertainty regarding future events.

Example. The Eisenhower Administration decided in 1953 that the government should dispose of the synthetic rubber-producing plants that the government had built in World War II and still owned. The President sent a legislative proposal to Congress to authorize the Executive to put the plants up for sale. In considering that proposal, members of Congress expressed two objectives. One objective was that the government should get as much for these plants as it could since the government had paid for them in the first place. A second objective was to avoid greater concentration of rubber production in a small number of industries, that is, to dispose of the plants in a way that did not frustrate the government's antitrust policies. Congress could not at the time decide what relative weight to give to each objective because to do so depended on which companies would bid for the plants. However, the companies would not bid until there was legislation authorizing the Executive to dispose of them.

In these circumstances, Congress passed a bill stating the two objectives, directing the President to put the plants up for bid and, having received bids, to prepare a single plan for disposing of all of the plants, with these two objectives in mind. This plan would then go into effect unless either House of Congress vetoed it within thirty days.

Having called for and received bids for the plants, President Eisenhower prepared a single plan on how to dispose of them and submitted it to Congress. Both Houses of Congress held hearings, a Senate subcommittee under Paul Douglas (D. IL) extensive hearings. The committees decided that the President had established an equitable balance between the two objectives and they recommended that his plan not be vetoed.

Example. In 1974 Congress decided that it should have a voice in decisions to sell large amounts of arms to foreign governments, which until then was largely a matter of executive discretion. But it was difficult to write meaningful standards in an authorizing bill for several reasons, principally the sudden and radical changes that can occur in unstable foreign governments. The legislative veto was adopted in lieu of standards. The President initiates a sale plan and, in this case, it requires a concurrent resolution of both Houses to veto a sale proposed by the President. The legislative veto provisions of the 1974 act were refined and expanded in the Arms Export Control Act of 1976.

Certain critics of the legislative veto have argued that Congress will fall into a habit of opting for future control through the veto in place of present control through the definition of clear statutory goals. Presumably this could happen, but the facts are clear that it hasn't happened, and there are no reasons to believe that Congress is likely to use the veto as a device for avoiding its duty to define goals in lawmaking.[3]

PROTECTING INTEGRITY OF PLANS

A second type of situation in which the legislative veto has unique advantages occurs when there is a perceived need to protect the internal integrity of a plan or program. Recall that the plans prepared by the Executive may not be amended by Congress. Congress can only veto an entire plan; it is all or nothing. Two examples will illustrate this use of the veto.

Example. The Regional Rail Reorganization Act of 1973 provided for federal support in reorganizing the bankrupt freight rail systems in the Northeast and Midwest, which included the Penn Central, Lehigh, Central of New Jersey, and others. A slimmed-down system would be operated by a new government-sponsored entity, Conrail, but planning for the system, including specifying the routes to be retained and routes to be abandoned, was to be done by another organization called the United States Railway Association (USRA). USRA's final system plan was to be submitted to Congress and to become effective sixty days thereafter unless it was vetoed by either House in that period. If vetoed, then USRA was to submit a revised plan which would also be subject to a legislative veto.

A principal reason for using the legislative veto in this case was to control the inevitable objections that would be made in Congress to abandonment of specific routes. The Massachusetts congressional delegation, for example, would likely object to abandoning trackage that served Gardner, Massachusetts, and the Pennsylvania delegation to abandoning routes that served Hershey, Pennsylvania. Without some constraints on amendments to retain routes that USRA considered to be uneconomical and irrational, the internal integrity and economic viability of the new system might be in jeopardy. With a legislative veto, however, no members could succeed in amending the plan for the purpose of preventing abandonment of routes in their districts. They could only vote against the full plan.

When USRA presented its plan to Congress in 1975, there was grumbling by a number of members about routes that were to be abandoned, and several bills were introduced that would have directed USRA to continue certain routes, but the plan was not vetoed and the bills were not adopted.

Example. The Carter Administration's 1978 arms sale package of $4.8 billion in war planes to Egypt, Saudi Arabia, and Israel, submitted under authority of the previously mentioned 1976 act, is another example of the use of the legislative veto to protect the internal integrity of plans. Israel's supporters in the United States objected strongly to tying the three together. They wanted to deny arms to Egypt and Saudi Arabia but to approve them for Israel. The President presented the three-in-one plan and insisted that tying the three together was a linchpin of U.S. foreign policy in the Middle East. A resolution of disapproval was introduced, but it was defeated in the Senate. The House did not then need to vote since under the Arms Export Control Act it requires a concurrent resolution of both Houses to kill the President's plan.

BREAKING STALEMATES IN THE LEGISLATIVE PROCESS

Where there is agreement among major parties that legislation is needed, but where there is a temporary stalemate, either within the Congress or between Congress and the Executive, that makes it impossible to reach agreement on the specific provisions of a program, the legislation can be enacted in general terms, and the detailed provisions can be considered subsequently when the President has initiated his plans. Use of the veto for this purpose is rare.

Example. In 1977 legislation to extend authorization of the Export-Import Bank for two years, the House included a ban on the export of Alaskan oil to Japan. The Senate refused to go along with a total ban. The compromise, struck in a conference of the two Houses and enacted, authorizes the President to allow exports if he finds this to be "in the national interest," but his decision is subject to a veto by either House of Congress within sixty days.

RESOLVING CONFLICTS INVOLVING CONGRESSIONAL DISTRUST OF EXECUTIVE AGENCIES

In infrequent cases congressional distrust of an executive agency is so profound that the legislature is hesitant to grant to administrators the type of discretion that would normally be granted and that is necessary to carry out the agency's program. In such cases the legislative veto is a conflict resolving measure that enables a program to move forward, while Congress keeps its administrators on short rein.

Evaluation of the Legislative Veto: Its Several Forms

With this understanding of the unique qualities of the legislative veto as a technique for congressional oversight of policy and administration, its several forms can be evaluated.

First, the negative form of the legislative veto, in which the President's plan goes into effect unless vetoed by either or both Houses, is almost always preferable to the affirmative form, in which the President's plan goes into effect only if both Houses of Congress approve it by concurrent resolution. The reasons for this are illustrated in the following example.

Example. In chapter 9 I described the circumstances that led to enactment of the impoundment control provisions of the Budget Control Act of 1974. To control the President's impounding of appropriated funds, Congress could have passed legislation prohibiting the practice but this they did not want to do, because there would always be many cases where most members would agree that appropriated funds should not be spent. Nor was Congress able to draft meaningful standards specifying the conditions under which the President should be allowed to impound because these conditions varied so much from program to program. Thus they adopted the legislative veto.

The bill approved by the House used the negative form—a President's order to rescind appropriations would be effective unless either House vetoed it within sixty days. The Senate bill used the affirmative form—a rescission order would expire after sixty days and the money must be spent unless both Houses approved it by concurrent resolution. The Senate refused to yield on rescissions and its form was accepted

reluctantly by the House. But from the point of view of congressional control of the Executive, it was the weaker, less effective form.

The point is this: the President may submit dozens of rescission orders in any fiscal year. Under the affirmative form, Congress must consider all of them, especially the least controversial ones, for without congressional action in both Houses, the President must spend the money. Under the negative form, Congress can focus only on the controversial orders. It can devote its time and attention to salient, important programs and ignore the others since the President's proposals to rescind funds for the latter will be effective unless vetoed.

In other words, the Senate bill was the stronger of the two only in a formalistic sense, only in terms of abstract categories of statutory instruments. In a realistic sense the House bill was more powerful, for it retained legislative power in the Congress and at the same time enabled the Congress to focus on important issues and priorities, by selecting the impoundments that should, in their view, be debated in terms of possible veto.[4]

Second, the one-House or two-House forms of the legislative veto are almost always preferable to the committee form—that is, the form in which the President's plan goes into effect unless vetoed by committee resolutions or goes into effect when approved by committee resolutions. The problem with the committee form is that by using it, Congress could be delegating too much authority to its committees. Committees play an important role in legislative veto actions in any case. Proposals to veto the President's plans are referred to committees which hold hearings on the plans and recommend to the whole House whether or not they should be vetoed. The issue is authority to make final decisions for Congress. Clearly Congress would not vest in its committees powers of final decision over legislation. On the other hand, Congress is willing to grant to its committees final powers with respect to selecting the witnesses for their hearings. Legislative veto actions lie between these two extremes. But if the legislative veto is used for the reasons that I have suggested, it will normally concern matters of such importance that the whole House should have an opportunity to review the work of its committees if it wishes to do so.

Third, a straightforward form of the legislative veto procedure is preferable to a convoluted form. In 1979 the Carter Administration, having opposed the legislative veto with vigor, said it would not object to a new proposed form which was adopted in the Gasoline Rationing Act of that year. According to this form, the President's plan can be vetoed by a joint resolution of both Houses of Congress. The President can then veto the joint resolution, and the Congress can by a two-thirds majority in both Houses override the President's veto of the joint resolution which vetoed the President's plan.

Such a convoluted parliamentary procedure can only reduce the confidence of citizens in their system of government. Imagine, if you will, a voter trying to make sense out of daily newspaper reports on the extended parliamentary

moves involved in such a procedure. The one-House and the two-House legislative vetoes are, on the other hand, straightforward enough.

Fourth, the form of the legislative veto authorizing the President to submit to Congress the plans that are subject to veto is almost always preferable to the form which authorizes the executive departments and agencies to submit plans directly to Congress or to congressional committees. The point is that the agency form can encourage a type of agency–committee relations in which the President, the only elected member of the Executive, is cut out of the decision process.

The Legislative Veto and Administrative Rules and Regulations

Between 1972 and 1981 Congress initiated statutory provisions for legislative veto of the rules and regulations of several agencies, and since 1975 it has been considering legislation to apply the procedure to the rules and regulations of most departments and agencies. Use of the veto to oversee and control agency rulemaking fits squarely into the first category for which the veto is so well adapted—where administrators have been given broad discretion because guidelines cannot be defined clearly in authorizing statutes and where appropriation and other procedures are ineffective in controlling this discretion. For agencies with broad discretion, their rules and regulations are important policy instruments. As such the rules should be subject to congressional oversight to determine if they are consistent with the intent of the legislation that they purport to implement. In recommending use of the legislative veto for agency rules and regulations under the Education Amendments Act of 1974 the House Committee on Education and Labor said: "The problem which this amendment seeks to meet is the steady escalation of agency quasi-legislative power, and the corresponding attrition in the ability of the Congress to make the law."

The late Judge Harold Leventhal of the Circuit Court of Appeals for the District of Columbia testified before the House Rules Committee in October 1979, opposing legislation to subject administrative rules and regulations to congressional veto. He said in effect that the examination of rules and regulations to determine if they are in accord with legislative intent is more properly a function of the courts than of the legislature. But how can this be? Is the Congress not likely to have a more accurate and policy-relevant view of legislative intent than a random judge? In opposing the legislative veto, Judge

Leventhal argued that the veto would, by its nature, tend to reduce judicial scrutiny of arguments that agencies' actions exceed legislative "contemplation." Perhaps it is not unwise to supplement a judge's opinion of what the legislature contemplated with the legislature's opinion of its own contemplation. The legislative veto is a means for doing this in cases where other techniques, such as appropriations, do not provide adequate oversight of agency rulemaking.

At these same hearings, Richard Bolling (D. MO), chairman of the Rules Committee, expressed his concern that legislative veto of agency rules and regulations would lead to excessive influence by special interests and that the agencies would become too sensitive to the current preferences of certain legislators, especially those on the committees that review executive proposals that are subject to veto. Bolling's concern is similar to that of certain academic critics who have argued that the legislative veto encourages a pathological form of bureau–committee relations. Iron triangles and whirlpools involving bureaus, committees, and interest groups derive advantages from broad legislative standards coupled with a legislative veto.[5] These criticisms and apprehensions are misplaced or exaggerated for several reasons. First, use of the preferred forms, which enable the whole House to review committee actions and the President to review agency proposals, reduces opportunities for excessive influence by special interests. Joseph Cooper of Rice University said in the excellent paper that he submitted for the record when he testified before the Rules Committee:

> The overall result of veto usage is therefore not unresponsive and unaccountable control by committees, but rather extension of the political processes that lie at the heart of representative government into areas of administrative policy-making where they are weak and attenuated. If reliance on committees in the veto process impairs representative government, this constitutes an unanswerable indictment of the regular legislative process as well.

Second, in response to Congressman Bolling's concern, special interests work wherever authority lies. If Congress elects to review agency rules and regulations for certain major programs, the lobbyists will work in the agencies to get them to draft agreeable rules and then in Congress to get the rules approved or vetoed. If Congress elects not to review agency rules and regulations, then the lobbyists will simply increase their efforts in the agencies. The corridors of the departments are as crowded with lobbyists as are those of the Capitol.

Some critics of the legislative veto complain that it introduces unnecessary political considerations into administrative rulemaking, reducing the fairness and objectivity of the process as it is conducted in the agencies under "notice —

and comment" provisions of the Administrative Procedure Act. But these critics' views of agency rulemaking are a fiction; the record is clear that interest groups, frequently those with the greatest financial resources, have a tremendous influence on the process. As West and Cooper have said: "It is simplistic to assume that intense, well-organized interests gain a special advantage in the veto-based legislative oversight process which they lack in administrative rulemaking."[6] Furthermore, only some of the agency rules for which legislative vetoes have been adopted or are being considered are covered by the Administrative Procedure Act.

A procedure for legislative veto of proposed rules and regulations, if it is structured to require that the President transmit the rules to Congress, has the additional advantage of firming up the President's control over the bureaucracy in rulemaking. Some members believe, however, that the President should not have supervision over rules and regulations of the so-called independent regulatory commissions. In that case, the President could be required to submit the proposed rules as drafted by the commissions, but with his own comments attached to them. These could include, if he believes it desirable, a recommendation that they be vetoed.

In conclusion, if used with restraint in the types of cases I have indicated, this new technique of legislative control, the veto, has great significance as a device for improving congressional oversight and, at the same time, improving presidential leadership. A State Department official responsible for arms sales has said of the veto: "It focuses executive branch decision-making in a way no other thing can. It makes the executive branch think about the real purpose of selling weapons in the first place—rather than just giving in to a good friend —because you know you're going to be confronted with those questions when you get to the Hill."[7] If on the other hand Congress uses the veto widely and without discrimination, then it will serve neither purpose well.

As government programs have become more numerous and complex, both the Executive and Congress have sought new techniques to implement and control them. For the Executive there have been legislative clearance, program budgeting, systems analysis, and the like. For the Congress, new budgetary techniques, short-term authorizations, and the legislative veto. As Cooper said in his statement before the House Rules Committee:

> Opponents of the veto should perhaps be reminded that the role of parties in our system, the use of the President's veto for policy purposes, presidential bill-drafting and bargaining in the lawmaking process, the attachment of provisos to appropriations bills, continuing oversight by congressional committees—all at one time or another violated conventional conceptions of sound or good practice and were bitterly attacked. Yet, all represented adaptations to institutional needs, survived, and have subsequently been regarded as quite tolerable and even essential.

The CHAIRMAN. Our next witness is Prof. Allen Schick of the University of Maryland. Thank you for coming.

STATEMENT OF PROF. ALLEN SCHICK, UNIVERSITY OF MARYLAND

Dr. SCHICK. Thank you, Mr. Chairman. I am very glad that on February 29, this committee is listening before it leaps, and I am sure that it will enable us to reach an understanding of how to proceed in the wake of the *Chadha* decision.

Mr. Chairman, I will refer to excerpts from my statement and ask that the entire statement be placed in the record.

The CHAIRMAN. Without objection, it will be received.

Dr. SCHICK. Mr. Chairman, I welcome this opportunity to discuss the implications of the *Chadha* decision for the appropriations and authorizations processes. My statement will also consider proposals for a constitutional amendment that would give Congress a legislative veto and the President an item veto.

In assessing the manner in which the legislative and executive branches might adapt to loss of the legislative veto, it is necessary to identify the factors that give rise to legislative efforts to control administrative actions. Legislative vetoes flourished because Congress delegated power to administrative organs but did not trust them to use that power wisely. Thus, two conditions coexist in use of the veto and other legislative controls: delegation of power and mistrust of power.

More than half of the legislative vetoes nullified by *Chadha* were enacted during the 1970's, a decade during which Congress delegated but did not trust. After the twin blows of Vietnam and Watergate, Congress could not safely assume that Presidential power would be used benignly or prudently.

When Congress does not delegate or trust, it reaches for any means at its disposal to ensure that governmental power is not misused. Thus, in the 1970's, in addition to the legislative veto, we had more limitations and riders in appropriations bills, and we also had more annual and short-term authorizations. Thus, the 1970's demonstrated that legislative vetoes tend to be accompanied by other restrictions; rather than being substitutes for the veto, authorization and appropriations controls are spawned by the same conditions that spur Congress to subject public agencies to other restrictions.

Now, if we are going to look at what happens after *Chadha*, it would be prudent to examine why it is that the legislative veto is regarded as so useful. Its key virtue was that it established a flexible relationship between the two political branches of Government. The legislative veto neither barred nor licensed particular administrative actions. Rather it established a framework within which agents of the two branches could discuss their salient interests and differences and hammer out accommodations. In an era of mistrust between the two branches, when national leaders often were uncertain about the policies that should be pursued but were sensitive to the outcomes that they wished to avoid, the legislative veto permitted the continuing and necessary business between these warring power centers to be conducted in a civil and effective manner. Be-

cause they contained veto provisions, controversial laws could be enacted. Because it was armed with the veto, Congress could delegate but still oversee administrative activities.

It is important in responding to *Chadha* to preserve this flexible relationship between the two branches.

The need for flexibility suggests that Congress should not seek a single uniform remedy for *Chadha*, but should encourage piecemeal adjustment as the need or opportunity arises. Legislative vetoes were installed provision by provision in a selective approach that permitted Congress to exercise tight control when that was deemed necessary but gave agencies broad discretion when that was deemed to be appropriate. Although much has been made about the seemingly large number of vetoes invalidated by *Chadha*, the fact is that most of the relationships between the two branches were not governed by vetoes, maybe 1 percent, 5 percent, not at all the rest.

I am confident that without a comprehensive solution, Congress will successfully adjust to life without the veto by devising procedures and controls that are sensitive to the particulars of each case and to the relationship between it and the affected agency.

This line of reasoning leads me to argue against a constitutional amendment which would trade a legislative veto for an item veto. A blanket legislative veto in the Constitution would mean that this would become boilerplate in authorizing legislation, inserted merely as a matter of routine, not because Congress had any cause for concern. A blanket veto might induce carelessness in the delegation of power to agencies, and would rigidify relationships between the two branches.

I would also urge that the item veto be rejected. It would not do very much to control spending. It would not significantly ameliorate the budget crisis that now besets the Nation. An item veto would, to put it bluntly, strengthen the bargaining powers of the President whenever his spending priorities diverged from those of Congress. The President would be able to dictate the mix of expenditures, though total spending might not be affected.

I see no justification for strengthening Presidential power merely for the purpose of impairing Congress role in setting national priorities. Those who want to do something about the budget crisis should seek realistic solutions, not escapist slogans which do nothing but score political points.

Let me turn now to the remedies Congress may have in its appropriations, authorizations, and impoundment actions. With respect to appropriations, it is too early to ascertain whether *Chadha* will lead to more legislation and limitations in appropriations. My impression is that fewer such provisions were added in the 1983 session, but the dropoff—if there was one—was due mostly to the enactment of relatively clean continuing appropriations which contained less legislation than had been the case in previous years.

Despite *Chadha*, I would urge the committee not to open money bills to more limitations and legislation. By retaining the current rules, the House and the Senate would permit piecemeal and flexibility adjustments to the loss of the legislative veto.

Limitations are crude instruments compared to the legislative veto. Under the precedents of the House, limitations must be

worded narrowly and rigidly. They cannot compel administrative action, nor can they be contingent on certain happenings. This was illustrated a few years ago when a proposed limitation to prohibit abortions except when the health of the mother was endangered was ruled out of order, and the House therefore was impelled to adopt an absolute ban against abortions.

There is one area, sir, where I would urge that the rules be tightened, and that pertains to continuing appropriations because these are not deemed to be general appropriations. They are not subject now to the rule XXI bar against legislation in these bills. This interpretation emerged at a time when continuing resolutions were quite limited in scope. However, recent continuing resolutions have covered most—and in a few years—all of the regular supply bills.

With respect to authorizations, I understand the temptation that, because of *Chadha,* Congress should convert to more annual authorizations, but I hope that this course of action is rejected. What might make sense in isolated cases would greatly overload Congress and delay essential business if annual authorizations were broadly applied.

This year, for example, it is now about to be March, virtually none of the required authorization bills have been enacted into law which means that the House is faced with but two possibilities, either delay appropriations until the authorizations are enacted or ignore the authorization process altogether and proceed forward with appropriation. And within 2 months, the chairmen of the Appropriations Subcommittees will be coming forward to ask that they be permitted to proceed with their bills, regardless of the status of authorization. To have more annual authorization, would make that matter much worse rather than better.

I would recommend that this committee put the House back in order by inscribing a 2-year minimum term for authorizations in the rules. Biennial legislative action, in tandem with annual appropriations, would furnish ample opportunity for Congress to oversee government agencies and take corrective action. A 2-year minimum on authorizations would decongest the floor, restore a working relationship between Congress and the executive branch, allow the House to function in accord with its rules, and permit agencies to organize their work in a more effective manner. A 2-year minimum would still allow exceptions in cases where closer scrutiny was deemed necessary.

Along with minimum durations for authorizations, Congress should consider the imposition of maximum terms. The purpose would not be to sunset Government programs or agencies, but to ensure that their actions are periodically reviewed by Congress in the exercise of its legislative power. Just as virtually all annual authorizations apply to permanent programs and are renewed each year so, too, virtually all programs converted from permanent to 5-year authorizations, if that were the duration deemed most suitable, would be extended prior to expiration. But in the course of reauthorizing these programs, Congress would have an opportunity to enact do's and don'ts with respect to past or prospective agency actions. This would be effective compensation for loss of the legislative veto.

With respect to impoundment control, Professor Maass has described the intent of the 1974 Impoundment Control Act and the fact that part of the act pertaining to deferrals has been nullified by the Supreme Court. As a consequence, this area of impoundment can once again become a battle round between the legislative and executive branches.

It is true, as was pointed out by Mr. Conte, that the White House has indicated that it will be reponsive to congressional actions with respect to impoundments, even in the absence of a legislative veto. Nevertheless, I think it is important to restructure proper controls in response to the Court's decision. I would divide the world of impoundment into three categories with separate rules pertaining to each of them. First would be a category called reserves. These are the kinds of impoundments permitted by the Anti-Deficiency Act. They are usually not controversial. They are intended solely for efficiency and not to change the priorities or policies of Congress. In these cases, these reserves would continue in effect unless overturned by enactment of Congress and signed into law by the President.

Second, with respect to withholding, these would actually be policy changes. In these cases, I would suggest that policy changes to prevent the fulfillment of a program at a level determined by Congress, could take effect only if approved by Congress within a stipulated period of time.

Finally, something that has been given much attention recently because of the budgetary crisis is what I would call pro rata reductions. These would allow roughly the same percentage reductions to be applied across the board to discretionary expenditure. That would mean if you cut social programs, you have to apply the same percentage to defense programs. That would preserve the priorities of Congress. It would not change them but permit lower expenditures. The President could not use impoundment to impair priorities, but only to implement them.

Finally, with respect to nonstatutory procedures, these have been very effective in the reprogramming area. I would urge we explore why they have been effective; the principal reason is that in reprogramming Congress has a baseline against which it can compare administrative action. The baseline is a detailed schedule of expenditure that the administative agency submits to the Appropriations Committee when it comes to the Hill to request an appropriation. When the agency deviates from that baseline and request a reprogramming, the Appropriations Committee can compare the new way of spending money with the original intention. Without that baseline, virtually every administrative action might have to come before the Hill for approval. The effect would be to substantially enhance the role of committees vis-a-vis the House and Senate, and the role of staff vis-a-vis the Members.

Over the past century, there has been erected an administrative state which spews forth mountains of rules and regulations each year. It would be a proper exercise of legislative power to curtail the scope of these rules and regulations, or for Congress to be more precise in its delegation of power. Congress cannot itself become the administrative state by requiring prior approval of administrative actions in the same manner as it now increasingly requires

such prior approval of reprogrammings. To require approval would overload both Chambers. To permit it would give committees a great deal of discretion and weaken Congress as a whole as well as the affected Government agency.

In the aftermath of *Chadha,* it is important to maintain a positive outlook in the relations between the two branches. Those of us who wish the decision of the Supreme Court would have been more discriminating and limited in its reach should be confident Congress will do what the Supreme Court did not do, and that is to reconstruct the relationship between the executive and the legislative branches on a case-by-case basis, selecting for each aspect of the relationship the most appropriate form it should take.

Thank you, Mr. Chairman.

[Dr. Schick's prepared statement follows:]

STATEMENT OF ALLEN SCHICK
BEFORE THE
HOUSE COMMITTEE ON RULES

February 29, 1984

Mr. Chairman, I welcome this opportunity to discuss the implications of the Chadha decision for the appropriations and authorizations processes. My statement will also consider proposals for a constitutional amendment that would give Congress a legislative veto and the President an item veto.

In assessing the manner in which the legislative and executive branches might adapt to loss of the legislative veto, it is necessary to identify the factors that give rise to legislative efforts to control administrative actions. Legislative vetoes flourished because Congress delegated power to administrative organs but did not trust them to use that power wisely. Thus, two conditions coexist in use of the veto and other legislative controls: delegation of power and mistrust of power. If, however, Congress were niggardly in its delegation, it would not need the veto power to rein in government agencies. Similarly, if it were confident that delegated power would be put to good use, Congress would not restrain agency discretion through veto procedures.

More than half of the legislative vetoes nullified by Chadha were enacted during the 1970s, a decade during which Congress delegated but did not trust. After the twin blows of Vietnam and Watergate, Congress could not safely assume that presidential power would be used benignly or prudently. Although legislative vetoes directed at the White House (such as those contained in the War Powers Act and the Impoundment Control Act) are well known, most of the vetoes were aimed at administrative agencies to which Congress had previously delegated power. For example, the Moss-Magnuson Act of 1974 expanded the power of the Federal Trade Commission, but after that power was exercised Congress equipped itself with a legislative veto over FTC rulings. It acted in a similar manner with respect to the Consumer Product Safety Commission.

When Congress delegates but does not trust, it reaches for any means at its disposal to ensure that governmental power is not misused. Thus, the 1970s also was a decade in which Congress frequently used limitations and riders in appropriations and short-term (often annual) authorizations to control administrative actions. It is commonly assumed that the legislative

veto is a substitute for other legislative controls; therefore, if Congress were to regain the veto it would not be so impelled to limit administrative discretion by other means. But the 1970s demonstrated that legislative vetoes tend to be accompanied by other restrictions; rather than being substitutes for the veto, authorization and appropriations controls are spawned by the same conditions that spur Congress to subject public agencies to other restrictions.

The reverse is also true: when it perceives the exercise of power to be beneficial, Congress will not impede its use through vetoes or other hindrances. This implies that loss of the legislative veto will not necessarily induce Congress to insert more restrictions into authorizations and appropriatons. If an era of good feeling were to return to Washington (this is a conjecture, not a prediction), Congress might willingly grant virtually unfettered discretion to government agencies.

But on the reasonable assumption that this happy state of affairs is not likely to recur in the near future, it would be prudent to examine the options available to Congress. To do so requires an explanation of why--despite periodic complaints by the White House--the legislative veto was a useful tool for both Congress and the executive branch. The key virtue of the legislative veto was the flexible relationship it fostered between the two political branches of government. The legislative veto neither barred nor licensed particular administrative actions. Rather it established a framework within which agents of the two branches could discuss their salient interests and differences and hammer out accommodations. In an era of mistrust between the two branches, when national leaders often were uncertain about the policies that should be pursued but were sensitive to the outcomes that they wished to avoid, the legislative veto permitted the continuing and necessary business between these warring power centers to be conducted in a civil and effective manner. Because they contained veto provisions, controversial laws could be enacted; because it was armed with the veto, Congress could delegate but still oversee administrative activities.

The strength of the legislative veto was reflected in its infrequent use. Congress did not often disapprove administrative decisions, but by threatening to review regulations or other actions, it was able to influence the outcome. In a penetrating examination of the veto's effects on a number of federal programs and agencies, Bruff and Gellhorn found that it facilitated negotiation and compromise by the agencies and relevant congressional

committees. Agencies frequently modified their stance after being sensitized to congressional concerns. But once they reached an understanding with Congress, the agencies were able to implement their regulations or other actions. The veto accommodated to the salient interests of each branch: Congress was able to shape policy, and agencies were able to conduct their activities.

In devising new means of legislative control to compensate for Chadha, it is important to preserve this flexible relationship between the two branches. It would be simple for Congress to restrict agency discretion by inserting "provided that none of the funds shall be used...." limitations in appropriations bills and by prohibiting certain types of activities in authorizing legislation. But in order for the work of government to continue, Congress must use subtle means that enable it to control and agencies to act.

The need for flexibility suggests that Congress should not seek a single, uniform remedy for Chadha, but should encourage piecemeal adjustment as the need or opportunity arises. Legislative vetoes were installed provision by provision in a selective approach that permitted Congress to exercise tight control when that was deemed necessary but gave agencies broad discretion when that was deemed to be appropriate. Although much has been made about the seemingly large number of vetoes invalidated by Chadha, the fact is that most of the relationships between the two branches were not governed by vetoes.

I am confident that without a comprehensive solution, Congress will successfully adjust to life without the veto by devising procedures and controls that are sensitive to the particulars of each case and to the relationship between it and the affected agency.

A Constitutional Trade: Legislative and Item Vetoes

The advantages of selectivity lead me to the view that Congress should not endorse a constitutional amendment that would give it a legislative veto and the President an item veto. Constitutional authorization would be seen as a green light to apply the legislative veto across-the-board to all rules and regulations as well as to many other administrative actions, regardless of whether it was appropriate for each situation. I would not be surprised if the legislative veto were to become boilerplate in authorizing legislation, inserted merely as a matter of routine, not because Congress had any cause for

concern. A blanket veto might induce carelessness in the delegation of power to agencies, and would rigidify relationships between the two branches.

The second part of the bargain—an item veto--should also be rejected. An item veto would enhance presidential power at the expense of Congress but it would not do much for budget control. Because of mandated entitlements and other "uncontrollable" spending, an item veto would hardly make a dent in the deficit, nor would it significantly ameliorate the budget crisis that now besets the nation. An item veto would, however, strengthen the bargaining position of the President whenever his spending priorities diverged from those of Congress. The President would be able to dictate the mix of expenditures, though total spending might not be affected. If the current President had an item veto, he probably would get a bit more for defense and prevent Congress from providing a bit more for domestic programs, but the overall size of the budget would not be materially altered.

I see no justification for strengthening presidential power merely for the purpose of impairing Congress' role in setting national priorities. Those who want to do something about the budget crisis should seek realistic solutions, not escapist slogans which do nothing but score political points.

What can be done short of a constitutional amendment in response to Chadha? Quite a lot with the instruments already at hand. In accord with the purpose of these hearings, I will discuss controls linked to Congress' power of the purse.

Limitations and Riders in Appropriations

For almost two centuries, legislation and appropriations have been distinct congressional functions. At first by logic but later by rule, the House and Senate limited appropriations bills to the supply of funds and legislation to non-money matters. Under this division of labor, what could be done in one type of measure could not be done in the other. Congress understood that if legislation were permitted in appropriations, controversy over substantive issues might impede the flow of essential funds to government agencies. It also feared that pressure to provide appropriations might lead to the enactment of legislative riders which would not gain approval on their own. Recent problems, including serious delays in the enactment of appropriations, validate these concerns.

Despite the logic and the rules, legislation and appropriations have frequently been commingled in the same measure. Riders and limitations

appeared early in congressional history, the former spurred by efforts to exploit the "must" character of appropriations, the latter premised on the notion that if Congress has the power to appropriate, it can withhold funds from certain uses. The frequency of riders and limitations has varied over the years, depending in part on the extent to which the House and Senate have disciplined themselves to function according to the rules. Despite the plethora of complaints about them, riders were more prevalent a century ago than they have been in the recent past. But there has been an upsurge in limitations during the past decade. A rule adopted by the House at the start of the 98th Congress has made it easier to avert consideration of limitations, but it is important to note that this new procedure pertains only to limitations added by floor amendment, not to those recommended by the Appropriations Committee. In fact, however, most limitations are inserted by the Committee and most are carried over from year to year without change.

When an appropriations bill is a vehicle for riders or limitations, these provisions usually terminate at the end ofthe fiscal year unless they are renewed in the next year's appropriation. This need for recurring action enables Congress to adjust each year's version to changes in executive-legislative relations. Thus, provisions concerning the MX missile have been varied from year to year. But the annuality of riders and limitations exposes the approrpiations process to recurring conflicts, as has happened with respect to antiabortion limitations.

It is too early to ascertain whether Chadha will lead to more legislation and limitations in appropriations. My impression is that fewer such provisions were added in the 1983 session, but the dropoff (if there was one) was due mostly to the enactment of relatively "clean" continuing appropriations which contained less legislation than had been the case in previous years.

Despite Chadha, I would urge the Committee not to open money bills to more limitations and legislation. If Congress (whether in response to Chadha or for any other reason) wants to put more of these provisions into appropriations, it already has sufficient means to do so. But there is no reason for inviting more friction and delay in the consideration of measures needed for the continuation of government. By retaining the current rules, the House and the Senate would permit piecemeal and flexible adjustments to loss of the legislative veto.

Limitations are crude instruments compared to the legislative veto. Under the precedents of the House, limitations must be worded narrowly and rigidly. They cannot compel administrative action, nor can they be contingent on certain happenings. They cannot easily differentiate among the various types of situations to which the denial of funds might apply. To pass parliamentary muster, they must be cast in negative terms. This limited scope of limitations has led the House to adopt absolute bans on the use of federal dollars to finance abortions, because amendments which would have permitted abortions to safeguard the health of the mother were ruled out of order.

The rules should not be liberalized to encourage more riders and limitations. I sense a tide in the House running against extraneous matters in money bills, as weary Members strive to complete their appropriations responsibilities more expeditiously than they did a few years ago. Morevoer, if the House were determined to control federal agencies through limitations, it could work its will under the present rules.

There is one area whereas I would urge that the rules be tightened. Under the precedents of the House, continuing appropriations are not deemed to be general appropriations and, hence, they are not subject to the Rule XXI bar against legislation in these bills. This interpretation emerged at a time when continuing resolutions were quite limited in scope. However, recent continuing resolutions have covered most (and in a few years) all of the regular supply bills. These are the very measures for which the historic separation of legislation and appropriations was intended. What can be more necessary for the continuation of government than a continuing resolution? By placing these measures outside Rule XXI, the House has permitted the wholesale cramming of carelessly developed legislation into bills that must be rushed to enactment in the space of a few hours. No greater crime has been committed against orderly legislative process in recent years than the enactment of 100-page continuing resolutions whose contents are known to a few and understood by none.

Legislative Control Through the Authorizations Process

In the Age of Mistrust, Congress extended its control by subjecting many programs and agencies to frequent (often annual) reauthorization. After Vietnam, the State Department was put an annual authorization; after Watergate, the Justice Department and the intelligence agencies were subjected to annual review. Approximately 30 major components of the federal

government, including virtually all defense expenditures, now undergo annual reauthorization.

Reauthorizing legislation has proved to be an effective vehicle for legislative control. This legislation often contains detailed directives and prohibitions. The annual defense authorization bill for the 1984 fiscal year is a case in point. In addition to reauthorizing the Defense Department, the legislation contained dozens of prohibitions, restrictions, and conditions such as the following: the Army was barred from buying engines for its M-1 tank from a second source; development of a new computer system was conditioned on submission of a plan to Congress; procurement and deployment of the MX missile was restricted; and further development of the airborne laser laboratory was curtailed.

Because they require frequent congressional renewal and are not restricted as to their legislative content, temporary authorizations are convenient and popular vehicles for legislative control. Now that Congress lacks a legislative veto, it might find frequent reauthorizations even more attractive. For example, rather than review the rules proposed by the Federal Trade Commission, Congress might subject it (and other regulatory agencies) to annual reauthorization, and write its own rules (or undo those of FTC) in each year's law.

I hope that Congress eschews this tempting course of action. What might make sense in isolated cases would greatly overload Congress and delay essential business if annual authorizations were broadly applied. In recent years, Congress has had difficulty coping with a limited number of reauthorizations; it's workload would swell to unmanageable levels if annual authorizations became the rule rather than the exception. Some authorizations would not be enacted at all, forcing Congress to make policy in appropriations; others would be enacted with no House or Senate debate whatsoever. Many appropriations bills would be delayed for lack of authorization, while the continuing resolution would become a "freight train" carrying the authorizations that had not been acted upon into law. Tensions between Congress and government agencies, as well as between authorizing and appropriating committees would probably escalate. Budgetary perspectives would be even more truncated than customarily, and it would be difficult to get Members and committees to think beyond the exigencies of the next year. There would be further breakdown in the distinction between authorizations and appropriations and the two sets of measures would become more alike.

In the face of the temptations of annual review, I would urge this Committee to put the House back in order by inscribing a two-year minimum term for authorizations in the Rules. Biennial legislative action (in tandem with annual appropriations) would furnish ample opportunity for Congress to oversee government agencies and take corrective action. A 2-year minimum on authorizations would decongest the floor, restore a working relationship between the authorizations and appropriations processes, enable the House to function in accord with its Rules, and permit agencies to organize their work in a more effective manner. A 2-year minimum would still allow exceptions in cases where closer scrutiny was deemed necessary.

Along with minimum durations for authorizations, Congress should consider the imposition of maximum terms. The purpose would not be to "sunset" government programs or agencies, but to ensure that their actions are periodically reviewed by Congress in the exercise of its legislative powers. Just as virtually all annual authorizations apply to permanent programs and are renewed each year, so too, virtually all programs converted from permanent to 5-year authorizations (if that is the duration deemed most suitable) would be extended prior to expiration. But in the course of reauthorizing these programs, Congress would have an opportunity to enact "dos" and "don'ts" with respect to past or prospective agency actions. This would be effective compensation for loss of the legislative veto.

The Impoundment Control Process

Impoundment control is an area where the legislative veto was effective, for it enabled both branches of government to protect their salient interests in this contested aspect of government power. Now that the veto is gone, Congress must devise new means of ensuring that the President does not unilaterally override appropriations by withholding funds from their intended uses. Congress also is faced with pressure from some to strengthen the President's impoundment power as a means of curtailing federal expenditure, and from others to strengthen congressional means of terminating presidential impoundments. A decade after the Impoundment Control Act, this area can once again become a battleground area between the legislative and executive branches. In the short period of time since Chadha, the White House has been relatively constrained in its impoundments, thereby averting renewal of the

warfare that characterized the Nixon era. But this truce will not last forever, and one should not be surprised if it crumbles under the weight of massive budget deficits and political blamesmanship.

There are many ways to restructure impoundment control. The proposal set forth below meets two tests: workability and neutrality, that is, it does not unduly tilt impoundment power toward one or the other contesting branch. I would divide impoundments into three categories, depending on their purpose, with different rules for each. (1) Reserves would be impoundments expressly permitted by the Anti-Deficiency Act and would not be used to alter congressional policies or priorities. Because of their routine character, reserves would continue in effect unless overturned by legislation which could be signed or vetoed by the President. (2) Withholdings would be deferrals or rescissions proposed for program or policy reasons, and would cease to have effect unless approved by legislation within a stipulated period of time. (3) Pro rata reductions would be permitted under terms set by Congress to curtail overall expenditure without tampering with relative priorities. These reductions might be limited to discretionary accounts, or they might also be applied to entitlements, but the President could not selectively cut some parts of the budget without applying approximately the same percentage reductions to the remainder. Pro rata reductions would continue in effect unless disapproved by legislation. The Comptroller General would have strengthened powers to ensure that the three types of actions were properly classified and reported to Congress.

The Committee might devise specialized measures to handle each type of impoundment, and it might also establish expedited procedures (such as a special calendar) for bringing these matters to the floor. But it should be recognized that regardless of the measures designated for the various forms of impoundment, Congress can use any form of legislation or appropriations measure to deal with a presidential impoundment.

Nonstatutory Procedures

Nonstatutory controls have the flexibility which I previously identified as a principal advantage of the legislative veto. These procedures require an agency to obtain congressional approval (usually by the relevant committees or subcommittees) before it can put a proposed policy or change into effect.

This approach is extensively used to enable congressional committees to control the reprogramming of funds--the shift of appropriated money from the originally intended use to another use within the same account. As in the case of administrative actions subject to legislative veto, most reprogrammings are permitted to take effect.

Flexibility in reprogramming is enhanced by the fact that the rules (such as the threshhold to which it is applied) and the procedures vary from area to area. In addition, most reprogramming rules and procedures are set forth in committee reports and informal understanding, though in a few areas there has been a trend to prescribe them in law. I am not sure, however, that the prior approval route used in reprogramming could be easily adapted to other executive-legislative interactions. The reprogramming process depends on establishment of a fairly clear and precise "baseline" for determining whether a particular use of funds constitutes a reprogramming. This baseline usually is the detailed schedule submitted to the Appropriations Committee (and in some instances the relevant authorizing committee as well) when the agency justifies its budget request, as modified by subsequent congressional action.

Without a baseline, virtually all agency actions and proposals could be subject to prior approval. Congress would, in effect, be delegating power to its committees to make regulations and other types of policy without going through the full legislative process. While this procedure might not offend Chadha, it does offend my sense of what proper legislative responsibilities are. Hundreds--perhaps thousands--of proposed actions would have to be reviewed by certain committees. The task, and in most cases the final say, would be vested in staff members who would be acting unilaterally in behalf of the Congress of the United States. The closed, ex parte dealings which emerged in some agencies subject to the legislative veto would multiply. The Administrative Procedures Act and its protections might become nullities, and the only important consideration would be access to congressional staff. Private deals would become commonplace and rights now deemed to be fundamental to due administrative process might go out the window.

Mr. Chairman, over the past century, Congress has erected an administrative state which spews forth mountains of rules and regulations each year. It would be a proper exercise of legislative power to curtail the scope of the administrative state or to be more precise in its delegation of power. But Congress cannot itself become the administrative state by requiring prior approval of administrative actions. To require such approval

from the House and Senate would overload both chambers; to permit such approval to be given by committees would weaken both Congress and the affected agencies.

In the wake of Chadha, it is important to maintain a positive outlook on relations between the two branches. Those of us who wish that the decision would have been more discriminating in its reach should be confident that Congress will do what the Supreme Court did not (and perhaps could not) do. That is, to Congress will reconstruct that relationship on a case by case basis.

The CHAIRMAN. Thank you very much, Professor Schick. It is a very valuable contribution.

I like the way you put it about developing a better relationship, not necessarily antagonistic, but a way by which we can work more effectively and closer together.

It seemed to me, as Justice White pointed out in the *Chadha* case, the Court seemed to be unwilling to attribute to the Congress the power to impose conditions in effect to effect certain types of legislation. The Congress lays down conditions by which the law will become inoperative. For example, aid is given to a certain country provided the President certifies that the human rights are more respected in that country. We have legislated subjected to a condition, as it were. Yet, now when the Congress sets another condition, if either side of the House disapproved, remember the legislation that said that was the joint resolution submitted to the President, and most of them signed by the President, and it simply said if, however, for example, promulgating rules by the agencies of Government, the executive branch, if, however, one branch of the Congress disapproved the rules that you promulgate, then they do not take effect.

We had a case a little bit ago here in respect to the proposed assessment in respect to telephones by the Federal Communications Commission. It proposed to assess a $2 charge against the users of telephones. Well, the Congress here decided that they did not want that $2 regulation to go into effect. They proposed and actually enacted legislation that was a joint resolution type of legislation. It does not seem to me it would have made any difference when the Congress delegated the authority to the Federal Communications Commission. The only authority they had is what is delegated to them by Congress. We could fix the rate of every phone line, bus line, railroad, and every other line item by item if we had the time to do it and wanted to do it. We have delegated that authority because we cannot do it as a Congress to an agency. We could have said we will permit you to fix these fees and regulate this industry, but we are going to keep a watch on what you are doing, and if either House of the Congress disapproves of what you are doing, our delegation is limited, it is terminated at that instance.

Now, the Court has said that cannot be done. They have said, by virtue of the fact that one House is acting that, that is attempting to pass a bill. We are not attempting to pass a bill. We are simply

setting a condition for the limitation of congressional power. That is why I cannot understand why the Court would go so far as to say you cannot do that kind of thing, yet they allow conditions to be attached to the conduct of other agencies or other people. But if Congress chooses by a joint resolution duly passed under the Constitution, duly submitted or approved by the President, that has a provision in there—in other words, we cannot use one House of the Congress as the exercise of a condition as it were.

Do you have any comment to make on that?

Dr. SCHICK. You have persuaded me. Now, you have to work on the nine people in the Supreme Court across the street and see if you can have more success with them. I want to make two comments. One is speculation as to why the Supreme Court ruled the way it did in *Chadha*. We are all aware that this was a case selected by the Justice Department to provide an opportunity for the Court to overrule that particular use of the legislative veto, but not to touch other types of vetoes. I think the Supreme Court was fearful that if it were to permit some legislative vetoes, but not others, it would be in the same quandary as in search and seizure cases and obscenity cases over the years. There would be an endless amount of cases coming before the Court. The Court wanted to shut off that line of adjudication because it was fearful that it could never draw clear lines between permissible and unpermissible vetoes.

The second point arises directly from your comment when you talk about Congressmen attaching conditions to administrative actions and those being permissible conditions and essential to the legislative process. I believe that those conditions will, in most cases, survive the *Chadha* test. Legislative conditions should and will continue to be an important part of the relationship between the legislative and executive branches.

The important thing after *Chadha* is for Congress to insure when it writes the original law which gives power to the agency that it is very clear in defining those conditions and in defining what triggers them into effect. If it makes sure with respect to the conditions as to how they take effect, then despite *Chadha*, Congress will still be able to exercise effective control over the administrative process.

The CHAIRMAN. That is interesting. You said the Court decided they had better stop this thing now with a sweeping bill, and then let the process find its way back with further limitation and further scrutiny. So I guess you would not disagree with my thesis it is all right for the Congress to pass bills with legislative vetoes to get it back for further consideration in spite of the *Chadha* case.

Dr. SCHICK. I would agree with you it is all right for Congress to pass bills with conditions, but I am not quite sure whether any of those legislative conditions can any longer be a legislative veto.

The CHAIRMAN. Right after the *Chadha* decision, we had some instances here, I think, from the Foreign Relations Committee was one of the first ones. They had a legislative veto. We sent it back to them on the theory that we cannot approve legislation that has been held unconstitutional by the Supreme Court. We had another one that came from another committee, and we did the same thing. Later on, as we began to have some of the hearings we are having

here now on this matter, it began to dawn on me just about what you said that the court thought that was the best way to handle it was to strike them all down now and let those that must justify legitimacy appear in the future and then let them be finalized, justified, legitimatized as they were given scrutiny and found to be all right.

I am going to advocate in this committee that if anybody sends us another bill with a legislative veto in it that we scrutinize it, ask them when they come here for the approval of their rule, did you feel that this is the only way you could effectuate the objective you want to accomplish with this legislation, which is to have the safeguard of this veto, and maybe for a technical reason did you leave out the separability clause.

Did you consider this legislation as an entity and the like? If they answer in the affirmative, I am in favor of treating the legislation like any other proper legislation and let it go to the floor. If it is approved, let it go on through the judicial system and eventually up to the Supreme Court and let the Supreme Court take another look at it as they do all the time, taking second and third looks on matters on which they previously expressed an opinion.

Dr. SCHICK. I wonder about the questions you are asking of the committees when they come for a rule. It is hard enough to be the gatekeeper of the House Rules; and it is harder still to be gatekeeper of the Supreme Court's reasoning or thinking process.

The CHAIRMAN. Maybe you have eased our obligation.

Mr. Wheat, do you have any questions?

Mr. WHEAT. Thank you, Mr. Chairman. I have just a question or two.

I read through your testimony and I was interested in how you proposed a number of solutions that have been overlooked in trying to overcome a legislative veto problem and then you knocked them all down.

You encouraged us not to recommend these proposals to Congress. Rather, you suggested that we approach legislative vetoes on a case-by-case basis. The only particular recommendations that I see in your testimony as to how to approach legislative vetoes are in the comments section.

Are there other recommendations that you would have as to how we could approach overcoming legislative veto problems on a case-by-case basis?

Dr. SCHICK. Yes; there is another recommendation in my statement, and that is that the House establish a rule against permanent authorizations, not against permanent legislation, but against permanent authorizations. If you have a rule against permanent authorizations, periodically all agencies would be required to come before Congress for reauthorization. In the course of reauthorization, Congress could determine how the agency conducted itself under its delegation of power and make such changes as it wishes in the power it delegates to those agencies.

Mr. WHEAT. That is very broad and sweeping. An agency may not be able to narrow itself into a legislative act type of veto remedy. Is there a specific action you would recommend and would you recommend putting a condition on the expenditure of money for that action?

Dr. SCHICK. That I endorse in my statement, but I suggest that you not open the door to more of these limitations. In other words, under the current rules, sir, the House has in my judgment, adequate opportunity to attach limitations and riders to appropriations bills.

Mr. WHEAT. Are you talking about requiring the prior approval of Congress?

Dr. SCHICK. It could be that. The problem with prior approval in appropriation bills is that those may not be regarded by the Parliamentarian, as limitations, and therefore points of order might survive against them. In other words, if you have a limitation with no ifs, ands or buts, and a point of order were raised against it, the Parliamentarian is likely to rule against the point of order.

The CHAIRMAN. Thank you very much, Professor. We are very grateful to you for coming and making your valuable contribution.

That concludes the hearing today, with our deep thanks to our distinguished witnesses who have come before us.

[Whereupon, at 3:40 p.m., the committee adjourned, to reconvene at 2 p.m., Thursday, March 1, 1984.]

LEGISLATIVE VETO AFTER CHADHA

THURSDAY, MARCH 1, 1984

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RULES,
Washington, D.C.

The committee met, pursuant to notice, in room H-313, the Capitol, Hon. Claude Pepper (chairman) presiding.

Present: Representatives Pepper, Long, and Wheat.

The CHAIRMAN. The committee will come to order, please.

This is an additional hearing upon the important matter of what the Congress ought to do with respect to the legislative veto under the decision of the Supreme Court in the *Chadha* case.

We have already had some hearings that have been excellent. Among the witnesses yesterday, we had some Members of the House who gave valuable testimony, and two witnesses, one from Maryland and the other from Harvard, who gave excellent statements.

Today we have a distinguished list of witnesses, and we will be very pleased to hear them. The first witness is the Honorable Pete Domenici who has been delayed.

Senator Chiles also will be here a little later. Mr. Penny, the Honorable Timothy J. Penny will begin.

Mr. Bolling, will you please come and share the chair where you have sat so many times. I will sit in the next one. You are at home in this chair.

Mr. Penny, we are pleased to have you and we welcome you.

STATEMENT OF HON. TIMOTHY J. PENNY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MINNESOTA

Mr. PENNY. Mr. Chairman, members of the committee, I am pleased to participate in these hearings on the response of Congress to the *Chadha* decision to strike down the legislative veto. I am here today to propose a joint committee to review regulations issued by Federal agencies.

I know that proposals like this have been made before. In the 96th Congress, Representative Kindness proposed a joint committee, and in the 97th Congress, Representative Moakley, a member of this committee, proposed a House select committee to deal with regulations and indicated support for a joint committee if the Senate was willing. I believe that it is still a good idea, and the need is much more urgent as a result of the Supreme Court's *Chadha* decision.

We have such a committee in the Minnesota State Legislature where it is called the Legislative Commission to Review Adminis-

trative Rules. I served on the Commission for 6 years as a State senator, 2 of them as chairman.

In the Congress, this joint committee would be made up of an equal number of Members of the House, appointed by the Speaker, and the Senate, appointed by the majority leader. In Minnesota there are five Members from each body. The chairmanship would alternate between the House and Senate every 2 years, as is true of other joint committees in Congress.

The purpose of this proposed Joint Committee on administrative rules is to centralize and elevate congressional focus on regulations in response to the Supreme Court's decision to strike down the legislative veto. We all know that the legislative veto was developed because some regulations are arbitrary, capricious and not in accordance with the intent of the laws establishing Federal programs. A Joint Committee To Review Regulations would focus additional attention on these rules in the absence of legislative veto authority.

The joint committee would meet either at the call of the chairman, at the call of a certain percentage of its members (20 percent in Minnesota; 2 members of a 10-person commission) or in response to a written request signed by a specified number of Members of the House and Senate—in Minnesota, again, 5 of the 201 members of the legislature must sign a request.

By a majority vote, the committee would decide whether to hold a public hearing on a particular rule. In Minnesota, the legislative commission also has the power to direct an agency to hold a public hearing on a rule that it has issued or is proposing to issue. I propose that a Congressional Joint Committee also have this power. I recognize that the *Chadha* decision may make this impossible, but it is a useful tool for the legislative body.

Following a hearing, if a majority of the members of the joint committee believe that the regulation under investigation violates the intent of the law on which it is based, the committee may introduce identical bills in each House to repeal the regulation.

These bills would first be referred to the standing committees with jurisdiction for a specified time period for comment and recommendations. But I must emphasize that if this overall review process is to be effective, the standing committees with jurisdiction must be involved and consulted throughout. Referring a bill repealing a regulation to them after an extensive investigation and hearing process should only be a formality. In fact, I expect that many requests for hearings would originate with the standing committees, if the system of review worked properly.

What I just sketched out is an overview of the formal arrangements. What is in many ways more important are the informal powers and arrangements that develop around such a committee in its defense of the prerogatives of the Congress. The bill disapproving a regulation is a last resort. By holding hearings, directing agencies to hold hearings, and just focusing public attention on the rulemaking process this joint committee can have a very positive impact on the writing of rules and the administration of programs. It was my experience that many problems between the legislative and executive branches were avoided when Minnesota's Legislative

Commission to Review Administrative Rules became involved in oversight of the rulemaking process.

That concludes my prepared statement. I will be pleased to answer any questions you might have.

The CHAIRMAN. Mr. Bolling, do you have any questions?

Mr. BOLLING. No, thank you.

The CHAIRMAN. Mr. Long?

Mr. LONG. No, thank you.

The CHAIRMAN. Thank you, Mr. Penny. That is an interesting approach to this problem. We appreciate your being here.

Mr. PENNY. I appreciate this committee's interest.

The CHAIRMAN. Now we have the Hon. Lawton Chiles. We would welcome your statement.

You already know that Senator Chiles is not only a distinguished Senator and colleague from Florida, but he is also a ranking member of the Budget Committee in the Senate.

Senator, we are glad to have you.

STATEMENT OF HON. LAWTON CHILES, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator CHILES. Thank you, Mr. Chairman.

Mr. Chairman and Mr. Former Chairman and Congressman Long, I am delighted to be here today to speak to you on this point. I have, Mr. Chairman, sort of a lengthy statement, and I would like to submit that for the record.

The CHAIRMAN. Without objection, it is received.

Senator CHILES. I will see if I can shorten that a little bit as we go along.

I think we do have to face the Supreme Court decision and try to figure and see what we have to do about that. Part of that, of course, is trying to determine what that decision does to the Budget Act. At one time, when it first came out, we did not know whether we still had a Budget Act. I think we have to kind of take a look at that and see. As we look at the Budget Act, these big budget deficits have sort of broken our confidence, and they have set off, at the same time, a search for some magic procedure to bring those deficits under control. I do not know—but it would be nice if we could find a magic procedure—I do not know that we need anything new. We really need to see how we can make the existing act work.

We have a device in the existing act, in reconciliation, which I think is necessary in any process we put together, especially if you are trying to look at not only new programs but the old and determine how you try to make some changes.

I think we certainly do need to improve the existing procedures we have and use those procedures.

The specific deferral issue has not been formally tested, the decision has apparently canceled out the legislative veto which has been placed in the Budget Act.

By cutting off deferrals, that certainly does not kill the Budget Act, nor does it make it less useful as a deficit-fighting statute. While the Budget and Impoundment Act of 1974 does not have a

severability clause, the rule makes it clear the legislative veto proposal is severable.

In *Chadha*, the Court worked through the severability issue. The decision said that if what remains when the veto provision is taken out is still a workable administrative mechanism, then the statute can stand. That certainly seems to be the case in the Budget Act.

We still have the formal arrangements between the congressional committees. One is reprogramming. That is a device we have used for a long time.

Deferral itself is sort of trying to codify or make just a little more reason. That time we were in a big fight with President Nixon. At the time we passed that legislation, it really was drafted—Chairman Bolling, you had an awful lot to do with that drafting on the House side, as some of us did on the Senate side—but that was before we won all of the cases, and which I think Congress won all of the cases that were filed in regard to impoundment under the Nixon Act. But we were not sure how those cases were going to come out at the time. We were looking for a device to put in. The rescission mechanism remains. *Chadha* did not address this issue of a two-House legislative veto. But the Budget Act remains, I think, a useful tool to cut deficits.

There have been a number of new proposals to deal with that outside the Budget Act. So far I have not seen any as effective as the Budget Act itself. Enhanced rescissions argue for one proposal. It could be a true time nightmare.

Right now rescissions fall if both Houses do not act within 45 days. There are some new proposals which require both Houses to overturn within 45 days. Under that scheme, Congress might approve a given sum in an appropriations bill and the President might rescind it. Congress would have to restore it in a bill and the President could then veto it. Congress would then have to take up the override of that veto and, my goodness, you are going the long way around the track to try to get a decision on what we have, on what is taking place in one action.

I do not want to waste the time of the committee to talk about balance of powers. Every time people talk about these things, I think our Founding Fathers knew what they were about. They did not want us to have a king. They were trying to spread the power. For some reason we always tend to want to accumulate it in phases of our history. Then we seem to regret the situation.

Another proposal is the line item veto. To me, that is really frightening, for a number of reasons. One, it certainly would alter the congressional power and the checks and balance. It gave us the power to appropriate. And the other thing that kind of bothers me when people talk about the President should be able to make decisions. I have operated on the line item veto in the States. Many States have had that experience. It is not the President or the Governor who makes that decision. It is some guy with a shade on down in OMB that never liked the program. If he ever gets a chance they take them out of the budget. Then they try to jockey the funds around all the time. And remember those are people that never get elected. You cannot write them a letter. They do not change. If they get the right to address the line item veto list, they have all got their projects. And in many instances they are going to

be small enough you are going to have a hard time. That bureaucrat is going to be able to put it on there. Again, I do not know how your State legislatures work, but Florida works about the same in your experience, I think, Mr. Chairman, in some of these line item vetoes in the State, we went into so-called executive session and closed the door and said, "What does the Senator from Polk County want to do on this line item veto?" They overrode the Governor and never looked at the merits. It is a comity rule of local privilege.

When the Governor had a line item veto, we had a way of dealing with that in our State legislature. But if we put that in up here, again think of the power that gives the President. Give me a computer printout, I want to kind of see what Chairman Pepper is up to in his district. What are some of his favorite projects? He is not in line right now. We need to send him a message. We will find some little ones that will not raise a lot of exception, but at the same time it may be the funding of a national seashore, or a Biscayne Monument, or having to do with beach erosion down along Miami Beach. That is something that we know the chairman is interested in. We will put that on the list and let him worry about it. That will get him off our back.

We are talking about a portion of the budget that affects about 18 percent of the budget. And this particular President, it would change maybe under the next one, and I do not mean line-item veto of defense appropriations. If you look at the areas where our problems are, it is not in the discretionary programs. Those are the ones we have cut the hell out of over the last 3 years. There is no line-item veto now of the entitlement program. Maybe they will ask for that next and then you could have a part in determining what happens in those cases. But it seems like to me it is a red herring to say this is how we can balance the budget. This is how we have control.

The programs that are growing now faster than the GNP are medicare, interest in the national debt, and defense. And those are areas that are not going to be taken up by line-item veto.

Again, we do not know what the term line item means. Is that an overall category? Does that come down to a particular project? Can you look and decide what water project you want to veto? No one seems to know that.

I would certainly hope that the Congress would not buy that as being a solution to our problem or transfer of that power.

Most of the provisions I have seen give the President the right to veto or reduce. It is literally giving the President the right to write the appropriations bill.

The other problem I see with it, and I say this from the standpoint of a fiscal conservative, if you think this is a way of reducing spending. If you happen to think that Congress is irresponsible, and a lot of people think that in regard to spending, I do not see this provision as doing other than making Congress more irresponsible. I can answer my mail both ways. I can say, "We have put everything in for your project and that old President line item vetoed it." I can hear them say now when the vote comes up, "Go ahead, we can vote for this. The President will take care of that with a line item veto."

I hear people every time we get in trouble, we are spending too much. Let us just give the President power to cut everything 5 or 10 percent. A lot of people say that. They do not want to take the heat of making those cuts, so they are ready to transfer it to the President. I really think the only way people can grade us is whether we are responsive or not, or whether we will stand up to fight. If we do, fine and if we do not, they can grade us out. And I think to diffuse that authority further with a line item veto is not to be doing the proper thing for the checks and balances of the ballot box, or the people being able to really grade us.

To me, these two proposals are not as good as reconciliation. Reconciliation, maybe we should wrap it to a package of hard changes into a single bill. I think that is protection for people. When I answer my mail, "I sure didn't want to rescind your particular project, but it was in that bill and I either had to vote whether I was going to be a spender or a cutter, and I decided I had to vote to cut. It was necessary to do it." When we try to take these things on one thing at a time, what I find happens in the Senate many times somebody says, "I am for cutting. You know that, Lawton. I'm not for Boy Scouts. Bring me another one." And it is only when you have sort of brought them a package and said, "Here it is. You have got to swallow it or you have got to reject it", that you get a chance to have people speak.

I think reconciliation can be improved. I think we can do it by streamlining the Budget Act. I think you can drop the second budget resolution, make the first one binding, and put reconciliation on the first budget resolution. That was something we did by a motion I made back in 1980. We used reconciliation for the first time in 1980, and we reconciled about $5 billion. In 1981 we had to swap. It got a bad name, especially over here.

I do not think that was the fault, really, of the act. I think it was the fault of some people who allowed it to be written on the floor. It never did get to committees, never got to hearing, one vote. I doubt if that is going to happen again right away. There will be a stronger will to resist that. I do not think it was purely a fault in the act itself. We had reconciliation in the Senate. The committees worked in hearings, worked their will in a hearing to put together that package. I think now we can codify the reconciliation and keep, and I would strongly recommend we do something to nonbudgetary items.

It offends me very much to see the authorizing committees have decided this is a good way of tacking on nonbudgetary items and get the privilege on the Senate side of limited debate, fast track. I do not know how that works over here on the House side because our rules are different. But why should nonbudgetary items be placed in there to start with? A lot of them are major changes in legislation. We have seen that happen out of that Commerce Committee and I just think there is no place for that.

I think also we ought to have a right to amend that reconciliation substitute. For example, the Finance Committee, there is no way you can cut and substitute tax for what they have. I think that is taking away from the membership a right to make a decision on that. That I think can be bad, but I think again that could be fixed. I would like to see us have a regulatory budget and a

credit budget as part of the process. That is going a little bit further, but I think those things are necessary.

Overall, the Budget Act has detractors. Some say it takes too long, and others say it takes power from the committees, but the truth is I think when it comes to cutting deficits, the Budget Act has the potential of making the best use of our time. It again forces us to make a decision.

To me, I remember when I came to the Senate I could not believe that the Appropriations Committee passed 16 bills, never added up what we were doing, with each subcommittee sitting like a chieftain and you did not monkey with another monkey's monkey. We found, if anything, the bills always went up from the subcommittee to the full committee. The same Members of the proponents, the constituents of those bills, were always on the subcommittees and then went to the floor and amended them higher. Nobody ever said, "Wait a minute, we have to set some priorities." The Budget Act makes us have that national debate about where we should spend our money. I think that allows the American people to get involved in that debate.

I think some of the delays that have been blamed on the Budget Committee have not always been the Budget Committee's fault. The Appropriations Committee has sat on bills and decided, because some kind of political game that is going on between the White House and the Congress, we are going to hold the welfare or the human resources; we are not going to let it go before defense. We are going to tie it up. That was not really the Budget Committee's fault, but I have heard many, many people say the Budget Committee caused that. I think it was a different kind of thing.

All of the proposed options would massively shift power from the Congress in general over to the White House. I think we can improve the act, and streamline it and put it to work now and back it up with individual responsibility of the Members that are required to make it work, as designed. I think that would be better than buying the legislative veto proposals.

[Mr. Chiles' prepared statement follows:]

Senator **Lawton Chiles**

Florida

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Contact: Dennis Beal

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March 1, 1984

REMARKS OF

SENATOR LAWTON CHILES

AT A

HOUSE RULES COMMITTEE HEARING

ON THE

CHADHA CASE AND THE BUDGET/APPROPRIATIONS PROCESS

MARCH 1, 1984

"BUDGET RECONCILIATION AS A MEANS OF
REDUCING THE FEDERAL DEFICIT"

Good afternoon, Mr. Chairman. Let me compliment you on these hearings exploring the impact of the Chadha decision on the legislative veto. As a member of both the Senate Appropriations Committee and the Senate Budget Committee, I have a particular interest in the issue, and I appreciate the chance to give you my views.

You have asked me to address a variety of proposals that would give the Executive Branch more power over the purse. I want to state at the outset that I don't believe it is either desirable or necessary to unbalance the checks and balances written into the Constitution by our Founding Fathers. We can achieve budget control -- if that is the real intent -- without disrupting our constitutional system.

It has been eight months since the Supreme Court handed down the Chadha decision, and the dust has not had enough time to settle. In the first days following that decision, we had a lot of worry expressed over the impact the ruling might have on the Budget Act.

Frankly, I thought then -- and believe even more strongly now -- that the worry was misplaced. We already have what is potentially the most effective tool of all to deal with our budget problems. The tool is the reconciliation process included in the Budget Act. If we revise the process and use it effectively, it really can help solve our budget problems.

In truth, reconciliation may be the best hope we have among the wide variety of options now being discussed to get a hold on federal deficits.

But before I get into the virtues of reconciliation, let me first address the impact of Chadha on the budget process, and then discuss some of the other proposals aimed at cutting the federal deficit.

CHADHA AND THE BUDGET PROCESS

By now most commentators agree that Chadha has put an end to the practice of one-house vetos of executive actions. This seems to rule out the deferral provision of the Budget Act under which Congress provided that deferrals -- or temporary impoundments -- would become effective unless disapproved by one House of Congress.

This specific deferral issue has yet to be formally tested, and right now we seem to be in a period where we are muddling through. But even if the one-house mechanism for overturning a deferral is finally determined to be no longer valid, the loss of that power neither strikes down the Budget Act itself, nor renders the Act ineffective as a deficit-fighting statute.

And the reason, of course, is the concept of severability. The Budget and Impoundment Act of 1974 does not contain a severability clause. But in Chadha, the court worked through the severability issue, and decided that if what remains when the legislative veto provision is stricken still is a "workable administrative mechanism," then the statute can stand.

I believe that clearly applies in the case of the Budget Act. Deferral procedures were, from the very

beginning, a compromise device. And loss of the formal deferral mechanism in no way compromises the continuing value of the Budget Act.

Beyond the deferral question itself, it has been commonplace for individual committees to work out informal arrangements on appropriations bills that would permit adjustment in accounts. Often called "reprogramming", the device enables funds to be reallocated to meet emergency needs. It may be that this process ought to be examined in more detail with an eye toward codifying it into the Budget Act itself. In any case, it ought to be reviewed to see if it has a Chadha problem, and if so, how it might be formally revised and adopted as a more regular feature of the budget process.

So, while the one-house veto is apparently no longer available, we still have some informal arrangements through which Congress and the executive branch can deal with particular spending issues. Beyond that, the President still has another form of impoundment authority available to him, and that, of course, is rescision.

The rescision power enables the President to propose permanent spending reductions which require approval by both Houses of Congress within 45 days through enactment of legislation. Rescisions are really just new appropriations, but with a minus sign. They follow the constitutional provision by both Houses and presentation to the President required by Chadha. The

only new mechanism is allowing the President to withhold funds for 45 days while Congress considers proposed rescisions. Chadha did not address that as an issue.

Overall, Chadha seems to have affected the Budget Act in one specific way, denying the use of the deferral authority. But because of the implict severability doctrine as well as pre-existing practice among Congressional committees and other features of the Budget Act, the utility of the Budget Act has not been materially impaired.

NEW PROPOSALS: ENHANCED RECISION AUTHORITY.

Mr. Chairman, with federal deficits as high as they are, we have heard a series of new proposals about how to fight them. Among those proposals is a Senate plan to give the President stronger rescision power. I must say I'm skeptical about giving the President such additional power. The proposal says, with disarming innocence, let's just treat a rescision like a deferral. But let's not forget that a rescision is legislation . Giving the President the power to rescind unless Congress objects, is to give the power to legislate.

One reason for my skepticism is a shift in the separation of powers between Congress and the White House. I will address that issue more fully when I discuss the item veto.

But for now, my skepticism springs from two concerns. To begin with, the Federal deficit in Fiscal 1985 will be in excess of $180 billion. Please keep in mind that this is the deficit proposed by the President himself. The President passed-up the opportunity to exercise prior restraint and give us a budget closer to balance. So it strikes me as peculiar that we should be talking about giving the White House more power when it has failed to use the power it already has in the deficit fight, namely, the President's own budget.

But let's assume we give the President enhanced rescision power, the kind that would require both Houses of Congress to act to overturn the President's rescisions within 45 days instead of having it fall if both houses do not act, as is the case now.

If you think the budget takes a lot of time, rescisions could become a full-scale time nightmare. Congress might approve a given sum in an appropriations bill, only to have it rescinded by the White House. Congress would then have to restore that amount in a piece of legislation which could then be overridden by the President. To finally reach its original goal, Congress would then have to override the veto by a two-thirds vote in each house.

That, it seems to me, would convert the legislative process into a safari that leads us all over the place only to return to the starting point.

So I do not believe reshaping the rescision power is a realistic way to help us contain federal deficits.

NEW PROPOSALS: THE LINE-ITEM VETO

Another device has been proposed to help cut deficits. It would require giving the President sizeable new powers, but the proposal itself is not new. In fact it has been around for more than a century, and it is called the line-item veto. Most state governors have that power, but the fact that it's been around so long should tell us something about why the President doesn't have it.

To begin with, it would upset the separation of power between the White House and the Congress over appropriations. The Founding Fathers purposely gave that power to Cogress, the branch of the federal government closest to the people. They understood that people had to have a place to which they could go and make their case. And it works.

People can come right through the doors of Congress and be heard on issues which affect their lives and homes. All our spending decisions in Congress are a product of public opinion.

But if the President is given the item veto, it won't be the President who makes the veto decisions. They will be made for him by bureaucrats sealed away in some basement office in the Executive Office building. No one voted for those bureaucrats, and no one will be able to reach them the way they can reach a member of Congress.

Let me add here that this description is not just conjecture. We have now had almost ten years experience with the Budget Act, and I have seen thousands of rescisions sent up by the White House. They are not the kind of cosmic policy decisions that reach the President. They are normally small programs.

A savvy President could use the item veto as a political weapon. Perhaps he could strike projects of states where the Senator or Representative has not cooperated with the President in the past, or withhold the veto to get something the member of Congress otherwise would not give.

Moreover, bureaucrats in Washington can't possibly be familiar with the conditions in every state that require a particular project. A worthwhile project might be struck down with an item veto solely because it has an unfamiliar name. Or those same bureacrats might not like a particular program, and go after it from personal bias.

There are other problems with the item veto. For example, no one knows what the term "item" really means. Would the President have the right only to veto certain accounts in an appropriations bill? Or could he go farther and actually cut individual projects? Nobody knows for sure, and the author of the proposal in the Senate cannot really give me a satisfactory answer.

The item veto does not reach the big items of spending in the budget. It would touch just about 18

percent of total spending that falls in the category of "non-defense discretionary programs." And it's those areas where we have already made sizeable cuts in the last three years.

Worse than any of these problems, is that by giving the President the power to cut OR REDUCE an item, we are giving him legislative power. He could actually amend bills, changing them to suit his personal version of what he believes policy should be.

It seems to me, Mr. Chairman, that if you give the President such sweeping powers over appropriations, there's nothing to stop him from acquiring the same power over entitlements, like Social Security. Some people have even suggested giving the President the authority to "withhold" COLAs as a means of cutting the deficit. And if we open the door that far, there's no telling how it can ever be shut again.

As we look back over these assorted proposals, the real issue comes into sharper focus. And the real issue is responsibility.

The question every member of Congress should ask of themselves is are we willing to do the job we were elected to do. Are we willing to make hard choices, or just give up our jobs to the White House. If the answer is, yes, we are willing to do our jobs, then we can stop the search for new gimmicks to fight the deficit.

We have the answer already on the books. And it's called the Congressional Budget and Impoundment Act of 1974. Now, I know the budget act has its detractors. Some ask what good has it done when the deficit's larger than it's ever been before. The answer there is that the budget act has done its job. We have actually made cuts already that will total $360 billion of deficit reduction over five years. The budget act is not a victim of its own weakness, but rather of an economic policy which cut taxes $2 for every $1 in spending cuts.

We made the spending cuts because the budget act made it possible through the device of reconciliation.

RECONCILIATION: THE BEST ANSWER

I am not one of those who says the Budget Act is too fragile to be amended. It has been in place almost ten years. We know its strength and its weaknesses.

Mr. Chairman, it took us five years of experience to learn that if we really want to cut spending programs we need reconciliation, and we need it on the first budget resolution.

Much of the criticism of the Budget Act is the amount of time we spend on budget matters.One way we can streamline the process is to drop the Second Budget Resolution, make the first one binding, and put reconciliation where it belongs -- on the first resolution.

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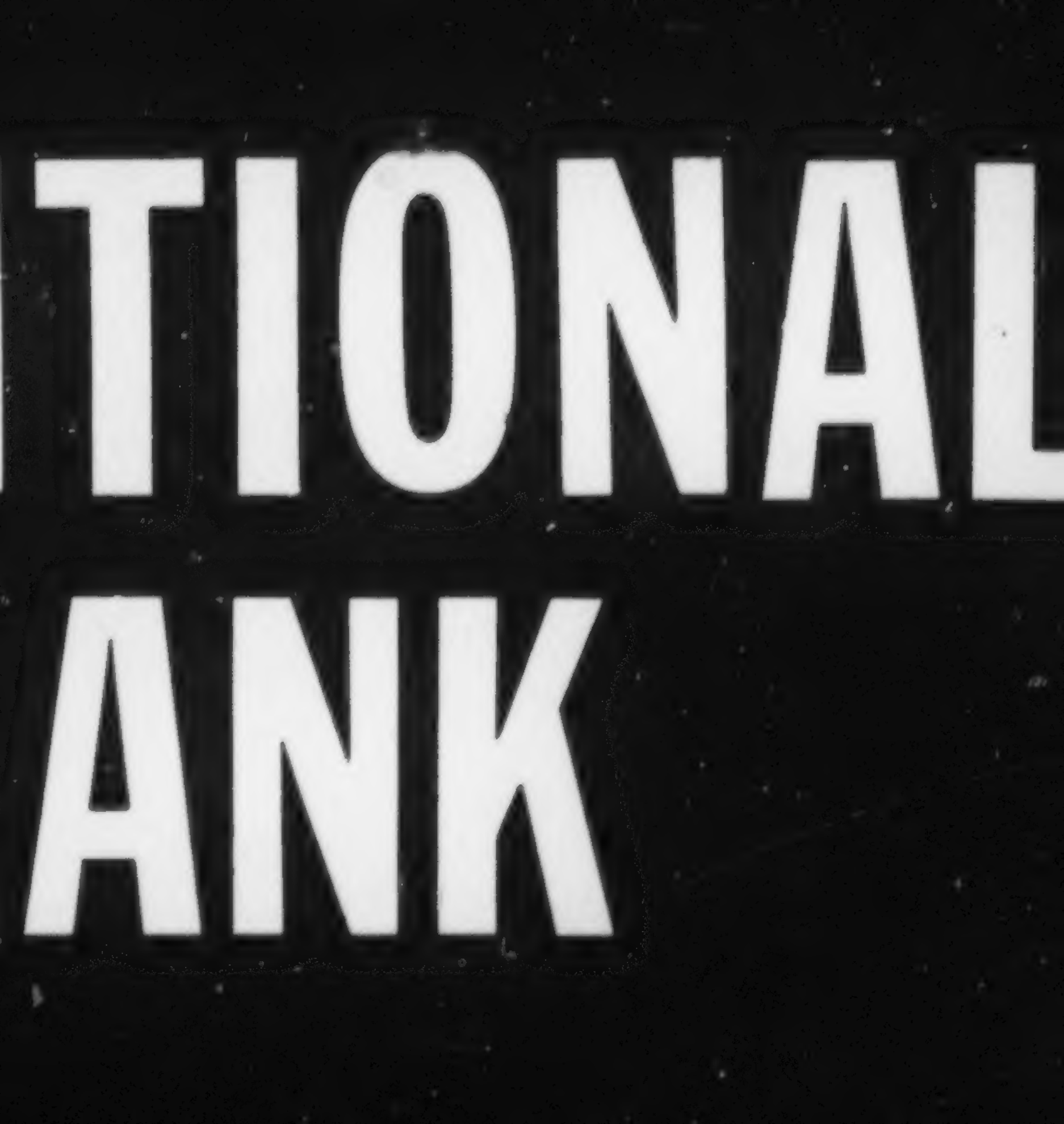
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If we are going to change entitlement programs in a fair way -- but in a way that saves money -- we have to do it early in the year so that agencies have time to write regulations, and train state and federal workers to implement those regulations. There just isn't time to do that on a second budget resolution in September or October, when the fiscal year begins October 1.

And it is not realistic to expect committees which have gone through the entire legislative process, through working out differences within their committees, amending bills on the floor and working out differences in conference -- only to be asked to start all over.

We tried that in the past, on bills like the farm bill and the Higher Education Act, and it just did not work. Congress was just not willing to redo all its work. So it is much more effective to set out the legislative agenda for cost savings early in the year, instead of at the end. We have learned through experience that reconciliation works. We first tried it in 1980, on my motion at the Budget Committee, and reduced the deficit by $5 billion. In 1981, we tried it on a much larger scale and reduced spending by $130 billion.

Now with deficits so high, reconciliation is a ready-made, proven means to attack the huge levels of red ink. In fact, it would be hard to imagine a better way. We found over the years that you simply can't put together a package of meaningful spending reductions one piece at a time. In government, as in politics, if

you want to get something you have to give something. And reconciliation allows us the chance to package a whole bundle of proposals in one vehicle, and show some results.

But there are some problems with Reconciliation. It has evolved as an ad-hoc procedure, and it needs to be codified. We need to have protections to reduce the deficit, but we need protections against misuse. For example, we should prohibit the inclusion of non-budgetary matters in a Reconciliation bill. That raised a lot of hard feelings in the 1981 Act, and I believe the criticism is correct.

We also have a problem in the Senate with the "germaneness rule." That says that if a committee reports one particular spending cut or tax provision, then a member cannot report a different provision as a substitute. He can move to strike and therefore increase the deficit but he cannot give the body an opportunity to consider a different way to reduce the deficit. That doesn't seem fair to me, and it should be amended.

Other amendments to Reconcilation I have recommended are to institute both a credit budget and a regulatory budget process. The latter would parallel the spending process in the Budget Act -- we would have a President's regulatory request -- the Budget Resolution would set broad functional totals -- then the Appropriations Committee would set detailed agency-by-agency limitations on the total cost of federal regulations.

Mr. Chairman, the deficits frighten every one. And delaying action because of an election year, or waiting for constitutional change to rewrite the balance between Congress and the White House isn't going to do us much good.

The best thing we have going for us is the Congressional Budget process. If the President will cooperate, if Members of Congress will abide the hard choices that go with our jobs, we can cut the deficits in a timely way. And the best way is to put the Budget process and reconciliation to work for the good of the nation.

The CHAIRMAN. Thank you very much, Senator.

Mr. Bolling?

Mr. BOLLING. I would like to commend you for your statement, some of which I disagree with—the issue of item veto but I will try to explain. But I commend you because of the key role you played in making the Budget Act work, and I think it has worked better in the Senate than in the House, and I am sure the Senator from Florida made a contribution in bridging the partisan gap. So instead of having a partisan fight on the floor from the very beginning of the Budget Act, the Senate was able to work in a bipartisan way.

Senator CHILES. I wish I could take credit for that. I cannot, I do think. We were very fortunate to have Henry Bellmon as the ranking Republican at the time, and the Republicans did participate in the process. They did not just vote no. And I think your burden has been much harder in the House when the Republicans have voted no. And the Senate Republicans think that same thing. Time after time they have tried to talk to their colleagues over here and say, "Get into the process and participate."

Mr. BOLLING. I think it is very good of the Senator to say that. He is too modest. He did have a considerable role. It is important that people will recognize it publicly.

The CHAIRMAN. Thank you, Mr. Bolling.

Mr. Long?

Mr. LONG. I would like to commend Mr. Chiles for his fine statement and the contribution he has made.

I share the view that it has worked better over there than over here. It really got out of hand for awhile. I think probably it is in some danger. With respect to the suggested changes, with respect to how it might be strengthened and corrected, I am becoming

more and more sure you have to do it by one resolution and by reconciliation. I sometimes think we have to go further and make those cuts.

Senator CHILES. We had the same problem in the Senate this last time. What we promised in July, we did not deliver until October.

Mr. LONG. In 1981, which was an important experience, the amendment was not written in committee, not written on the floor, but written by OMB and the White House, and pieces of paper were stapled together on the way up here at midnight. I think the way the administration, the executive branch and the White House handled the matter really did great harm to the budget process and to the integrity of the process.

Senator CHILES. I think that is exactly right. I listened with interest to the newsman who was broadcasting over here when I heard, I think it was last year, some of the Republican leadership was complaining that the Democrats had brought a measure out in a briefer period of time and with a steamroller. I am sure you all must have enjoyed those comments.

Mr. LONG. Compared to what had happened in 1981, it was an orderly process last year.

Senator CHILES. I think one of the things that happens in our democratic process is we learn through our mistakes. There is nothing better than tying the albatross around their neck sometimes. As they used to say in Florida, you can keep a dog from stealing chickens if you tie one around his neck for awhile. So I think we had that in 1981, one tied around us, just like we had a tax cut tied around us. A lot of us have regretted voting for it. Those things do not mean necessarily that you throw everything out. You learn by those errors and, hopefully, they will not repeat themselves.

Mr. LONG. Thank you.

The CHAIRMAN. We in Florida already knew the distinction with which Senator Chiles serves. He did a magnificent job for the State. We are proud of the contribution that he has made.

Senator CHILES. Thank you.

The CHAIRMAN. We will take just a brief recess and go and vote and we will come right back.

[A brief recess was taken.]

The CHAIRMAN. The committee will come to order, please.

We have the privilege now of hearing, I think, the most distinguished Member of this House who ever presided over this committee, the Honorable Richard Bolling. We like to describe him as a gentleman and a scholar. He is outstanding. He is a very learned man and deeply dedicated to the interests we have in this country.

We are very much pleased to have the Honorable Richard Bolling appear before us on this important matter.

STATEMENT OF HON. RICHARD BOLLING, FORMER REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI

Mr. BOLLING. Thank you, Mr. Chairman. I am very grateful to you, but not surprised by your great courtesy and kindness to me. It is a pleasure to be back with you.

I do not have a prepared statement, and I will be relatively brief.

After listening to Senator Chiles' excellent statement I think I will try to put this issue in perspective at least from my point of view, without being too partisan about it. Inevitably, it carries a little partisanship. Reconciliation was used in 1981 in a way that made it include authorizing bills as well as appropriations bills, and it made enormous changes in programs that had been accepted and carefully worked out, and were working rather well. It dealt with virtually everything that comes before the Congress, and it did not do it in a very carefully worked out way.

My own judgment is that, from the point of view of the House of Representatives, it effectively destroyed the whole of the legislative process, the integrity of the legislative process.

Congress ought to have an orderly system in which the legislative committees examine the issues and policies in the Congress as well as its general operations, and then conclude what the issue should be that goes through the Congress. After the authorization process, the appropriations process should determine the actual money for expenditures.

We added to that the necessity of an overall approach, the Budget Committee approach. I think that was an essential step to take. We had no illusions when we passed that bill that it was a perfect bill. And one of the great problems with it was that it was extraordinarily difficult to see how there would be enough time for all the committees—the legislative committees, the Appropriations Committee as well as the Budget Committee—to complete their work. And that problem is before you in many different ways now, and it is a very important question.

What we are really dealing with, when we deal with the question of legislative veto, is a problem of the whole of the legislative process, and where the legislative veto has come to fit into the whole of the process. Now I grew up in this institution and I served under Sam Rayburn who was, in my judgment, a very great Speaker, but, even more important and much less often said, he was an extraordinary legislator. He was probably the best legislator that ever served in this institution.

Sam Rayburn understood the legislative process from having practiced it from the level of an individual member of the committee to the chairman of one of the most powerful committees dealing with much of the New Deal, in the 1930's. He became chairman of the Interstate and Commerce Committee in 1931. He did not give up that chairmanship until he became the majority leader in 1937.

In 1941, unlike, so far as I know, anyone in modern times who became Speaker, he was elected unanimously by the House to succeed a Speaker who had been ill during his majority leadership and who died in office. And, rather than go through a show of fight in 1941, the House, I think, elected him by resolution. And then he served until his death in 1961, longer than any Speaker by more than a multiple of two. And in that process, he was always a legislator. I had the privilege of working in his primary legislative institution, which was called the board of education, and he always was a good legislator, and he bitterly opposed the legislative veto.

Nobody has ever accused Rayburn of not being concerned about the power of the House, the power of the House and Senate togeth-

er face to face with the President. He was one of the few people who could do this. He felt very strongly about the House and he was always a protector of the House. He was never Ambassador to the House from the Executive. He recognized himself as the leader of the institution, not just the Democrats, but the institution as a whole. And I think his opposition to the legislative veto in itself is an important factor. It is an important factor, in my view.

What I would like to get at now, I think in consideration of the legislative process is the question of the legislative veto. I think it is also time to look very carefully at the item veto. And I will talk about that in a generic sense. I am really not interested in one that allows the President to reduce. I am only interested in one that allows the President to strike out any particular appropriation. And I will be brutally frank in saying why I disagree with Senator Chiles.

I have watched the House long enough to know there is one abuse of power in the House of Representatives that I find very unlovely, and often not in the public interest. That is the power of senior Members to see to it that their districts or States get a great deal more than they deserve in terms of public works programs and military programs. A man who was chairman of the Committee to Oversee the War, the Truman Committee, told me,

> For Heaven sake, Dick, never, never allow a military installation to go in your district because, if you do, you will then be caught in a trap. For economic reasons, your people will insist that you keep it. The military may not want it at all; it may not be of any use, but we still keep these things and they go on forever simply because they are there.

It is the same kind of thing I have seen happen on regular public works, not once but many times. And I think we need a balance of power restored so that the President has an opportunity to cut out specific items by what I used to call the item veto. I know that goes against the desires of virtually every Congressman and virtually every Senator. I do not much care because I think it is much more important at this stage of the game to look at the overall problems that we confront, and one of them certainly is budgetary.

I am not suggesting for a minute that that is the solution to the problem of deficits; it is not. What has been said is accurate. There are great dilemmas—cuts in taxes, enormous increase in defense expenditures—but there are a great many other things that can be cut down and cut back.

I will close by saying I am well aware that there are a great many unmonitored programs that have been invented in different times, a good many of them ineffective, which go on without anybody's real knowledge that they work or do not work. We still have a substantial number of programs, I believe, that simply are not monitored adequately. And I think we are dealing with the whole problem when we are looking at this very important matter which must be dealt with ultimately. I think we ought to remember the whole problem and not be misdirected because we are concerned about this relatively narrow but very important problem of legislative leadership.

Thank you.

The CHAIRMAN. Thank you, Mr. Bolling.

You mentioned in the beginning of your statement the action taken on the reconciliation resolution in 1981. I remember very well Chairman Perkins, of the Education and Labor Committee, being very much upset about that resolution, not only cutting billions of dollars from educational programs, but actually removing from the statute books some of our legislation. As he said on one occasion, some programs we had worked for for 30 years to get them into the laws of this land. What was your understanding when the budget law was enacted?

Mr. BOLLING. My judgment was it was not intended to reduce the whole legislative process to one reconciliation matter. I do not think the intention ever was. Although I am responsible for it, it is very questionable whether reconciliation was ever intended to occur on the first budget resolution. That was a very tough one to allow in 1980. Through a series of misunderstandings, a proposal by me in an early meeting on the budget we were in a position that we perhaps would have to go to the leadership of the two Houses—the House and the Senate, Republicans and Democrats and in 1980 both the House and the Senate were Democratic—to come up with an adequate method of cutting the budget substantially. We were going to have to have an unusual approach, a multiyear approach dealing with authorizations, entitlements and so on in order to get the rather small amount.

It then turned into this business of reconciliation on the first resolution. So you had a very questionable situation, but that is one of those situations in which the realities, the needs of the Congress and the country overrode exactly the way the law was written. I do not think there is any question that what was done in 1980 and 1981 might very well be described as way out of line with what was in mind of the drafters, of all the different budget acts that were around, or bills that were around before we finally settled on a final version.

The CHAIRMAN. There is one other question I would like to ask, out of your large experience and knowledge of the legislative process, do you consider that the legislative veto is essential or is highly desirable to be pursued as a part of the legislative function; or is it essential or highly important to the exercise of the legislative function of Congress?

Mr. BOLLING. Well, there are a lot of people who criticize me for being inclined to look at the overall picture, and that may be justified on occasion. My own view is if Congress did its work well on the first go around in the passage of laws, we would not have as much need for an awkward substitute method.

In other words, if Congress were to work out the compromises that needed to be worked out at the beginning of the process and were to be more precise, it would not eliminate the need for regulation on the part of agencies, but its delegation of power to agencies would be much less broad. I would much prefer to see us become the kind of workmen that we, I think, are perfectly capable of being on the initial passage of legislation.

I think in a country of this size, with so much variety in cultures and regions and attitudes, it is important not to move too swiftly. The dilemma that confronts us is we have a system in which, unlike most countries, the conservatives are capable of delaying

action on many social programs so much too long that when it becomes possible to do something about those programs, there is an overanxiety on the part of the people who believe in the program, that we tend to move too swiftly, too fast. When we go both too slow and too fast, we end up with a product that I do not think is a good one.

I would hope that in time, in the next 10, 20, or 30 years, we would come to have a better ability to deal with our problems evenly and even with some sense of planning and anticipation. I am not going to go into that at great length.

I do not think the legislative veto ought to be the key element as do the strong proponents of it. I think it is very much preferable to have a better quality of legislation at the front end. But there has to be some kind of mechanism that will allow the Congress to check. At the same time, I think that has to be balanced out. But I do not think it should be essential. There may be some device that is needed to make it easier for the Congress to stop something. But I think there are many other devices that may not be the legislative veto.

The CHAIRMAN. Thank you.

Mr. Long?

Mr. LONG. I surely agree with you and Mr. Rayburn. It has caused me a great deal of concern and trouble over the years. The line item veto is another.

I just wonder about what, in my mind, is a fairly considerable problem with respect to abuse of the process by the President. That is what Senator Chiles was talking about. For example, we know the President, in my opinion, lacks a sensitivity toward working people and the poor, who have paid the biggest price. The cuts did not come out of the military programs but educational and academic. Does that worry you?

Mr. BOLLING. Well, it worries me, but it does not worry me as much as to tell you to have a comprehensive approach to balance things out in the real sense. I think if the President had the opportunity to have the line item veto this year, we really would not see much action that would be punative. I think he would wait until another year if he got re-elected.

When you have a highly political President, as I think this one is, and others have been, it seems very important to have votes on what they are really interested in.

I think the dilemma we confront in not providing the President with a line-item veto, they have an opportunity to fuzz things up by putting it all together as a political scheme, like Mr. Chiles was talking about in reverse. This is, after all, in all of our Government, despite the desire of many, many conservatives to pretend it is not a political process, it is highly political.

Mr. LONG. It was intended to be.

Mr. BOLLING. Certainly the Founding Fathers understood that and I would be all for the country going more and more into what the President's real intentions and duties were, even at the risk of a further difficulty in dealing with it.

Mr. LONG. In my district it is hard for me to take that position.

Mr. BOLLING. I have exactly the same commitments that you people do. I have just slightly different views as to how you get there.

Mr. LONG. Let me ask you, and I share your view with respect to this one—the lack of surveillance, and the lack of policing programs that are in effect; some are to far out to work and many are not working; would this, in your opinion, justify moving to sunset legislation, or do you feel the time has come and gone?

Mr. BOLLING. I think it has come and gone. They came up with legislation later that was much more to the point, more realistic than the original bill that was being sold. I think you probably know as much or more about that particular subject than anybody. I do not think we can do very much dramatically with sunset, but I think you have got to have that kind of approach. In the long run, every program, every single program, including every single weapons system, ought to be examined with regularity, so that we do not get in these situations, particularly with weapons, because once it gets started, you cannot stop it.

We have a great many programs, and I can name a few in the field of education, where we clearly are continuing the worst and least efficient programs, while we stop the better ones. I think there has to be a system; I think it ought to be part of oversight. You simply have to have some kind of realistic approach. I keep coming back, not because I am afraid of details, what I keep coming back to is we have to have a better legislative process. That is very important, put an end to legislation that is no longer needed as well as the initiation of legislation that is long needed.

Mr. LONG. I appreciate your views.

The CHAIRMAN. Mr. Wheat?

Mr. WHEAT. [Question inaudible.]

Mr. BOLLING. I am not relating them one to the other. All I am doing is bringing up that I think item veto in the hands of the President is healthy.

Mr. WHEAT. I can understand that item veto is important to the President in our budget process. [Inaudible.]

Mr. BOLLING. I do not think we have had an honest Presidential budget since Truman. I think it was a political document then, a statement of what the policies are.

I think it is very important for us to get to where the public knows more and more about what the bureaucrats are doing. I think the generalities are part of the problem.

[Colloquy continued between Mr. Wheat and Mr. Bolling inaudible and unreportable.]

The CHAIRMAN. Thank you, Mr. Bolling.

There are a whole lot of things that we would like to ask you about but Mr. Domenici has been waiting and we have to go vote shortly.

I will add one thing. You made a very important suggestion that, while we perhaps do not need the legislative veto, we would need to develop some technique by which Congress could maintain supervision and oversight. I think a great deal of thought should be given as to how we can do that with the passage of new legislation, while conforming to the constitutional process.

Thank you very much.

Mr. BOLLING. Thank you, Mr. Chairman. I enjoyed being here.

The CHAIRMAN. We next have the great pleasure of the Honorable Pete Domenici, chairman of the Senate Budget Committee, who has done a great job.

Senator, I will run right down and vote and come back.

[A brief recess was taken.]

The CHAIRMAN. The committee will come to order, please.

As I said, the committee is very much honored to have the distinguished Senator Pete Domenici, chairman of the Senate Budget Committee to come here to testify on this important matter.

STATEMENT OF HON. PETE V. DOMENICI, A U.S. SENATOR FROM THE STATE OF NEW MEXICO

Senator DOMENICI. Thank you, Mr. Chairman. I have detailed remarks which I would like to make part of the record.

The CHAIRMAN. Without objection, it will be received.

Senator DOMENICI. Mr. Chairman, I am testifying principally as one who has been involved in the budget process, but I have been privileged of late to serve also on the Appropriations Committee in the Senate. Frankly, I have served on a couple of major authorizing committees in my 11 years. In fact, I still serve on the Energy and Natural Resources Committee and the Environment and Public Works Committee.

I could not agree more with Congressman Bolling in his suggestion that we had really better start looking at an overhaul of the whole process.

Everyone is looking for a reason to assign to the failure of the process to work. I guess as chairman of the Budget Committee I end up being the chairman of the committee that is the most recent scapegoat. Some say the process is not working very well in the last 3 years or so. I do not think that is true at all. I think the fiscal pocedures in Congress were about to fall apart before we got a budget process.

The first reconciliation bill that was spoken of here was in 1980 when your party was in control of both Houses. It was an urgent time politically from the standpoint of the economy, and the Budget Act, with its great versatility, was used by the majority party in both Houses to effect a reconciliation. We thus established precedent and, absent some reform which would literally say you cannot do it, it is imbedded in the law. As a matter of fact, I would suggest, after about 9 years on the Budget Committee, and 3 as chairman, that you have a better chance of doing something significant by having reconciliation on the first budget resolution rather than the second. You might want to minimize the scope, but the whole idea of having two budget resolutions and reconciliation on the second has turned out to be unachievable. As a matter of fact, by inference and again by tradition, we are turning the first resolution into a second automatically, because we do not have two since we can hardly get one passed much less two. If we had to wait around for the second resolution in order to get reconciliation, that might please some because I think that would be the demise of reconciliation. With some, that would be all right.

It has been said, I think by you, Mr. Chairman, the distinguished chairman of a very distinguished committee, that reconciliation should not be used to wipe laws off the books.

Let me suggest that the very distinguished Chairman Pepper concluded properly, but assessed blame in the wrong place. Reconciliation did not wipe anything off the books. What it did was say to a committee, "You have within your jurisdiction the following laws to authorize the following sums of money. Now you pick and choose, but you reduce the authorizing level by $4 billion. You do it." It happened that in that process a number of very small authorizing laws were used to accumulate this amount of billions. So they might have taken a $40 million program and eliminated it. You have thereby accomplished the first $40 million of the requirement. That was the committee's choice.

It so happens that once they did that, Mr. Chairman, and put it in the bill, reconciliation forced a vote on other measures, including that action, and therein there may be some concern. Historically, the authorizing process carries its own weight, its own pluses and its own minuses. Historically, authorizing legislation does not get carried with other good baggage or fall with other bad baggage. In this case, these programs were part of a great big package. And that permitted people up here who might not otherwise have done so—in this Senator's opinion, did not have the courage to do so—to vote for the package or against the package. They might have picked it apart had it been voted on piece by piece and, not wanting to go home and say how they voted, on the individual issues, they vote for the whole. It appeared to be what the people in the country wanted at that point. It had the significant impact of saving a lot of money.

I do not say that this is a perfect process. I am sure it can be fixed up. It does not always enjoy the benefit of the expertise or deliberative minds the authorizing committees have.

Having said that, I am convinced that we are not going to have that kind of massive reconciliation again. On the other hand, I am convinced, with the kind of deficits we have, we are going to use this tool of reconciliation a number of times before we stop. I do not believe that either the President or the Democratic Party's nominee is going to be able to get by without asking Congress to do something dramatic, both on the tax and savings side. I do not think you will ever get it done in a timely manner unless you package it. And I am not one to believe that we package things up here very voluntarily.

The CHAIRMAN. I could not agree with you more. The people of this country are not really schooled in the techniques of budget, but they can understand when you are $200 billion short.

Senator DOMENICI. Well, I have gone far astray from my statement. You will find none of those remarks in it.

I will say, with reference to the *Chadha* case, I find that we do not have to do anything to the Budget Act as a result of that case.

There is a section in the act with reference to deferrals, which is probably unconstitutional, and is, in my opinion, ambiguous and unclear, and, therefore, we would look at it and see if it is severable. I think it is. Therefore, the act is intact, but we cannot use that section.

In my prepared remarks, I indicated that it has not been used much anyway. Most deferrals are dealt with in appropriations bills, and that clearly is constitutional and clearly compatible with the Budget Act, as an alternate means of effecting deferral disapprovals.

It seems to me we have a technically unconstitutional section, but it is a section that is not much used, and surely I would not busy myself, and hope you will not recommend that we amend the Budget Act for that. Maybe the act needs major reform and if we pursue that, we can fix that section and make it constitutional.

With reference to line-item veto, or item veto, I wish the distinguished Congressman Wheat, who asked a question about what a President could veto that would not have an adverse impact on the poor, were here. I would give him a few examples. On the other hand, I am not for it, but it seems to me what the President would use it for is not to veto things that affect poverty. I think we have got the wrong key.

We fund engineering schools and new buildings for $40 million because certain of our Members have power, and nobody even knows it is there. Since I saw it happen, I tried and I got one through the Senate. I could not get it through the House. That is where you put on the appropriations bill to give your university a new building. I think the President would veto that, but I do not think it has anything to do with poverty. In addition, most of the good poverty programs that affect people in a meaningful way are entitlements. Apparently no one has suggested item veto for entitlements.

Nonetheless, I do not think we ought to pursue the item veto. In my testimony, I am very skeptical about it. First of all, I think it is a very dramatic step. It might have a tendency to change the whole relationship between the President and the executive branch. I am not sure I am ready to take that step just because we have these deficits.

If there were a relationship between the big deficits and the line items that I thought were truly substantive, we should probably do something like this.

As I told you in my testimony, a small percentage of the total Federal budget would be subject to line-item veto. If you exempt defense, you find that a very small amount would be subject.

The CHAIRMAN. Senator Chiles raised the question of definition of line items.

Senator DOMENICI. I think former Congressman Bolling alleviated the problem of having to attempt to define it by defining it for himself. He clearly meant line item, which means you pick an item that is clearly discernible and stands on its own and you say no to it in its entirety. That is the traditional definition, and it was in that context that I was speaking.

Nonetheless, there are other possible definitions such as taking a series of accounts and cutting them 10 percent automatically. That really is not item veto. It enhances Presidential authority over the process of appropriations, and my reasoning applies to both kinds.

I think there is another issue, another reason that the line-item veto is not terribly attractive. Our budgets have grown so large, and so numerous in items, you will end up with bureaucrats doing

a lot of the vetoes instead of politicians. I have the highest regard for the bureaucracy. Those that work in my State, and there are thousands of them, justifiably think we ought not blame them for our Government's problems.

Our laws are so complicated, and bureaucrats are not responsible, but they get blamed. Nonetheless, I do think the bureaucracy would filter up in the line-item process things they do not like. I am not sure we are ready to handle that either in the Congress or the Executive.

Having said that, I am going to make just one further observation. I think we have done one questionable thing in the appropriations process. We have put Presidents in a posture at this point and others where they really do not have as much authority as they probably ought to have.

We give them combined bills, "Take it or leave it, Mr. President. We are passing this today. Good luck, we are going home tomorrow. You do not have money for paychecks tomorrow. We are off on vacation." I think we ought to fix that too. I understand there has to be tension between the branches of this great system. But that truly is an imbalance that we ought to fix in some way. I do not have any great ideas as to how to do that. I think if you are sending the President appropriations bills, the smaller in size the better; the more timely, the better in terms of doing the piece of work right. Let the President and the Congress have a spot, neither having excessive strength and power over the other.

I do not know how we can do that. It seems clear to me that people of this country would be upset if they understood how the system currently operates. You have been here much longer than I. How many times have we stayed until midnight in order to pass a bill so that paychecks could be issued, and then the bill was a continuing resolution and we went out and we were not going to be back for 10 or 12 days and the President could do anything but sign that.

I do not know how big an issue that is, but it surely is relevant to any reform process.

Having said that, let me close with one other remark. I wish the distinguished Congressman Long were here. I cannot tell this committee with certainty, but discussions on deficit reduction are progressing, and I think we will have something soon. The most devastating thing to the poor of our country is not a cut in programs. The most devastating thing to the poor of our country is an economy that is not growing. An economy that is not growing and is suffering from inflation at the same time. I think we can prove that the poor in this country are literally devastated by that. The best thing we can do to help the poor of this country is to keep the economy growing at 4½ or 5 percent and then, from time to time, fill the gaps for those citizens in our country who cannot make it. But I tell you, a little program here and there may soothe some of our consciences and make us feel like we are doing something for the poor but, basically, if we have another major recession and we let inflation go up to 12 or 15 percent, we will have hurt more poor in 1 year than we are going to help with all the programs that people hope are back on the books, that we can afford, that we have not been funding for the past year or so. Now, I may be wrong, but I

tell you I feel that just as certainly as they do about the programs. I have a serious hunch that I am right unless and until we change this economic system, and I am not for that. The other options are worse. We ought to get on with fixing this one.

I think we have gone through enough trauma that we ought not fool around with it. We ought to get on with the business of making sure the economy grows.

We had 4 years of no real growth. About 2 years of Carter and about 1½ or 2 years with Reagan, and literally, no real growth. You can now conclude that that is about as devastating a medicine as you can have. I think our obligation is to find out how we can make it grow. And that is the No. 1 priority.

It has been my pleasure to be here with you all. I do compliment you for having hearings on this very important legislative veto issue. I merely told you how I thought it relates to the Budget Act, and I will close by saying I never thought it was a terribly significant tool when I voted for it. We can do our business and not legislate and keep a string. You legislate, they carry it out. If we are not smart enough and do not have a good enough process to legislate without being worried about keeping a string, then we ought not legislate. Chairman Bolling gave you one solution: Pass better legislation. I will give you one: Maybe don't legislate at all. We have a tendency to do it the other way and not feel confident that legislation is right, so we want to keep a string and look over the President and his executive branch and say no. The Court just told us that is not going to work. So we have to find some other way to do the job better.

Thank you very much. I will be pleased to answer any questions.

[Mr. Domenici's prepared statement follows:]

STATEMENT OF SENATOR PETE V. DOMENICI

CHAIRMAN, SENATE BUDGET COMMITTEE

ON ISSUES RELATING TO

THE CHADHA DECISION & A PRESIDENTIAL LINE ITEM VETO

BEFORE THE

HOUSE RULES COMMITTEE

MARCH 1, 1984

MR. CHAIRMAN:

I WOULD LIKE TO BEGIN BY COMMENDING YOU AND YOUR COMMITTEE FOR HOLDING THESE HEARINGS ON THE IMPLICATIONS OF THE SUPREME COURT'S LANDMARK RULING IN IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA. IT IS IMPERATIVE THAT WE IN CONGRESS DEAL WITH THE RAMIFICATIONS OF CHADHA IN THE MOST INFORMED AND DELIBERATE WAY POSSIBLE.

THE EFFECT OF THE CHADHA DECISION ON THE CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT OF 1974 INVOLVES THE CONSTITUTIONALITY OF SECTION 1013(B) OF THE ACT. AS YOU KNOW, SECTION 1013(B) PERMITS EITHER HOUSE OF CONGRESS TO VETO DEFERRALS OF BUDGET AUTHORITY PROPOSED BY THE ADMINISTRATION. THE SUPREME COURT'S DECISION HELD THAT A ONE-HOUSE VETO IS UNCONSTITUTIONAL BECAUSE IT CONSTITUTES A LEGISLATIVE ACTION, WITHOUT HAVING BEEN PASSED BY BOTH HOUSES OF CONGRESS AND SIGNED INTO LAW BY THE PRESIDENT.

SEVERAL POINTS SHOULD BE MADE IN LIGHT OF THE CHADHA DECISION. FIRST, IT IS MY FIRM BELIEF THAT SECTION 1013(B) IS SEVERABLE FROM THE REST OF THE BUDGET AND IMPOUNDMENT CONTROL ACT, LEAVING TITLES ONE THROUGH NINE AND THE OTHER SECTIONS OF TITLE TEN INTACT.

SECOND, THE ACTUAL IMPACT OF THE CHADHA DECISION IS SMALL. FROM FISCAL YEARS 1981 THROUGH 1983, THERE WERE APPROXIMATELY $25 BILLION IN DEFERRALS PROPOSED BY THE ADMINISTRATION. ONLY $533 MILLION OF THESE DEFERRALS WERE DISAPPROVED DUE TO IMPOUNDMENT RESOLUTIONS ADOPTED BY THE CONGRESS PURSUANT TO SECTION 1013(B). THUS, OVER THE THREE-YEAR PERIOD ONLY 2 PERCENT OF THE ADMINISTRATION'S PROPOSED DEFERRALS WERE DISAPPROVED DUE TO EXERCISE OF THE 1013(B) DEFERRAL DISAPPROVAL MECHANISM.

THIRD, UNLIKE MANY OF THE OTHER LAWS AFFECTED BY CHADHA, THE CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT DOES NOT NEED TO BE CHANGED TO TAKE ACCOUNT OF THE DECISION. MOST DEFERRALS WHICH ARE DISAPPROVED BY CONGRESSIONAL ACTION OCCUR THROUGH PROVISIONS IN APPROPRIATIONS LAWS--NOT IMPOUNDMENT RESOLUTIONS UNDER SECTION 1013(B). THE PRACTICE OF USING APPROPRIATIONS LAWS TO DISAPPROVE DEFERRALS BEGAN PRIOR TO CHADHA AND CONTINUES TO BE THE MAJOR MEANS BY WHICH CONGRESS DISAPPROVES DEFERRALS. FOR EXAMPLE, IN FISCAL 1981, 100 PERCENT OF THE DEFERRALS DISAPPROVED BY CONGRESSIONAL ACTION OCCURRED THROUGH APPROPRIATIONS MEASURES AS OPPOSED TO IMPOUNDMENT RESOLUTIONS. IN FISCAL 1982 THIS FIGURE WAS 71 PERCENT, AND

IN FISCAL 1983 IT WAS 89 PERCENT. THIS PREVAILING METHOD OF DISAPPROVING DEFERRALS--WHICH CAN EASILY BE EXPANDED TO COVER 100 PERCENT OF THE CASES--SATISFIES THE REQUIREMENTS OF CHADHA, BECAUSE APPROPRIATIONS BILLS ARE PASSED BY BOTH HOUSES OF CONGRESS AND SIGNED INTO LAW BY THE PRESIDENT. THEY THEREFORE COMPLY WITH THE BICAMERALISM AND PRESENTMENT CLAUSES OF THE CONSTITUTION. IT IS ALSO IMPORTANT TO NOTE THAT SECTION 1013(A), WHICH REQUIRES THE PRESIDENT TO TRANSMIT DEFERRAL MESSAGES TO THE CONGRESS, REMAINS INTACT.

THUS, WHILE CHADHA HAS HAD MAJOR IMPLICATIONS FOR MANY LAWS, THE CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT HAS BEEN AFFECTED IN A RELATIVELY MINOR WAY AND NEED NOT BE CHANGED IN THE WAKE OF THE CHADHA DECISION.

IF CONGRESS TAKES UP A MAJOR BUDGET REFORM BILL, WE SHOULD CERTAINLY CONSIDER AMENDING SECTION 1013 IN ORDER TO CLARIFY THE PROCEDURES FOR DISAPPROVING DEFERRALS. A MEASURE SUCH AS CONGRESSMAN CONTE'S BILL, H. R. 3754, WHICH WOULD PROVIDE FOR DEFERRALS TO BE DISAPPROVED THROUGH ENACTMENT OF LEGISLATION, WOULD BE ONE WAY OF CLARIFYING THE SITUATION. NEVERTHELESS, BECAUSE THE USE OF APPROPRIATIONS BILLS TO DISAPPROVE DEFERRALS SATISFIES THE REQUIREMENTS CHADHA, IT IS UNNECESSARY AT THIS TIME TO OPEN UP THE BUDGET ACT FOR AMENDMENT BECAUSE OF THE COURT'S RULING.

MR. CHAIRMAN, I HAVE ALSO BEEN ASKED TO COMMENT ON PROPOSALS TO AMEND THE CONSTITUTION TO GIVE THE PRESIDENT A LINE-ITEM

VETO. IT IS MY UNDERSTANDING THAT THERE HAS BEEN SOME SENTIMENT IN THE HOUSE OF REPRESENTATIVES FOR CONSIDERING SIMULTANEOUSLY CONSTITUTIONAL AMENDMENTS FOR A PRESIDENTIAL LINE-ITEM VETO AND A LEGISLATIVE VETO. I BELIEVE THAT THESE TWO ISSUES ARE VERY DIFFERENT AND SHOULD NOT BE CONSIDERED AS SOME KIND OF CONSTITUTIONAL TRADE-OFF. AN AMENDMENT FOR A LEGISLATIVE VETO WOULD SIMPLY RESTORE THE PRE-CHADHA STATUS QUO, WHILE A LINE-ITEM VETO WOULD PROVIDE THE PRESIDENT WITH A VERY NEW TYPE OF POWER.

I HAVE NOT YET MADE UP MY MIND ON THE ADVISABILITY OF GIVING THE PRESIDENT THE POWER TO VETO INDIVIDUAL ITEMS IN APPROPRIATIONS BILLS. I DO BELIEVE THAT SEVERAL ISSUES OUGHT TO BE CONSIDERED VERY CAREFULLY WHILE THE VARIOUS ITEM VETO PROPOSALS ARE DEBATED.

FIRST, AS A MECHANISM TO REDUCE DEFICITS, THE ITEM VETO, SINCE IT IS USUALLY ENVISIONED AS A MEANS TO REDUCE DISCRETIONARY APPROPRIATIONS, WOULD AFFECT ONLY A LIMITED PORTION OF THE BUDGET. BECAUSE CERTAIN MANDATORY ITEMS--MANY OF WHICH ARE NOT EVEN SUBJECT TO THE ANNUAL APPROPRIATIONS PROCESS--CAN'T BE REDUCED OR ELIMINATED WITHOUT CHANGES IN SUBSTANTIVE LAW, THE ITEM VETO WOULD APPLY TO LESS THAN HALF OF NEW BUDGET AUTHORITY, APPROXIMATELY 40 PERCENT. IF DEFENSE PROGRAMS WERE EXEMPTED, LESS THAN 20 PERCENT OF NEW BUDGET AUTHORITY WOULD BE SUBJECT TO THE LINE-ITEM VETO. MOREOVER, SINCE DEFICIT FIGURES ARE BASED ON OUTLAYS, IT IS IMPORTANT TO NOTE THAT OUTLAYS SAVED BY A LINE-ITEM VETO WOULD BE EVEN LESS BECAUSE MANY DISCRETIONARY ACCOUNTS SPEND OUT SLOWLY.

SECOND, GIVING THE PRESIDENT AN ITEM VETO, PARTICULARLY THE POWER TO REDUCE (IN ADDITION TO THE POWER TO ELIMINATE) ITEMS OF APPROPRIATION, WOULD CERTAINLY INCREASE THE PRESIDENT'S POWER TO SHAPE FEDERAL BUDGETARY POLICIES. DEPENDING ON ONE'S VIEW OF THE PROPER ROLES OF THE EXECUTIVE AND THE LEGISLATURE, THIS MAY OR MAY NOT BE DESIRABLE.

THIRD, THE POWER TO DISAPPROVE, AND PARTICULARLY THE POWER TO REDUCE, ITEMS OF APPROPRIATIONS WOULD LIKELY CURTAIL THE INCENTIVE OF THE PRESIDENT TO COMPROMISE WITH THE CONGRESS ON APPROPRIATIONS SINCE HE COULD REDUCE SPENDING ON HIS OWN INITIATIVE. SIMILARLY, THE EXISTENCE OF AN ITEM VETO MIGHT LEAD SOME MEMBERS OF CONGRESS TO SEEK TO INCLUDE MORE "PORK BARREL" ITEMS IN APPROPRIATIONS SINCE THEY COULD THEN PASS THE BUCK OF FISCAL RESPONSIBILITY TO THE PRESIDENT. BOTH OF THESE POSSIBILITIES COULD HINDER THE EFFECTIVE FUNCTIONING OF THE LEGISLATIVE PROCESS.

FOURTH, ALTHOUGH IT HAS OFTEN BEEN POINTED OUT THAT 43 STATE GOVERNORS HAVE LINE-ITEM VETO AUTHORITY, WE SHOULD BE CAREFUL TO CONSIDER THE DIFFERENCES BETWEEN STATE BUDGETS AND THE FEDERAL BUDGET. FOR EXAMPLE, LINE-ITEM VETO AUTHORITY AT THE STATE LEVEL WOULD LIKELY APPLY TO THE GREAT BULK OF STATE EXPENDITURES WHEREAS AT THE FEDERAL LEVEL, AS I HAVE MENTIONED, IT WOULD LIKELY NOT APPLY TO THE LARGE PORTION OF THE FEDERAL BUDGET DEVOTED TO ENTITLEMENTS. ALSO, IT WILL BE IMPORTANT FOR US TO LEARN MORE ABOUT THE EFFECT OF THE LINE-ITEM VETO ON EXECUTIVE-LEGISLATIVE RELATIONSHIPS IN THE STATES BEFORE WE MAKE DECISIONS ON THIS ISSUE AT THE FEDERAL LEVEL.

FINALLY, ANY PROPOSAL TO GRANT THE PRESIDENT AN ITEM VETO SHOULD BE DRAFTED WITH GREAT CARE AND BACKED UP BY METICULOUS LEGISLATIVE HISTORY, SINCE THE CONCEPT OF AN ITEM VETO PRESENTS MANY UNCERTAINTIES. AMONG THESE ARE:

- THE AMBIGUITY OF THE TERM "ITEM;"
- WHETHER THE POWER TO "DISAPPROVE" ITEMS WOULD, BY IMPLICATION, INCLUDE THE POWER TO "REDUCE";
- AND HOW A PRESIDENT WOULD EXERCISE AN ITEM VETO ON A SPENDING MEASURE SUCH AS A CONTINUING RESOLUTION.

THE LINE-ITEM VETO HAS BECOME A POPULAR TOPIC OF DISCUSSION IN LIGHT OF THE URGENT NEED TO REDUCE FEDERAL DEFICITS. BURGEONING DEFICITS ARE INDEED OF GREAT CONCERN, AND WE MUST INVESTIGATE ALL CREDIBLE APPROACHES IN OUR SEARCH FOR THEIR ELIMINATION. THE ITEM VETO IS WORTHY OF SUCH INVESTIGATION. HOWEVER, AS I HAVE POINTED OUT ON PREVIOUS OCCASIONS, THIS CONCEPT IS NOT A PANACEA, AND I WOULD CAUTION THIS COMMITTEE AGAINST VIEWING IT AS SUCH. EXISTING FEDERAL BUDGET PROCEDURES PROVIDE THE MEANS TO REDUCE DEFICITS IF CONGRESS CAN MUSTER THE POLITICAL WILL NECESSARY TO ACHIEVE THESE REDUCTIONS. I PERSONALLY WOULD LIKE TO SEE THE CONGRESS USE EXISTING PROCEDURES TO REDUCE DEFICITS. BUT IF WE CANNOT DO SO, WE NEED TO CONSIDER ALTERNATIVES, SUCH AS THE LINE-ITEM VETO.

IN CLOSING, MR. CHAIRMAN, I COMMEND YOU AND THE COMMITTEE ON YOUR EFFORT IN SORTING OUT THE RAMIFICATIONS AND APPROPRIATE CONGRESSIONAL RESPONSE TO THE CHADHA DECISION, AND I THANK YOU FOR YOUR TIME.

The CHAIRMAN. Thank you, Senator Domenici.

You are one of those who have made more efficient and more effective the democratic process. We all know it is our responsibility to make it work. It does not work automatically.

Senator DOMENICI. That is right.

The CHAIRMAN. People make it work. It takes knowledgeable, dedicated people to make it work.

I was interested in what you said about what is the best way to help the most people. I think all of us are aware of the fact our economy is going through a period of transition and change are throwing people into categories where they are not adapted. People will never get their jobs back that they once had.

Senator DOMENICI. Right.

The CHAIRMAN. We need the best kind of economic thinking, planning and guidance. Even the business people can profit by wise leadership on the part of the Government, not to tell them what to do; but inform them on what we discern as to the trends of the economy that may affect them. We should help them transfer over to another area of activity. Maybe we can help them to go through that period of transition.

Do you feel that we need to preserve the veto power in some way in order to preserve for Congress the opportunity to function as it should?

Senator DOMENICI. No.

The CHAIRMAN. Do you think we can exercise oversight and do our supervisory work in other ways without the veto?

Senator DOMENICI. I do. I do not think we put our process under the gun enough. If it is imperative that the law is made to our liking as a legislative body, because we are not going to get a second crack at its results as it is administered, then maybe we just have to operate in that way and produce laws that we are more confident of. If we cannot do that, then I would say maybe we should not legislate in those areas where we are so vague and so uncertain of the results that we need to keep a string on it.

There are other things. There ought to be more oversight, although that is easier said than done. I guess we go through cycles. We considered the Sunset concept and found that it created more problems than it cured. We thought that Sunset provisions would promote oversight. We said, "Let us have oversight" as part of a veto and now that veto is out. It seems to me that oversight is done only when it involves a very sexy political issue, where we can get a little notoriety out of the oversight. When the oversight has to get down to the nitty gritty, it is left to the staff. That is all right too. But I do not think we do that very well. How you change that, I do not know.

The CHAIRMAN. Let me ask you one other question. Some people writing on the *Chadha* case have suggested that we set up some sort of an agency that would perform the veto function rather than Congress. It would be Congress' agency to examine rules to see if they were too broad and the like. Do you have any comment on that?

Senator DOMENICI. No, Mr. Chairman, I do not have any feel for that.

At one time, I think a Senator made a suggestion—that instead of doing case work—we should set up an agency to do case work. That does not seem practical to me. I thought that was what the Government was for. We should write the law correctly and let the Executive administer it, and if we do not like the results, change the law.

The CHAIRMAN. There is one other thought, say we wrote a bill of particulars to the President and say, "These are the things being done by an executive agency, and we ask you to correct these." In other words, make the Executive responsible. If he did not do it, Congress would hold him responsible for it. Is that approach worthy of consideration?

Senator DOMENICI. Well, Mr. Chairman, I am not enough of an expert on it to tell you. It seems to me, however, that what you are describing will work until you get down to those very, very tough issues, and it is those tough issues that create this problem. I do not think a bill of particulars to the President—with reference to the eight or nine areas we are locked up on—would do much good. It might work as to the run-of-the-mill regulations that Congress does not like. I would also suggest that we might have difficulty getting a bill of particulars through both Houses of Congress. We would probably have to have a conference and it might take forever.

One thing came to my mind today—and I have never said this before, but since we are talking about the budget process—it may be that we ought to consider making the budget process more of a joint effort. You remember the old Joint Atomic Energy Committee? You see, the hangup on the budget is that it is difficult to get a budget through both Houses and then go to conference and get a conference to agree. As I have thought of this for the last couple of years, it dawned on me that maybe it is one process where you could create a joint committee of both Houses, and rotate the chair, with equal strength, and get a resolution that is generated by both bodies originally, and then ratified in both Houses, instead of the process we have now. However, that might have been more easily palatable had both bodies still been Democratic. It seems to me the idea of making it joint is better when the same party controls both Houses.

The CHAIRMAN. I think that has a lot of value to it.

Senator DOMENICI. Thank you.

The CHAIRMAN. Now our next witness we will have is Nancy Harvey Steorts, Chairman, U.S. Consumer Product Safety Commission.

We are pleased to have you Ms. Steorts.

STATEMENT OF NANCY HARVEY STEORTS, CHAIRMAN, U.S. CONSUMER PRODUCT SAFETY COMMISSION

Ms. STEORTS. Thank you, Mr. Chairman.

It is a pleasure to testify today on the subject of legislative veto and to offer my views on this important issue and its potential effect on such agencies as the Consumer Product Safety Commission.

Between 1981 and the Supreme Court's decision last June in *Immigration and Naturalization Service* v. *Chadha,* there have been legislative veto provisions in three of our statutes. They provided either a two-House veto or a one-and-a-half-House veto; that is, either House could have vetoed a regulation of the Commission, provided that the other House did not disapprove of the veto. There seems to be no question that both types of veto were covered by the Supreme Court's decision in *Chadha* and in the subsequent used-car sales case.

It is important to note that Congress never invoked any of the legislative veto provisions in the Commission's statutes. It is just as important to note that Congress has twice taken a direct hand in our regulatory process, once by issuing a consumer product safety standard legislatively—cellulose insulation standard—and once by amending another one of our consumer product safety standards—power mowers.

History suggests that there is really no need for legislative veto provisions in our statutes, although we can function quite well with a workable veto provision. If, however, Congress feels it should have veto authority over agency rules, I would prefer that it be by the disapproval process. In other words, I would prefer that Congress review our regulations and act only when there is substantial objection rather than having to approve all of our regulations before they can take effect. The approval method, I believe, would be burdensome and unwieldly for both the Congress and the Commission and could delay needed protections for American consumers.

This brings me directly to a discussion of the veto provisions that have been proposed for our agency, specifically, and those that would apply to all agencies, in general.

Last summer, the House passed two different legislative veto provisions as part of the authorizing legislation for the Consumer Product Safety Commission. That overall legislation is still pending business in the Senate, including the two veto methods.

No. 1. Congressman Levitas offered a proposal that no funds appropriated to the Consumer Product Safety Commission for fiscal years 1984, 1985, or 1986 may be used to place in effect a safety regulation published in final form by the Commission after enactment of the provision and before October 1, 1986, unless a joint resolution approving such regulation has been enacted and signed by the President. This would provide that inaction by either House or the President constituted a veto.

Some questions are raised by this proposal: If Congress and the President do not act, the Consumer Product Safety Commission cannot enforce any new safety regulations. With no time limit for congressional action, it is possible that a Commission safety regulation, which Congress may ultimately approve, will be unnecessarily delayed. Likewise, revocations, exemptions to regulations, and minor amendments that reduce the regulatory burden on industry would also be delayed.

Does it mean that a rule will be on the books after the established effective date, but that the Commission cannot spend money to enforce it? If so, does the regulation preempt all State and local requirements that address the same risk of injury under section 26

of the Consumer Product Safety Act? When is the proper time, for a person adversely affected by the regulation, to challenge it in court under section 11 of the act? Can anyone even be adversely affected by a regulation that may never be placed in effect? In fact, after a safety regulation has been enacted with congressional and Presidential approval, is judicial review still appropriate or meaningful?

No. 2. Congressman Waxman introduced a proposal which would provide that no Commission rule may take effect if, within 90 days of continuous session of the Congress * * * a joint resolution disapproving such rule is enacted. Unless a veto action has the approval of both Houses of Congress and the President, like any other legislation, the regulation would go into effect.

A problem raised by this proposal concerns the 90-day continuous session requirement. This can translate into a period much longer than 3 months. During the indeterminate period of time, there is uncertainty about the effective date and confusion within the regulated industry. It would be much better to establish a specified number of calendar days.

I understand also that concern has been expressed that this measure contains no expedited or specific procedures for consideration by the full House and Senate. Other similar bills are pending, however, which would provide the legislative timetable for voting on such joint resolutions of disapproval. I find this type of provision to be the most acceptable.

Congress, in my opinion, does have the responsibility to review and oversee the actions of both independent and executive agencies, including their regulations. Such oversight by appropriate committees and reporting requirements placed on the agencies seem to be sufficient. Moreover, the opportunity for disapproval resolutions, with expedited procedures built into the process and with a specified number of calendar days, seems to me to be the best method of congressional review on agency rules. On the other hand, the approval method of enacting agency regulations, in effect, constitutes a one-House veto, since either body could kill a rule by doing nothing. Agencies, under this provision, would be mostly advisory committees for Congress, which would then have to go through the full process of rulemaking in order to arrive at a conclusion.

Mr. Chairman, it is my view that Congress should review the regulations of the agencies it creates. Speaking as the chairman of one such agency, the Consumer Product Safety Commission, I can assure you that CPSC will diligently carry out whatever function that Congress assigns. However, it is my belief that the best system that could evolve after the *Chadha* decision, in addition to reporting and oversight, would be one providing Congress the opportunity for joint resolutions of disapproval, with expedited procedures built into the process.

Thank you for the opportunity to present these views for your consideration, and I would be pleased to respond to any questions.

The CHAIRMAN. Ms. Steorts, you referred to a joint resolution of disapproval.

Ms. STEORTS. Yes.

The CHAIRMAN. You would not be satisfied with a concurrent resolution?

Ms. STEORTS. Where both the House and Senate concurred on disapproval? I would have no problem with that, Mr. Chairman, although I understand that a concurrent resolution would not meet the test of the *Chadha* decision, since it would not include presentment to the President.

We have said we feel we do our work in such a way that we should be able to be scrutinized by the Congress as well as the President.

The CHAIRMAN. Some people criticize the fact we have too many commissions. Do you know of any substitute for the commission? Congress cannot administer everything. It cannot give its time to administer every area in the economy. I do not know who else would do it if you did not have commissions. You would have to give it to some bureau. If one man did it or one woman, one executive, the commissions have a bipartisan constituency and it tends to have a degree of objectivity.

Ms. STEORTS. Absolutely.

The CHAIRMAN. Just one other thing. You realize that the administration itself complains about issuing more regulations than we need, oftentimes confusing or conflicting regulations. I am sure you strive in your agency not to promulgate any more regulations than are needed, but they take paper on which to write them, people to write them and people to administer them, so it is an exercise of governmental authority that generally we agree ought not be carried beyond the proper bounds. I think this administration wants to reduce the number of regulations. All of us favor reducing paper-work in any way we can on the part of the Government or its agencies.

The commission is a very important part of our system and I think you are right in saying it is an essential part. I do not know of any substitute for it.

Congress has the authority to regulate all the freight rates, everybody involved in interstate commerce. We cannot pass a bill to regulate every single rate, every carrier. We do not have the time to do it. So if we tried to do it, we would not get anywhere. So, there is no substitute that I know of for the commission.

You have made a valuable contribution, Ms. Steorts and we appreciate your coming.

Ms. STEORTS. Thank you, Mr. Chairman.

The CHAIRMAN. Our next witness is Milton J. Socolar, special assistant to the Comptroller General of the United States. We are pleased to have you.

STATEMENT OF MILTON J. SOCOLAR, SPECIAL ASSISTANT TO THE COMPTROLLER GENERAL

Mr. SOCOLAR. Thank you, Mr. Chairman.

Mr. Chairman and members of the committee: It is a pleasure to be here this afternoon to discuss the impact of the *Chadha* decision on the authorization appropriation process. I am particularly pleased to have the opportunity to state for the record the General Accounting Office's views on the continued validity of the Im-

poundment Control Act after *Chadha.* I have a short prepared statement, and then I will answer any questions.

We have said before that the Impoundment Control Act represents an ingenious and significant compromise. It harmonized the different Senate and House views of how Executive impoundments should be handled and put aside the seemingly irresolvable conflict over what constitutional or other authority sanctioned Executive impoundments in the first place. At the same time, the unmistakable philosophy underlying the act provided a means by which the Congress strengthened its control over Executive impoundments.

It is our view that the Supreme Court's decision in the *Chadha* case does not compel any change to the procedures established by the Impoundment Control Act. Indeed, they should continue to be followed. We take this position because we think that the act differs significantly from the type of situation involved in *Chadha.*

Moreover, the mechanism created by the act greatly assists in making appropriation implementation decisions. We can think of no substitute which would preserve the same flexibility for both the executive and legislative branches. We feel strongly that the mechanisms of the Impoundment Control Act, including the reporting requirement and the opportunity for congressional response, should not be abandoned or altered unless the courts specifically require this action.

The Impoundment Control Act provides for dealing with two types of impoundments in separate ways. Under the act, the President is required to report all impoundments to the Congress. Funds impounded must be made available for obligation if the Congress registers disapproval.

For budget authority which the President seeks to have rescinded, approval is registered by the enactment in both Houses of a required rescission bill, and disapproval is registered by failure of both Houses to pass the required rescission bill within a period of 45 days. The rescission procedures under the act clearly are not affected by *Chadha.* To effect a rescission under the act requires full legislative action, passage by both the House and the Senate and approval by the President. The Court in *Chadha* would certainly uphold this procedure.

In the case of deferrals, congressional approval is registered by inaction and disapproval is registered through enactment in either House of Congress of a resolution of disapproval. Deferrals under the act are effected when proposed and the failure to act on a disapproval resolution denotes congressional acquiescence in the specific deferral proposal. On the other hand, enactment of an impoundment resolution expresses both Congress' objection to the deferral itself and skepticism about the statutory or other authority claimed to support it.

In our opinion, the legislative veto proscribed by the *Chadha* decision is distinguishable from the resolution of disapproval permitted under the Impoundment Control Act in instances in which the President proposes a deferral of budget authority. In *Chadha,* the Court ruled that Executive action taken under substantive authority conferred by legislation can only be overturned by full legislative action; that is, by passage by both Houses of the Congress and approval by the President. Any attempt by the Congress to reserve

in one or both Houses or in committees the authority to overturn any previously delegated Executive action without satisfying the requirements for passage of legislation was held invalid under the Constitution.

The question of whether the Executive has been delegated the authority to postpone spending an appropriation is not universally clear. An appropriation for formula grants or which otherwise sets up entitlements to receive funds from the Federal Government may not properly be deferred at all. In such case, a resolution of disapproval is merely a statement to the Executive that one House of the Congress objects to continuation of the unauthorized withholding of budget authority. As this would not constitute a withdrawal of authority previously delegated, it is not covered by the *Chadha* decision.

At the other extreme are instances in which the Executive proposes to defer spending for reasons directly related to the program in question. Such deferrals are specifically authorized by the Antideficiency Act, 31 U.S.C. 1512. Any attempt to retract that authority through a resolution of disapproval would fall within the ambit of *Chadha* and be unallowable. However, in all of our experience since 1974, we are not aware that the Congress has ever passed an impoundment resolution disapproving a deferral specifically authorized by the Antideficiency Act.

Generally, proposed deferrals fall somewhere between these two extremes. They are neither clearly authorized nor clearly unauthorized. Such instances often arise when a proposed deferral would disrupt the anticipated timely and orderly implementation of Government programs for which budget authority is provided by duly enacted law. When this happens Congress has the opportunity under the Impoundment Control Act to review the proposed deferral, its supporting authority and its probable impact. Weighing these considerations, Congress can then decide to acquiesce in the deferral even though it may change the original expectations as to how a program would be managed. However, under such circumstances, if the Congress objects to a deferral which dislocates program implementation and which lacks clear authority, its objection does not need to rise to the level of legislation to be effective. This, in our view, is the truly inspired accommodation of the Impoundment Control Act. It provides a workable mechanism for balancing the powers of the executive and legislative branches with regard to subtle and complex issues not readily amenable to more straightforward consideration on a case-by-case basis.

Because it allows considerable flexibility to both the legislative and executive branches, the act has been effective for 10 years as a peace treaty to resolve interbranch skirmishes over claimed authority to impound, and to eliminate the perception that impoundment power was being abused. As a practical matter, the continued validity of the deferral procedure will be resolved on a deferral-by-deferral basis by the President and the Congress. If they cannot agree, it will have to be resolved in the courts. For the present, the executive branch has expressed its intent to continue to transmit the special messages required by the act, and we are unaware of any indication that the validity of the act's procedures will be challenged.

If our views are correct there should be no need to amend the Impoundment Control Act. Neither should it be necessary to incorporate impoundment resolutions into appropriations bills. However, we see nothing objectionable about using a convenient regular or supplemental appropriation bill to accomplish disapproval of a deferral.

In our view, the *Chadha* decision has no effect on the validity of riders on appropriation bills. These riders embody some express limitation or restriction on how the appropriated funds may be expended. For example, "None of the funds appropriated by this act may be used for purpose *x*." Since these riders are part of the appropriation bill and are enacted into law under the prescribed constitutional procedure, *Chadha* does not affect their validity.

We foresee the increased use of riders by the Congress after *Chadha*. The Supreme Court, in striking down the legislative veto, indicated that the Congress would have to find other ways of controlling Executive action. The rider, which specifically limits the manner in which the executive branch may use appropriated funds is an effective way to accomplish this purpose.

Where there is no statutory procedure enacted to regulate the redirecting of budget authority from one purpose to another within an appropriation account, and the Congress enacts a lump-sum appropriation without limitations, it is implicitly conferring the authority to reprogram. There are a number of informal limitations that specific committees have placed on the authority of certain agencies to reprogram. Some of these have been incorporated into regulations by the agencies themselves. An example would require that the agency request and the authorizing committee to approve any desired reprogramming. Such informal, nonbinding limitations may continue to be observed, even after *Chadha*. However, an agency is legally entitled to disregard these informal procedures although it is unlikely that it would choose to do so.

A statutory requirement to accomplish the same purpose; that is, committee approval of a committee veto over reprogrammings of lump sum appropriations, would not be permissible under *Chadha*. Such a statutory requirement would amount to an attempt to reserve to the Congress the authority to overturn an Executive action a reprogramming decision, pursuant to an implied delegation of authority in the lump sum appropriation, without use of the constitutional mandated legislative procedure. Statutory requirements to report to certain committees before proceeding to reprogram or delay reprogramming action for a specified waiting period of course remain valid.

Finally, your committee has asked our views on a possible constitutional amendment granting to the Congress the legislative veto and, as a tradeoff we assume, a line-item veto for the President. We do not think such an amendment is desirable.

First, we are not certain that the first part of the amendment is necessary at this time. Given the fact that Congress itself drafts proposed legislation in the first instance, it may devise other effective and constitutional ways to control Executive action. This would make the flexibility previously accorded by the legislative veto less important.

Second, even if an amendment to secure the legislative veto were desirable, we would object to it being tied to an item veto for the President. In our opinion the line item veto would substantially shift the power of the purse from the Congress to the President. In effect, with such a veto power the President would be making the laws as well as carrying them out. The authority to make appropriations is perhaps the most important power the Congress has under the Constitution, and it should not be permanently sacrificed under any circumstances.

I will be happy now to answer any questions you may have.

The CHAIRMAN. Mr. Socolar, I was in Congress when this legislation was enacted relative to impoundment. I have never understood what the argument of the Executive is that he has the right to impound appropriations made by Congress in an appropriations bill which has become law.

The Constitution says that the President will see to it that the laws are executed. Why would he not be under that provision with regard to appropriations bills as well as other bills which have become law?

Mr. SOCOLAR. At the time the Impoundment Control Act was passed, there were a large number of cases which were litigated through the courts making exactly that same point to the executive branch, and the executive branch did lose a great number of those cases, I think 70 or 80 percent of the cases litigated.

On the other hand, as I pointed out earlier, at the other extreme there are situations which are duly enacted in law providing for the Executive to impound. For example under the Antideficiency Act, the full amount funded may not be deemed necessary to carry out the program appropriated for. Where those have taken place, Congress has never seen fit, as far as we are aware, in 10 years, to overturn that kind of decision.

The CHAIRMAN. I think it is well to have the Impoundment Act, but it seems to me to be redundant to have Congress have to come back. It seems to me it is a presumption on his part that he can pick and choose among the bills which he will execute and which he does not.

All right. Thank you very much. We appreciate your coming and making a valuable contribution.

Mr. SOCOLAR. Thank you.

The CHAIRMAN. I am advised that Hon. Stuart M. Statler, Commissioner, U.S. Consumer Product Safety Commission, would like to have his statement entered in the record. Without objection it will be admitted at this point.

[Statement of Commissioner Stuart M. Statler, as received, follows:]

"MUCH ADO ABOUT...
LEGISLATIVE VETO"

REMARKS OF
COMMISSIONER STUART M. STATLER
U.S. CONSUMER PRODUCT SAFETY COMMISSION
BEFORE
THE KENNA CLUB
UNIVERSITY OF SANTA CLARA

AUGUST 26, 1983

IT IS A PLEASURE TO BE HERE TODAY. I HAVE BEEN LOOKING FORWARD TO DISCUSSING WITH YOU THE RECENT -- AND HIGHLY CONTROVERSIAL -- SUPREME COURT DECISION CONCERNING LEGISLATIVE VETO. THE DECISION GOES TO THE CORE OF HOW POWER IS ALLOCATED AND EXERCISED IN WASHINGTON AMONG THE THREE BRANCHES OF GOVERNMENT.

LET ME BEGIN BY SHARING A BIAS. I HAVE LONG BEEN OPPOSED TO ANY LEGISLATIVE VETO THAT CIRCUMVENTS THE ORDERLY PLAN FOR LEGISLATING SET FORTH IN ARTICLE I OF THE CONSTITUTION. THIS MEANS ANY MECHANISM THAT ALLOWS EITHER HOUSE OF CONGRESS, OR EVEN A CONGRESSIONAL COMMITTEE, TO BLOCK AN EXECUTIVE BRANCH ORDER OR INDEPENDENT AGENCY REGULATION, WITHOUT FULL PARTICIPATION BY BOTH HOUSES OF CONGRESS AND THE PRESIDENT. UNTIL THE HIGH COURT ACTED, LEGISLATIVE VETO MEANT THAT AGENCY RULEMAKING -- INTENDED BY CONGRESS TO REFLECT CAREFUL DELIBERATION AND DETAILED DUE PROCESS SAFEGUARDS -- OFTEN GAVE WAY TO A TUG-OF-WAR BY SPECIAL INTERESTS FOR VOTES IN CONGRESS, BASED ON ARBITRARY CONCERNS OR ONE-SIDED PRESENTATIONS INSTEAD OF ON THE MERITS OF THE ISSUE AT HAND. LIKEWISE, PRESIDENTIAL DECISIONS COULD BE SECOND-GUESSED AND REWORKED BY CONGRESSIONAL COTERIES WHO WANTED TO MAKE THEIR MARK ON NATIONAL POLICY WITHOUT AFFORDING THE PRESIDENT ADEQUATE OPPORTUNITY TO COUNTER A LEGISLATIVE VETO.

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OVERVIEW

UNDER THE SUPREME COURT'S LANDMARK RULING ON JUNE 23RD OF THIS YEAR IN IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA, (103 S. CT. 2764 (1983)) ("CHADHA"), LEGISLATIVE VETO -- UNCHECKED VETO AUTHORITY BY EITHER OR BOTH HOUSES -- WAS EFFECTIVELY LAID TO REST. THE CHADHA DECISION SWEPT AWAY A MEANS OF OVERSIGHT BY CONGRESS THAT HAD BECOME COMMONPLACE IN VIRTUALLY EVERY NOOK AND CRANNY OF GOVERNMENTAL ACTIVITY.

LEGISLATIVE VETO CAME TO THE FORE IN 1932, WHEN PRESIDENT HOOVER AGREED TO THE DEVICE IN EXCHANGE FOR BROAD POWERS TO REORGANIZE THE EXECUTIVE BRANCH. SINCE THEN, SEVERAL OTHER PRESIDENTS HAVE SIMILARLY AGREED TO SWAP BROADSCALE AUTHORITY TO REORGANIZE THE STRUCTURE OF GOVERNMENT IN RETURN FOR SHORTCUTS IN EFFORTS BY CONGRESS TO OVERSEE THE EXERCISE OF THAT AUTHORITY. MANY OTHER VETO PROVISIONS AROSE DURING THE WATERGATE PERIOD: WITH SERIOUSLY STRAINED RELATIONS BETWEEN CONGRESS AND PRESIDENT NIXON, NUMEROUS LAWS WERE ENACTED -- NO LONGER LIMITED TO THE MERE STRUCTURING OF THE EXECUTIVE BRANCH -- INCORPORATING LEGISLATIVE VETO IN KEY AREAS RANGING FROM BUDGET POLICY TO ENVIRONMENTAL CONTROLS, WAR POWERS TO ARMS SALES.

SOME 200 SUCH LEGISLATIVE VETO PROVISIONS WERE WRITTEN INTO LAW. SMALL WONDER THAT JUSTICE WHITE, IN HIS DISSENT IN CHADHA, LAMENTED: "TODAY'S DECISION STRIKES DOWN IN ONE FELL SWOOP PROVISIONS IN MORE LAWS ENACTED BY CONGRESS THAN THE COURT HAS CUMULATIVELY INVALIDATED IN ITS HISTORY." (ID. AT 2810-2811, WHITE, J., DISSENTING). *

PREDICTABLY, THE OUTCRY FROM CAPITOL HILL FOLLOWING THE COURT'S EXPANSIVE RULING WAS LOUD AND ANGUISHED. TYPICAL OF THE INITIAL REACTION WAS THAT OF THE HOUSE'S LEGAL COUNSEL DECRYING THE FACT THAT "IT TOOK THE COURT 18 MONTHS TO SCREW UP WHAT IT TOOK CONGRESS 50 YEARS TO SET UP." I DON'T SHARE THIS VIEWPOINT. THE DEMISE OF LEGISLATIVE VETO IN NO WAY

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* SEE ATTACHED APPENDIX, FROM JUSTICE WHITE'S DISSENT, FOR LISTING OF STATUTES IMPACTED BY THE CHADHA DECISION.

SPELLS AN END TO THE HILL'S CONSIDERABLE CLOUT. FAR FROM IT. CONGRESS CAN CONTINUE TO HAVE AS MUCH SAY IN THE POLICIES AND PRIORITIES OF THE AGENCIES IT HAS CREATED: IT SIMPLY NEEDS TO DEMONSTRATE A CLEAR RESOLVE TO DO SO AND THEN APPLY, BY LEGISLATION AND OVERSIGHT, THE CONSIDERABLE MEANS IT ALREADY HAS AT ITS DISPOSAL.

THE DECISION

BEFORE DISCUSSING THE IMPACT OF CHADHA, LET ME FIRST PRESENT HIGHLIGHTS OF THE COURT'S RATHER COMPLEX DECISION AND A BRIEF REVIEW OF LEGISLATIVE COUNTERPROPOSALS THAT SURFACED IN ITS WAKE.

THE CHADHA CASE BEGAN IN 1974 WHEN JAGDISH RAI CHADHA, AN EAST INDIAN BORN IN KENYA, WON A DECISION FROM THE IMMIGRATION AND NATURALIZATION SERVICE AND THE ATTORNEY GENERAL THEREUPON RECOMMENDED THAT HIS DEPORTATION FOR OVERSTAYING A STUDENT VISA BE SUSPENDED. IN 1975, THE HOUSE OF REPRESENTATIVES, EXERCISING ITS POWER UNDER THE IMMIGRATION AND NATURALITY ACT, VETOED THE SUSPENSION.

CHADHA'S SUIT CHALLENGING THE HOUSE'S ACTION HIT A RESPONSIVE CHORD. IN 1980, THE NINTH CIRCUIT COURT OF APPEALS FOUND THE ONE-HOUSE VETO AN UNCONSTITUTIONAL VIOLATION OF THE SEPARATION OF POWERS DOCTRINE. ON APPEAL, THE SUPREME COURT EMBRACED A MORE SWEEPING RATIONALE IN KNOCKING DOWN THE VETO. THE 7-2 DECISION, DELIVERED BY THE CHIEF JUSTICE, FINDS THAT THE VETO FAILED TO CONFORM TO CONSTITUTIONAL REQUIREMENTS FOR THE EXERCISE OF LEGISLATIVE POWER.

AT THE OUTSET, THE COURT REJECTS ARGUMENTS THAT LEGISLATIVE VETO PER SE CAN BE JUSTIFIED ON GROUNDS OF CONVENIENCE, EFFICIENCY, OR LONG-TIME USE. INSTEAD, THE COURT FOCUSES ON THE NATURE OF THE VETO. TO DETERMINE WHETHER IT REPRESENTS LEGITIMATE LAWMAKING ACTIVITY, THE COURT REVIEWS FIRST THE UNCONSTITUTIONAL DIMENSIONS OF THE LEGISLATIVE PROCESS AND THEN THE DEFINITION OF A LEGISLATIVE ACT.

TO ENACT A FEDERAL LAW, THE COURT NOTES THAT THE CONSTITUTION REQUIRES BICAMERAL -- TWO HOUSE -- PASSAGE OF

LEGISLATION AS WELL AS PRESENTMENT OF A BILL FOR PRESIDENTIAL APPROVAL OR DISAPPROVAL. THESE REQUIREMENTS SERVE ESSENTIAL CONSTITUTIONAL FUNCTIONS. BICAMERALISM ENSURES THAT LEGISLATIVE POWER IS EXERCISED ONLY AFTER OPPORTUNITY FOR FULL STUDY AND DEBATE IN TWO, QUITE DIFFERENT SETTINGS. PRESENTMENT ENSURES THAT AN ELECTED FIGURE WITH A NATIONAL PERSPECTIVE, THE CHIEF EXECUTIVE, REVIEWS ALL SUCH LEGISLATION. IT ALSO GIVES THE PRESIDENT AUTHORITY TO PROTECT THE EXECUTIVE BRANCH FROM IMPROVIDENT LEGISLATION. PRESIDENTIAL VETO POWER, IN TURN, IS LIMITED BY THE POSSIBILITY OF SUBSEQUENT OVERRIDE BY CONGRESS SO AS TO PRECLUDE FINAL, ARBITRARY ACTION BY ANY ONE PERSON. OR, IN THE COURT'S OWN WORDS:

> IT EMERGES CLEARLY THAT THE PRESCRIPTION FOR LEGISLATIVE ACTION...REPRESENTS THE FRAMERS' DECISION THAT THE LEGISLATIVE POWER OF THE FEDERAL GOVERNMENT BE EXERCISED IN ACCORD WITH A SINGLE, FINELY WROUGHT AND EXHAUSTIVELY CONSIDERED, PROCEDURE. (Id. AT 2784).

TURNING TO ITS CONSIDERATION OF WHAT CONSTITUTES A LEGISLATIVE ACT, THE COURT FINDS THAT THE PURPOSE AND EFFECT, NOT THE FORM OF LEGISLATIVE POWER INVOKED, IS KEY. WHERE LEGISLATIVE ACTION ALTERS THE "LEGAL RIGHTS, DUTIES AND RELATIONS OF PERSONS OUTSIDE THE LEGISLATIVE BRANCH," THE COURT MAKES CLEAR SUCH AN ACT MUST BE EFFECTED THROUGH CONSTITUTIONALLY-MANDATED PROCEDURES.

AS THE OPINION STATES, THE HOUSE'S VETO AFFECTS OUTSIDE PERSONS, NAMELY, THE ATTORNEY GENERAL, EXECUTIVE BRANCH OFFICIALS, AND MR. CHADHA. OBVIOUSLY, THE VETO OVERRULED THE ATTORNEY GENERAL, AS WELL AS THE INS, AND CHANGED CHADHA'S STATUS. ABSENT THE VETO PROVISION, NEITHER THE HOUSE ACTING ALONE, NOR THE SENATE AND HOUSE ACTING TOGETHER, COULD HAVE REQUIRED THE ATTORNEY GENERAL TO DEPORT CHADHA AFTER HIS DETERMINATION THAT CHADHA SHOULD REMAIN. DEPORTATION WAS POSSIBLE -- IF AT ALL -- ONLY BY A SUBSEQUENT LEGISLATIVE ENACTMENT. THE COURT POINTS OUT THAT IT WAS CONGRESS' DECISION TO DELEGATE AUTHORITY TO THE EXECUTIVE BRANCH TO ALLOW CERTAIN DEPORTABLE ALIENS TO REMAIN IN THIS COUNTRY. DISAGREEMENT WITH

THE RULING NOT TO DEPORT, "NO LESS THAN CONGRESS' ORIGINAL CHOICE TO DELEGATE...THE AUTHORITY...INVOLVES DETERMINATIONS OF POLICY THAT CONGRESS CAN IMPLEMENT IN ONLY ONE WAY; BICAMERAL PASSAGE FOLLOWED BY PRESENTMENT...." (Id. AT 2786).

ALTHOUGH THE COURT WAS AWARE THAT ITS DECISION WOULD IMPOSE NEW BURDENS ON CONGRESS, IT MADE NO REAL EFFORT TO LIMIT THE REACH OF ITS LANDMARK OPINION. THE COURT'S RELATED RULINGS ON JULY 6TH SEEM TO DAMN VIRTUALLY ALL CURRENT LEGISLATIVE VETO PROVISIONS. WITHOUT COMMENT, THE COURT AFFIRMED THE DECISION OF LOWER COURTS THAT DECLARED UNCONSTITUTIONAL A ONE-HOUSE LEGISLATIVE VETO IN THE 1978 NATURAL GAS POLICY ACT AND A TWO-HOUSE VETO IN THE 1980 FEDERAL TRADE COMMISSION IMPROVEMENTS ACT.

THE QUESTION OF WHAT HAPPENS TO THE AFFECTED LAWS WHEN INDIVIDUAL VETO PROVISIONS ARE VOIDED IS LEFT UNANSWERED. IN CHADHA, THE COURT FINDS THE VETO ISSUE TO BE SEVERABLE. HOWEVER, MUCH MAY DEPEND ON WHETHER A PARTICULAR LAW CONTAINS A SEVERABILITY CLAUSE AS WELL AS AN EXAMINATION OF THE STATUTE'S LEGISLATIVE HISTORY. THE HISTORY WILL HELP DETERMINE WHETHER CONGRESS WOULD HAVE DELEGATED THE AUTHORITY IN THE FIRST INSTANCE, WITHOUT THE REVIEW MECHANISM. ABSENT A CLEAR INDICATION OF CONGRESSIONAL INTENT, THE SEVERABILITY QUESTION MAY TURN ON WHETHER, ON THE FACE OF THE STATUTE, THE VETO IS AN INEXTRICABLE PART OF THE WHOLE, OR IF WHAT REMAINS MINUS THE VETO IS-- IN THE COURT'S LANGUAGE -- A "WORKABLE ADMINISTRATIVE MECHANISM."

REACTION

IN THE DAYS AND WEEKS FOLLOWING THIS RULING, THERE WAS A FLURRY OF ACTIVITY AND RESPONSE. ALTHOUGH THE REAGAN ADMINISTRATION STRESSED ACCOMMODATION AND COOPERATION WITH CONGRESS, THE HILL WAS FAR FROM SANGUINE. NUMEROUS SUGGESTIONS WERE OFFERED TO RECLAIM WHAT WAS SEEN AS LOST AUTHORITY. THESE RAN THE GAMUT FROM PROPOSING A CONSTITUTIONAL AMENDMENT TO REVERSE CHADHA, TO DEPRIVING THE FEDERAL COURTS OF JURISDICTION TO REVIEW LEGISLATIVE VETO ISSUES, TO REDRAFTING EACH OF THE

200-PLUS AFFECTED STATUTES. SEVERAL MORE MODEST PROPOSALS URGE USE OF A JOINT RESOLUTION TO REVIEW AGENCY ACTION. THIS WOULD APPEAR TO PASS CONSTITUTIONAL MUSTER BECAUSE A JOINT RESOLUTION, LIKE ANY OTHER PIECE OF LEGISLATION, REQUIRES PASSAGE BY BOTH HOUSES AND APPROVAL BY THE PRESIDENT. IT ALSO ALLOWS FOR A TWO-THIRD'S VOTE BY CONGRESS TO OVERRIDE A PRESIDENTIAL VETO.

THE MOST TENABLE SUCH PROPOSAL IS CONTAINED IN THE AGENCY ACCOUNTABILITY ACT OF 1983. THIS APPROACH AROSE PRE-CHADHA, DATING BACK TO 1979 WHEN FIRST INTRODUCED BY SENATORS CARL LEVIN (D.-MI) AND DAVID BOREN (D.-OK), AND HAS RECENTLY BEEN REFASHIONED AND CO-SPONSORED BY SENATORS KASTEN (R.-WISC), AND GRASSLEY (R.-IOWA), DECONCINI (D.-ARIZ) AND DIXON (D.-ILL). IT OFFERS A "REPORT AND WAIT" REVIEW FOR ALL "SIGNIFICANT" AGENCY RULES. NO RULE COULD TAKE EFFECT FOR 30 DAYS FOLLOWING PUBLICATION IN FINAL FORM IN THE FEDERAL REGISTER. IN THAT TIME, IF A COMMITTEE OF EITHER HOUSE HAVING LEGISLATIVE JURISDICTION OVER THE RULE VOTES TO REPORT A JOINT RESOLUTION OF DISAPPROVAL, THE RULE COULDN'T TAKE EFFECT FOR AN ADDITIONAL 60 DAYS. DURING THAT PERIOD, BOTH HOUSES MUST PASS THE RESOLUTION AND THE PRESIDENT SIGN IT TO PREVENT THE RULE FROM TAKING EFFECT. THE BILL ALSO SPELLS OUT EXPEDITED PROCEDURES SO THAT A RESOLUTION CANNOT BE BOTTLED UP IN COMMITTEE OR BE FILIBUSTERED TO DEATH.

THE "REPORT AND WAIT" FEATURE FREES CONGRESS AND THE PRESIDENT FROM THE MINUTIAE OF AGENCY DECISIONMAKING. EACH BRANCH IS RESPONSIBLE ONLY FOR GIVING A "THUMBS DOWN" SIGN FOR OBJECTIONABLE RULES. AND THE BILL'S CAREFULLY-DRAWN PROCEDURES MEAN THAT ALL PARTIES AFFECTED BY CONGRESSIONAL REVIEW -- THE AGENCY, BUSINESS, AND THE PUBLIC -- KNOW WITHIN A REASONABLY BRIEF PERIOD WHETHER A RULE WILL GO FORWARD. DELAY IS AVOIDED AND NECESSARY PLANNING IN ALL QUARTERS, ON A CONTINGENCY BASIS, IS FACILITATED.

A SIMILAR "REPORT AND WAIT" APPROACH APPEARS IN ONE OF THE TWO LEGISLATIVE VETO ALTERNATIVES OFFERED JUST ONE WEEK AFTER THE CHADHA RULING DURING THE HOUSE'S REVIEW OF THE

CONSUMER PRODUCT SAFETY COMMISSION'S REAUTHORIZATION. THE HOUSE AGREED TO CONGRESSMAN HENRY WAXMAN'S (D.-CA) PROPOSAL TO PERMIT COMMISSION RULES TO TAKE EFFECT WITHIN 90 DAYS UNLESS DISAPPROVED BY BOTH HOUSES AND THE PRESIDENT. IN THE RUSH OF THE MOMENT, THIS AMENDMENT LACKS SOME OF THE PROCEDURAL NICETIES OF THE LEVIN-BOREN PROPOSAL WHICH IS MEANT TO APPLY TO ALL AGENCIES. IRONICALLY, IN THE VERY SAME CPSC REAUTHORIZATION BILL, THE HOUSE ALSO APPROVED A CONTRADICTORY AMENDMENT PUT FORWARD BY REPRESENTATIVE ELLIOTT LEVITAS (D.-GA), TO REQUIRE ANY FUTURE AGENCY REGULATION TO BE AFFIRMATIVELY APPROVED BY BOTH HOUSES AND BY THE PRESIDENT BEFORE IT COULD GO INTO EFFECT. REACTING IN FURY AND HASTE TO THE CHADHA RULING, THE HOUSE ADOPTED BOTH ALTERNATIVES, LEAVING A FINAL SELECTION TO CONFERENCE COMMITTEE ACTION LATER NEXT MONTH.

THE LEVITAS PROPOSAL IS UNFORTUNATE ALL AROUND. FIRST, IT WOULD ENSURE THAT AN ALREADY OVERBURDENED CONGRESS WOULD BE PLUNGED INTO A MORASS OF TIME-CONSUMING REVIEWS OF CPSC RULES MANY OF WHICH, ALBEIT IMPORTANT IN THEIR CONTEXT, ARE NOT DESERVING OF CONCERTED ATTENTION BY CONGRESS (E.G., LABELING REQUIREMENTS FOR WOOD STOVES, ACCEPTABLE ANGLES FOR CHAIN SAW KICKBACK, BLADE STOP-TIME FOR POWER LAWN MOWERS). IF THE REVIEW WERE APPLIED ACROSS-THE-BOARD TO ALL OR MOST AGENCIES THAT ISSUE RULES, IT WOULD DENY BOTH HOUSES THE TIME NEEDED, AND ALREADY IN SUCH SHORT SUPPLY, TO CONCENTRATE ON THE NATION'S DOMESTIC, NATIONAL SECURITY AND FOREIGN AFFAIRS PRIORITIES AND CRITICAL POLICY INITIATIVES. COMMENTS BY THE HIGHLY REGARDED CHAIRMAN OF THE HOUSE COMMITTEE ON ENERGY AND COMMERCE, CONGRESSMAN JOHN DINGELL (D.-MICH), PERHAPS BEST SUM UP THE INAPPROPRIATENESS OF SUCH A ROLE:

> IF THIS KIND OF AN AMENDMENT IS ADOPTED, THE CONGRESS WILL BE SO OVERLOADED WITH TRIVIA AND PIDDLING MATTERS THAT WE WILL BE INCAPABLE OF CARRYING OUT OUR ESSENTIAL FUNCTIONS, AND WE WILL HAVE, IN EFFECT, BECOME A COURT OF REVIEW...WE WILL SPEND ALL OF OUR TIME ENGAGING IN PIDDLING UNDERTAKINGS AND OUR ATTENTION TO GREAT MATTERS WILL SIMPLY NO LONGER BE AVAILABLE. (129 CONG. REC. H4778 DAILY ED. JUNE 29, 1983).

SECOND, SCRUTINY AND REEXAMINATION BY CONGRESS OF EACH STEP OF AN ALREADY TEDIOUS RULEMAKING PROCESS, WHETHER BY CPSC OR ANY OTHER REGULATORY BODY, WOULD MEAN EGREGIOUS DELAYS. BUSINESSES, AWAITING LEGISLATIVE AND EXECUTIVE ACTION ON A SO-CALLED FINAL RULE WOULD BE ON HOLD NOT KNOWING WHETHER TO MAKE VITAL DECISIONS TO REDESIGN PRODUCTS, ALTER ASSEMBLY-LINE PROCESSES, OR IMPLEMENT MARKETING CHANGES. CONSUMERS WOULD ALSO BE LEFT IN THE LURCH -- AT CONSIDERABLE RISK TO THEIR LIVES IF THE MATTER INVOLVED HEALTH OR SAFETY. THE CPSC, FOR EXAMPLE, ONLY ADOPTS RULES WHICH ADDRESS UNREASONABLE RISKS OF INJURY AND DEATH, AND THEN ONLY WHEN NO VOLUNTARY STANDARD EXISTS OR WHAT DOES EXIST IS FOUND NOT TO BE ADEQUATE. WHILE CONGRESS CONTEMPLATES WHETHER IT WILL UPHOLD AN AGENCY ACTION -- OR MORE LIKELY CAN'T FIND TIME EVEN TO ADDRESS THE MATTER -- CONSUMERS AND INDUSTRY ALIKE WILL BE AT A LOSS AS TO HOW TO RESPOND TO THE POTENTIAL HAZARD. THE LEGAL COMPLEXITIES ALONE WILL PROVIDE A FIELD DAY FOR LITIGATORS.

THIRD, UNDER THE LEVITAS PROPOSAL, INACTION BY EITHER HOUSE WOULD CONSTITUTE A DE FACTO VETO. IN EFFECT, WE'D HAVE A ONE-HOUSE VETO BY NEGATIVE OPTION. BY ONE HOUSE DOING NOTHING, A RULE IS SCRAPPED. IT IS A FAR MORE INTRUSIVE FORM OF VETO THAN ANY ENACTED HERETOFORE BY THE CONGRESS. THIS SUGGESTS THAT THE PROPOSAL MAY FLUNK THE CHADHA TEST IN THAT IT IS YET ANOTHER VERSION OF AN UNCONSTITUTIONAL LEGISLATIVE VETO.

THE APPROACH RAISES OTHER TROUBLESOME UNCERTAINTIES. FOR EXAMPLE, IT IS UNCLEAR WHEN JUDICIAL REVIEW WOULD BE APPROPRIATE FOR A RULE AWAITING CONGRESSIONAL AND PRESIDENTIAL RATIFICATION. THERE ARE ALSO QUESTIONS AS TO WHEN AND WHETHER SUCH A RULE AWAITING APPROVAL WOULD PREEMPT STATE REGULATIONS INCONSISTENT WITH THE PROPOSED FEDERAL ONE.

THE SHEER LUNACY OF THIS APPROACH BECOMES EVIDENT WHEN ONE CONSIDERS APPLYING IT TO AGENCIES ACROSS THE BOARD. REQUIRING SUCH RATIFICATION WOULD CAUSE LEGISLATIVE GRIDLOCK AND REGULATORY PARALYSIS. CONGRESS WOULD BE BURIED UNDER AN

AVALANCHE OF AGENCY DOCUMENTS; THE AGENCIES THEMSELVES LEFT TWISTING IN THE WIND UNTIL CONGRESS ACTED. JUST LAST YEAR, A LEAN ONE REGULATION-WISE, THERE WERE OVER 3000 PLUS REGULATIONS PUT INTO EFFECT. (ON AVERAGE, NEARLY 9000 RULES WERE PUBLISHED IN EACH OF THE PRECEDING TWO YEARS.) HOW CONGRESS COULD COPE WITH THIS VOLUME AND STILL ACCOMPLISH ITS VITAL WORK WHICH IS ALREADY HOPELESSLY BACKLOGGED DEFIES COMPREHENSION.

PROLONGED DELAY AND UNCERTAINTY WOULD BECOME THE NAME OF THE GAME. FOR INSTANCE, HOW MUCH MORE TIME WOULD IT HAVE TAKEN FOR THE FDA'S RECENT TAMPERPROOF PACKAGING RULES TO PROTECT CONSUMERS IF CONGRESS HAD THE FINAL SIGN-OFF? HOW MANY YEARS MIGHT CONGRESS DEBATE THE PROPOSED AIR BAG REQUIREMENT OF THE NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION? WOULD THE FEDERAL TRADE COMMISSION'S TRUTH-IN-LENDING RULES EVER HAVE SEEN THE LIGHT OF DAY?

OR AT THE OTHER END OF THE SPECTRUM, SHOULDN'T CONGRESS ATTEND TO MORE WEIGHTY MATTERS OF STATE THAN EPA'S SUGGESTED HERBICIDE TOLERANCE LEVELS FOR CHILI PEPPERS? AND DO WE REALLY WANT TO INTERRUPT DEBATE ON MILITARY ASSISTANCE TO EL SALVADOR TO HAVE CONGRESS PONTIFICATE ABOUT THE DEPARTMENT OF AGRICULTURE'S EGG SHELL GRADING SPECS OR MARKETING ORDERS FOR ONIONS GROWN IN DESIGNATED COUNTIES OF IDAHO AND OREGON? IS CONGRESS' IMPRIMATUR REALLY NEEDED FOR THE FCC'S PLAN TO REASSIGN FM BROADCAST CHANNELS IN UPSTATE NEW YORK, OR FOR THE DRUG ENFORCEMENT ADMINISTRATION'S PLAN TO MOVE THE DRUG MAZINDOL FROM ONE CONTROLLED SUBSTANCES SCHEDULE TO ANOTHER?

TO ASK THE QUESTION IS TO ANSWER IT. CONGRESS SHOULD STICK TO WHAT IT DOES BEST: POLICY AND PRIORITY SETTING FOR THE NATION AT LARGE, AND RENDERING ADVICE AND CONSENT TO KEY DECISIONMAKING BY THE PRESIDENT AND AT HIGH POLICY LEVELS. TO INVOLVE CONGRESS IN THE NITTY-GRITTY OF HOW POLICIES ARE TO BE <u>IMPLEMENTED</u> -- PRECISELY THE FUNCTION OF EXECUTIVE BRANCH AND INDEPENDENT REGULATORY AGENCY ACTIVITY -- IS TO DENIGRATE THE PROPER CONSTITUTIONAL ROLE OF THE CONGRESS, AND INEVITABLY, TO EVISCERATE IT.

IF, IN FUTURE DELEGATIONS OF AUTHORITY, CONGRESS EVEN CHOOSES TO GO THE ROUTE OF "REPORT AND WAIT" -- HOPEFULLY INCORPORATING EXPEDITED PROCEDURES -- IT SHOULD DECIDE AT THE OUTSET WHAT IS TRULY IMPORTANT, TRULY INTEGRAL TO ITS POLICY ROLE. IT WOULD MAKE SOME SENSE, FOR EXAMPLE, TO AMEND THE ARMS CONTROL ACT TO SPECIFY, NOT ONLY THAT THE PRESIDENT REPORT A PLANNED SALE OF AWACS TO SAUDIA ARABIA OR F-16s TO ISRAEL, OR THE PLACEMENT OF PERSHING MISSILES IN NATO COUNTRIES, BUT ALSO REQUIRE THAT SUCH ACTIONS BE CONTINGENT UPON A POSSIBLE JOINT RESOLUTION OF DISAPPROVAL. THE PRESIDENT COULD ALWAYS EXERCISE HIS VETO RIGHT, BUT CONGRESS WOULD HAVE BEFORE IT THE OPTION TO OVERRIDE. AND IT IS PRECISELY WITHIN THAT DYNAMIC TENSION OF POSSIBILITIES, AND THE CONCILIATION IT EVOKES, THAT CONSENSUS IN ITS BEST SENSE TENDS TO EMERGE IN MATTERS OF OVERRIDING PUBLIC POLICY.

LIFE AFTER CHADHA

THESE VARYING PROPOSALS TO "CONSTITUTIONALIZE" THE LEGISLATIVE VETO DEVICE REFLECT CONGRESS' EXTREME AGITATION AND DESIRE TO RECOUP AUTHORITY PURPORTEDLY LOST AS A RESULT OF CHADHA. BUT AS TIME WILL LIKELY SHOW, THE CONCERN IS OVERBLOWN, AND THE RESPONSE MISDIRECTED. CONGRESS CONTINUES TO HAVE, OR CAN ASSERT ITSELF TO REGAIN, ALL THE AUTHORITY IT COULD CONCEIVABLY WANT. FIRST AND LAST, IT HAS THE ULTIMATE SAY ON RIGHTING ANY REAL OR PERCEIVED POWER IMBALANCES THROUGH ITS OWN POWER TO ENACT OR RESCIND LAWS. SUBJECT ONLY TO POSSIBLE VETO BY THE PRESIDENT IF THE EFFORT IS EXCESSIVE, BY ENACTING A LAW, CONGRESS CAN IMPOSE, MODIFY OR VOID ANY AGENCY PURPOSE, FUNCTION, AUTHORITY OR ACTION.

IRONICALLY, IN THE SEVERAL YEARS IT HAS HAD LEGISLATIVE VETO AUTHORITY OVER THE CPSC, CONGRESS NEVER EXERCISED THE AUTHORITY. YET, IN EXERCISING ITS LEGITIMATE POWER TO ENACT, CONGRESS DID LEGISLATE A SAFETY STANDARD FOR CELLULOSE INSULATION AND ALTERED THROUGH LEGISLATION THE AGENCY'S FINAL SAFETY RULE FOR BLADE CONTACT INJURIES FROM POWER MOWERS.

MOST IMPORTANTLY, AT ANY TIME CONGRESS CAN MOVE TO CURTAIL OR LIMIT POWERS NOW DELEGATED TO THE PRESIDENT AND THE

EXECUTIVE BRANCH, AND RETURN KEY DECISIONMAKING TO CONGRESS. EXAMPLES ABOUND. BY STATUTE, CONGRESS COULD TAKE BACK THE SWEEPING POWERS GRANTED TO THE OFFICE OF MANAGEMENT AND BUDGET UNDER THE BUDGET AND ACCOUNTING ACT. HERE, IN AN ATTEMPT TO CENTRALIZE FISCAL HOUSEKEEPING CHORES, CONGRESS GAVE OMB SINGULAR -- AND WHAT TURNS OUT TO BE AWESOME -- AUTHORITY TO PROPOSE APPROPRIATIONS FOR ALL FEDERAL AGENCIES AND UNITS AS PART OF THE PRESIDENT'S RECOMMENDED BUDGET. THIS DIRECTIVE HAS BEEN CONSTRUED TO ENCOMPASS SETTING BOTH DOLLAR AND STAFFING LEVELS. OMB'S FIGURES ARE IMPOSED ON ALL AGENCIES, INCLUDING SO-CALLED INDEPENDENT AGENCIES WHICH ARE SUPPOSEDLY "CREATURES OF CONGRESS."

CONGRESS CAN, AND SOMETIMES DOES, REVISE THE OMB-SUGGESTED FUNDING LEVELS, ALTHOUGH THEY CUSTOMARILY TAKE ON A SPECIAL CONSECRATION OF THEIR OWN. BUT CONGRESS RARELY CHANGES THE PROPOSED STAFFING LEVELS, WHICH CAN BE EQUALLY CRITICAL TO AN AGENCY'S ABILITY TO FULFILL ITS STATUTORY MANDATE. AS A PRACTICAL MATTER, INDEPENDENT AGENCIES, AS OTHERS, ARE STUCK WITH WHATEVER PERSONNEL CEILINGS OMB, AN ARM OF THE ADMINISTRATION IN POWER, ASSIGNS. AND DON'T THINK THAT POLITICS AND IDEOLOGICAL FACTORS DON'T COME INTO PLAY.

SIMILARLY, CONGRESS COULD RECONSIDER ITS DELEGATION TO AN ADMINISTRATION IN POWER, AGAIN, ACTING THROUGH OMB, TO CONTROL THE COLLECTION OF INFORMATION BY GOVERNMENT AGENCIES, AGAIN -- EVEN "THE INDEPENDENTS." THROUGH THE PAPERWORK REDUCTION ACT, OMB IS A KIND OF FEDERAL INFORMATION CZAR, IMPOSING LENGTHY AND STAFF-INTENSIVE CLEARANCE PROCEDURES TO BE MET BEFORE MOST AGENCIES CAN COLLECT THE DATA THEY NEED FROM OUTSIDE SOURCES. OMB EVEN SETS AN INFORMATION COLLECTION BUDGET FOR EACH AGENCY, AND GOVERNMENT-WIDE.

IT IS OMB ULTIMATELY THAT MUST OKAY ANY INDUSTRY-WIDE QUESTIONNAIRE OR EVEN AN INFORMATIONAL TELEPHONE SURVEY WHICH MAY BE ESSENTIAL TO AGENCY RULEMAKING AND ENFORCEMENT ACTIVITY. OMB CAN STOP THAT PROCESS DEAD IN ITS TRACKS. AND ANY AGENCY

THAT MIGHT OTHERWISE CONSIDER BALKING AT THE ARBITRARINESS OR DELAYS ATTENDANT TO OMB REVIEW, MUST KEEP IN MIND THAT IT IS THIS SAME OMB WHICH WIELDS THE ALL-IMPORTANT BUDGET AND PERSONNEL AXE. COULD CONGRESS RECOUP SOME OF THAT AUTHORITY? OF COURSE IT COULD.

CONGRESS COULD ALSO REWRITE LEGISLATION WHICH NOW ACCORDS THE ADMINISTRATION IN POWER, THROUGH THE DEPARTMENT OF JUSTICE, LEVERAGE TO INFLUENCE AGENCY LAWSUITS. CURRENTLY, ALMOST ALL THE SO-CALLED INDEPENDENT AGENCIES, AND MOST OTHER AGENCIES AS WELL, MUST REQUEST A JUSTICE ATTORNEY TO ARGUE THE AGENCY'S CASE IN FEDERAL COURT. THE JUSTICE DEPARTMENT CAN EASILY SAY NO AND THAT'S USUALLY THE END OF IT. SUCH STATUTES GIVE THE EXECUTIVE BRANCH PRACTICAL CONTROL OVER WHAT LEGAL AND POLICY POSITIONS THE GOVERNMENT WILL PURSUE IN CRITICAL LAWSUITS INVOLVING SUCH ISSUES AS SUPERFUND ABUSES, BROADCAST LICENSE RENEWALS, WOMEN'S RIGHTS, AFFIRMATIVE ACTION, BUSING AND THE REST. IT GIVES AN ADMINISTRATION THE POWER TO DECIDE WHAT COMPANIES, WHICH INDUSTRIES, AND WHOSE PAC CONTRIBUTORS WILL BE SUED, AND WHICH WILL NOT.

ALL OF THESE SUGGESTED LEGISLATIVE REVISIONS MIGHT WELL BE VETOED BY A PRESIDENT, ANY PRESIDENT, WHO IS UNLIKELY TO WANT TO REVAMP THE CONSIDERABLE AUTHORITY WHICH CONGRESS HAS DELEGATED AWAY OVER THE YEARS. A PRESIDENT LIKEWISE COULD VETO ANY FUTURE JOINT RESOLUTIONS OF DISAPPROVAL LINKED TO A "REPORT AND WAIT" PROVISO. IN EITHER EVENT, CONGRESS RETAINS ITS TWO-THIRDS VETO OVERRIDE OPTION WITH WHICH TO IMPOSE ITS LEGISLATIVE WILL -- IF, FROM A INSTITUTIONAL "SEPARATION OF POWERS" PERSPECTIVE, IT REALLY WANTS TO REDRESS AN IMBALANCE OF AUTHORITY, IF ONE EXISTS AT ALL.

NOR SHOULD ONE FORGET THAT CONGRESS HAS OTHER HIGHLY EFFECTIVE WAYS TO KEEP TABS ON PRESIDENTIAL AND AGENCY ACTIVITIES. ALTHOUGH OMB MAKES RECOMMENDATIONS, CONGRESS DOES HAVE FINAL SAY OVER THE GOVERNMENT'S POCKETBOOK. THE PRESIDENT PROPOSES, BUT CONGRESS DISPOSES, IN THEORY AT LEAST. CONGRESS APPROPRIATES THE RESOURCES -- STAFFING AND FUNDING -- WHICH MAKE ALL THE BRANCHES OF GOVERNMENT FUNCTION.

JUST BECAUSE THE LEGISLATIVE VETO DEVICE HAS BEEN DISMEMBERED, IT IS INCONCEIVABLE THAT A PRESIDENT OR AN AGENCY WOULD CONSISTENTLY THUMB ITS NOSE AT CONGRESS BY ISSUING OFFENSIVE ORDERS OR REGULATIONS OR TAKING OTHER ARBITRARY ACTIONS CONTRARY TO THE EXPRESSED INTENT OF ELECTED REPRESENTATIVES. NO AGENCY OR CHIEF EXECUTIVE CAN AFFORD TO RISK THE PROLONGED WRATH OF THE KEEPER OF THE EXCHEQUER. BESIDES, AGENCIES ARE HEMMED IN BY THE FASTIDIOUS REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT AS WELL AS BY THE SPECIFIC TERMS OF THEIR RESPECTIVE ENABLING ACTS. PRESIDENTS ALSO ARE RESTRAINED BY THE VAGARIES OF POLITICS WHICH MANDATE CONCILIATION AND COMPROMISE WITH THE HILL, AS THE PREFERRED NORM. WHILE THERE ARE NOTABLE EXCEPTIONS, THE PRACTICAL CONSIDERATIONS OF A CHIEF EXECUTIVE WANTING TO ENACT KEY ELEMENTS OF HIS LEGISLATIVE PROGRAM REQUIRE SOME SEMBLANCE OF CIVILITY AND COOPERATION. REST ASSURED THAT NEITHER A PRESIDENT NOR THE AGENCIES HE ADMINISTERS WILL RUN AMUCK SIMPLY BECAUSE THE HIGH COURT HAS RULED THAT LEGISLATIVE VETO DOES NOT MEET THE CONSTITUTIONAL TEST.

AND IN THE DELICATE BALANCING OF POWER, IN RESPONSE TO CHADHA, CONGRESS MAY WELL DECIDE TO MAKE MORE EXTENSIVE USE OF ITS AWESOME BUDGETARY CLOUT. CONGRESS CAN GUIDE AGENCY DECISIONMAKING BY THREATENING TO HALT OR LIMIT FUTURE APPROPRIATIONS. WE COULD SEE AN INCREASED USE OF AMENDMENTS -- RIDERS -- TO FUNDING BILLS. IF A PRESIDENT DISAGREES WITH A RIDER TO BAR SPENDING MONIES TO ENFORCE A REGULATION WHICH CONGRESS DISLIKES, HE MAY FACE A TOUGH DECISION. VETOING THE BILL COULD EITHER TRIGGER AN OVERRIDE OR CUT OFF PART OF THE FUNDING PROCESS -- FOR THAT AGENCY ALONE OR PERHAPS FOR SEVERAL AGENCIES OR DEPARTMENTS THAT ARE ALL COVERED BY A SINGLE APPROPRIATIONS MEASURE. THE BILL WOULD BE SENT BACK TO BEGIN THE LABORIOUS PATH TO TWO-HOUSE PASSAGE ANEW. WHILE CONGRESS HAS EXERTED SUCH PRESSURE SPARINGLY UNTIL NOW, IT MAY RECONSIDER -- AMENDING ITS OWN RULES TO PERMIT GREATER USE OF APPROPRIATIONS RIDERS -- IN THE WAKE OF CHADHA.

OVERSIGHT IS YET ANOTHER POTENT WEAPON IN CONGRESS' ARSENAL TO KEEP A TIGHT REIN ON WAYWARD AGENCIES. AND CHADHA MAY BE EXPECTED TO INCREASE THE HILL'S RELIANCE ON THIS TOOL WHICH, UNLIKE THE LEGISLATIVE VETO, CAN BE EXERCISED BEFORE RATHER THAN AFTER AN AGENCY HAS ALREADY RENDERED A DECISION OR EMBARKED ON A COURSE OF ACTION (OR INACTION) THAT CONGRESS DEEMS UNWARRANTED. WE ARE LIKELY TO SEE MORE NUMEROUS AND EXTENSIVE OVERSIGHT HEARINGS, REPLETE WITH HIGH-VISIBILITY MEDIA EXPOSURE, TARGETING DEFENSE DEPARTMENT COST OVERRUNS, SOCIAL SECURITY FRAUDS, DELAYS IN MEETING POLLUTION CONTROL TARGETS, THE DUMPING OF TOXIC WASTES, OR SALES OF SOPHISTICATED TECHNOLOGY TO THE SOVIET UNION.

CONGRESSIONAL OVERSIGHT, PROPERLY CONDUCTED, CAN FOCUS ON WHETHER LEGISLATIVE POLICY AND PRIORITIES IN FACT ARE BEING CARRIED OUT. TO BEST ACCOMPLISH THIS, CONGRESS WOULD DO WELL TO GET ITS OWN HOUSE IN ORDER. THE CURRENT HODGEPODGE OF COMMITTEES AND SUBCOMMITTEES WITH OVERLAPPING JURISDICTIONS VITIATES COORDINATED, COMPREHENSIVE REVIEW BY CONGRESS. FOR INSTANCE, THE ENVIRONMENTAL PROTECTION AGENCY COMES UNDER THE JURISDICTION OF AT LEAST 30 DIFFERENT HOUSE AND SENATE COMMITTEES WHICH ARE OFTEN TRIPPING OVER ONE ANOTHER OR DISPATCHING CONTRADICTORY SIGNALS. AT THE VERY LEAST, CONGRESS SHOULD MOVE TO IMPROVE COOPERATION BETWEEN ITS SUNDRY COMMITTEES IF IT IS TO MAXIMIZE ITS IMPACT ON AGENCIES CARRYING OUT ITS WILL.

ANOTHER KEY FACET OF EFFECTIVE OVERSIGHT INVOLVES ACCESS TO INFORMATION. SUGGESTIONS HAVE BEEN MADE TO ENSURE THAT INFORMATION FROM AGENCIES IS MORE PROMPTLY AVAILABLE TO THE HILL. IT WOULD BE WELL TO AVOID THE KIND OF MEXICAN STANDOFF WHICH OCCURRED SOME MONTHS BACK WHEN EPA REFUSED TO TURN OVER DOCUMENTS IN RESPONSE TO A VALID COMMITTEE SUBPOENA AND THE JUSTICE DEPARTMENT DECLINED TO TAKE THE MATTER TO COURT. NEW LEGISLATION COULD ALLOW CONGRESS, THROUGH ITS OWN COUNSEL, TO ENFORCE SUBPOENAS IN FEDERAL DISTRICT COURT SO AS TO AVOID POLITICALLY-CHARGED CONFRONTATIONS. A CIVIL REMEDY -- PERHAPS FINING AN AGENCY ADMINISTRATOR -- COULD BE IMPOSED FOR FAILURE

TO TURN OVER REQUESTED INFORMATION, INSTEAD OF THE NOW-INFREQUENTLY USED CRIMINAL CONTEMPT SANCTION. OTHER POSSIBILITIES INCLUDE MAKING MANDATORY THE PROSECUTION OF CONTEMPT OF CONGRESS CITATIONS BY A U.S. ATTORNEY, OR IF THE CONTEMPT INVOLVED A HIGH EXECUTIVE BRANCH OFFICIAL -- AS IS LIKELY -- AUTOMATICALLY INVOKING THE EFFORTS OF A SPECIAL PROSECUTOR.

ALSO IN RESPONSE TO CHADHA, FUTURE LEGISLATION IS LIKELY TO BE MORE DETAILED AND, WHERE POSSIBLE, MORE EXPLICIT AND NARROW IN ITS DELEGATIONS OF AUTHORITY. CHADHA MAY ALSO HAVE THE EFFECT OF REVIVING VARIATIONS OF THE SUNSET CONCEPT -- THE PLANNED EXPIRATION OF STATUTORY AUTHORITY -- SO AS TO IMPROVE CONGRESSIONAL OVERSIGHT. FUTURE DELEGATIONS OF AUTHORITY, IF FORMULATED TO EXPIRE AFTER A SET PERIOD OF YEARS, WOULD PLACE THE BURDEN ON THE DESIGNATED AGENCIES TO JUSTIFY RENEWAL OF STATUTES OR FUNCTIONS SLATED FOR DEMISE.

CONCLUSION

THERE IS A WIDE ARRAY OF OPTIONS AVAILABLE TO CONGRESS TO CONTINUE -- NAY, TO ENHANCE -- ITS EFFECTIVE REVIEW OF PRESIDENTIAL AND AGENCY ACTIVITIES. IN TIME, FURTHER REVIEW IS LIKELY TO YIELD EVEN MORE POSSIBILITIES. NOTWITHSTANDING THE MUCH BALLYHOOED CRIES OF JUDICIAL INCURSIONS ON CONGRESS' OWN TURF, THE CHADHA DECISION TEMPORARILY MAY HAVE ADDED TO THE LEGISLATIVE WORKLOAD BUT IT IN NO WAY HAS DISPLACED CONGRESS FROM ITS PREEMINENT CONSTITUTIONAL ROLE.

CONGRESS NEEDS TO GIVE THE LEGISLATIVE VETO ISSUE ITS MOST CAREFUL AND CREATIVE DELIBERATION. ANY RESPONSE SHOULD REFLECT THE MOST THOUGHTFUL, REFINED ANALYSIS OF THE PROPER BALANCE OF POWER BETWEEN THE RESPECTIVE BRANCHES OF GOVERNMENT -- THE THREE ENUMERATED IN THE CONSTITUTION AND THE SO-CALLED "FOURTH BRANCH" OF INDEPENDENT REGULATORY AGENCIES AS WELL. NOW IS NOT THE TIME FOR KNEE-JERK ANTICS OR FOR LEGISLATIVE SHOWBOATING WHILE ASSESSING ONE OF THE MOST FAR-REACHING SUPREME COURT DECISIONS ON SEPARATION OF POWERS IN THE HISTORY OF THIS REPUBLIC. WHAT IS AT STAKE IS TOO IMPORTANT TO BE GIVEN AN EMOTIONAL RATHER THAN A WELL-CONCEIVED AND MEASURED RESPONSE.

APPENDIX 1

STATUTES WITH PROVISIONS AUTHORIZING CONGRESSIONAL REVIEW

This compilation, reprinted from the Brief for the United States Senate, identifies and describes briefly current statutory provisions for a legislative veto by one or both Houses of Congress. Statutory provisions for a veto by committees of the Congress and provisions which require legislation (i. e., passage of a joint resolution) are not included. The fifty-six statutes in the compilation (some of which contain more than one provision for legislative review) are divided into six broad categories: foreign affiars and national security, budget, international trade, energy, rulemaking and miscellaneous.

A.

FOREIGN AFFAIRS AND NATIONAL SECURITY

1. Act for International Development of 1961, Pub. L. No. 87–195, § 617, 75 Stat. 424, 444, 22 U. S. C. 2367 (Funds made available for foreign assistance under the Act may be terminated by concurrent resolution).

2. War Powers Resolution, Pub. L. No. 93–148, § 5, 87 Stat. 555, 556–557 (1973), 50 U. S. C. 1544 (Absent declaration of war, President may be directed by concurrent resolution to remove United States armed forces engaged in foreign hostilities.)

3. Department of Defense Appropriation Authorization Act, 1974, Pub. L. No. 93–155, § 807, 87 Stat. 605, 615 (1973), 50 U. S. C. 1431 (National defense contracts obligating the United States for any amount in excess of $25,000,000 may be disapproved by resolution of either House).

4. Department of Defense Appropriation Authorization Act, 1975, Pub. L. No. 93–365, § 709(c), 88 Stat. 399, 408 (1974), 50 U. S. C. app. 2403–1(c) (Applications for export of

defense goods, technology or techniques may be disapproved by concurrent resolution).

5. H. R. J. Res. 683, Pub. L. No. 94–110, § 1, 89 Stat. 572 (1975), 22 U. S. C. 2441 note (Assignment of civilian personnel to Sinai may be disapproved by concurrent resolution).

6. International Development and Food Assistance Act of 1975, Pub. L. No. 94–161, § 310, 89 Stat. 849, 860, 22 U. S. C. 2151n (Foreign assistance to countries not meeting human rights standards may be terminated by concurrent resolution).

7. International Security Assistance and Arms Control Act of 1976, Pub. L. No. 94–329, § 211, 90 Stat. 729, 743, 22 U. S. C. 2776(b) (President's letter of offer to sell major defense equipment may be disapproved by concurrent resolution).

8. National Emergencies Act, Pub. L. No. 94–412, § 202, 90 Stat. 1255 (1976), 50 U. S. C. 1622 (Presidentially declared national emergency may be terminated by concurrent resolution).

9. International Navigational Rules Act of 1977, Pub. L. No. 95–75, § 3(d), 91 Stat. 308, 33 U. S. C. § 1602(d) (Supp. III 1979) (Presidential proclamation of International Regulations for Preventing Collisions at Sea may be disapproved by concurrent resolution).

10. International Security Assistance Act of 1977, Pub. L. No. 95–92, § 16, 91 Stat. 614, 622, 22 U. S. C. § 2753(d)(2) (Supp. III 1979) (President's proposed transfer of arms to a third country may be disapproved by concurrent resolution).

11. Act of December 8, 1977, Pub. L. No. 95–223, § 207(2)(b), 91 Stat. 1625, 1628, 50 U. S. C. 1706(b) (Supp. III 1979) (Presidentially declared national emergency and exercise of conditional powers may be terminated by concurrent resolution).

12. Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95–242, §§ 303, 304, 306, 307, 401, 92 Stat. 120, 130, 134,

137–38, 139, 144, 42 U. S. C. §§2160(f), 2155(b), 2157(b), 2153(d) (Supp. III 1979) (Cooperative agreements concerning storage and disposition of spent nuclear fuel, proposed export of nuclear facilities, materials or technology and proposed agreements for international cooperation in nuclear reactor development may be disapproved by concurrent resolution).

B.

BUDGET

13. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93–344, §1013, 88 Stat. 297, 334–35, 31 U. S. C. 1403 (The proposed deferral of budget authority provided for a specific project or purpose may be disapproved by an impoundment resolution by either House).

C.

INTERNATIONAL TRADE

14. Trade Expansion Act of 1962, Pub. L. No. 87–794, §351, 76 Stat. 872, 899, 19 U. S. C. 1981(a) (Tariff or duty recommended by Tariff Commission may be imposed by concurrent resolution of approval).

15. Trade Act of 1974, Pub. L. No. 93–618, §§203(c), 302(b), 402(d), 407, 88 Stat. 1978, 2016, 2043, 2057–60, 2063–64, 19 U. S. C. 2253(c), 2412(b), 2432, 2434 (Proposed Presidential actions on import relief and actions concerning certain countries may be disapproved by concurrent resolution; various Presidential proposals for waiver extensions and for extension of nondiscriminatory treatment to products of foreign countries may be disapproved by simple (either House) or concurrent resolutions).

16. Export-Import Bank Amendments of 1974, Pub. L. No. 93–646, §8, 88 Stat. 2333, 2336, 12 U. S. C. 635e (Presidentially proposed limitation for exports to USSR in excess of $300,000,000 must be approved by concurrent resolution).

D.

ENERGY

17. Act of November 16, 1973, Pub. L. No. 93–153, § 101, 87 Stat. 576, 582, 30 U. S. C. 185(u) (Continuation of oil exports being made pursuant to President's finding that such exports are in the national interest may be disapproved by concurrent resolution).

18. Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. No. 93–577, § 12, 88 Stat. 1878, 1892–1893, 42 U. S. C. 5911 (Rules or orders proposed by the President concerning allocation or acquisition of essential materials may be disapproved by resolution of either House).

19. Energy Policy and Conservation Act, Pub. L. No. 94–163, § 551, 89 Stat. 871, 965 (1975), 42 U. S. C. 6421(c) (Certain Presidentially proposed "energy actions" involving fuel economy and pricing may be disapproved by resolution of either House).

20. Naval Petroleum Reserves Production Act of 1976, Pub. L. No. 94–258, § 201, 90 Stat. 303, 309, 10 U. S. C. 7422(c)(2)(C) (President's extension of production period for naval petroleum reserves may be disapproved by resolution of either House).

21. Energy Conservation and Production Act, Pub. L. No. 94–385, § 305, 90 Stat. 1125, 1148 (1976), 42 U. S. C. 6834 (Proposed sanctions involving federal assistance and the energy conservation performance standards for new buildings must be approved by resolution of both Houses).

22. Department of Energy Act of 1978—Civilian Applications, Pub. L. No. 95–238, §§ 107, 207(b), 92 Stat. 47, 55, 70, 22 U. S. C. 3224a, 42 U. S. C. 5919(m) (Supp. III 1979) (International agreements and expenditures by Secretary of Energy of appropriations for foreign spent nuclear fuel storage must be approved by concurrent resolution, if not consented to by legislation;) (plans for such use of appropriated funds may be disapproved by either House;) (financing in excess of $50,000,000 for demonstration facilities must be approved by

resolution in both Houses).
23. Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95–372, §§ 205(a), 208, 92 Stat. 629, 641, 668, 43 U. S. C. §§ 1337(a), 1354(c) (Supp. III 1979) (Establishment by Secretary of Energy of oil and gas lease bidding system may be disapproved by resolution of either House;) (export of oil and gas may be disapproved by concurrent resolution).
24. Natural Gas Policy Act of 1978, Pub. L. No. 95–621, §§ 122(c)(1) and (2), 202(c), 206(d)(2), 507, 92 Stat. 3350, 3370, 3371, 3372, 3380, 3406, 15 U. S. C. 3332, 3342(c), 3346(d)(2), 3417 (Supp. III 1979) (Presidential reimposition of natural gas price controls may be disapproved by concurrent resolution;) (Congress may reimpose natural gas price controls by concurrent resolution;) (Federal Energy Regulatory Commission (FERC) amendment to pass through incremental costs of natural gas, and exemptions therefrom, may be disapproved by resolution of either House;) (procedure for congressional review established).
25. Export Administration Act of 1979, Pub. L. No. 96–72, § 7(d)(B), 7(g)(3), 93 Stat. 503, 518, 520, 50 U. S. C. app. 2406(d)(2)(B), 2406(g)(3) (Supp. III 1979) (President's proposal to domestically produce crude oil must be approved by concurrent resolution;) (action by Secretary of Commerce to prohibit or curtail export of agricultural commodities may be disapproved by concurrent resolution).
26. Energy Security Act, Pub. L. No. 96–294, §§ 104(b)(3), 104(e), 126(d)(2), 126(d)(3), 128, 129, 132(a)(3), 133(a)(3), 137(b)(5), 141(d), 179(a), 803, 94 Stat. 611, 618, 619, 620, 623–26, 628–29, 649, 650–52, 659, 660, 664, 666, 679, 776 (1980) (to be codified in 50 U. S. C. app. 2091–93, 2095, 2096, 2097, 42 U. S. C. 8722, 8724, 8725, 8732, 8733, 8737, 8741, 8779, 6240) (Loan guarantees by Departments of Defense, Energy and Commerce in excess of specified amounts may be disapproved by resolution of either House;) (President's proposal to provide loans or guarantees in excess of established amounts may be disapproved by resolution of either House;) (proposed award by President of individual contracts for pur-

chase of more than 75,000 barrels per day of crude oil may be disapproved by resolution of either House;) (President's proposals to overcome energy shortage through synthetic fuels development, and individual contracts to purchase more than 75,000 barrels per day, including use of loans or guarantees, may be disapproved by resolution of either House;) (procedures for either House to disapprove proposals made under Act are established;) (request by Synthetic Fuels Corporation (SFC) for additional time to submit its comprehensive strategy may be disapproved by resolution of either House;) (proposed amendment to comprehensive strategy by SFC Board of Directors may be disapproved by concurrent resolution of either House or by failure of both Houses to pass concurrent resolution of approval;) (procedure for either House to disapprove certain proposed actions of SFC is established;) (procedure for both Houses to approve by concurrent resolution or either House to reject concurrent resolution for proposed amendments to comprehensive strategy of SFC is established;) (proposed loans and loan guarantees by SFC may be disapproved by resolution of either House;) (acquisition by SFC of a synthetic fuels project which is receiving financial assistance may be disapproved by resolution of either House;) (SFC contract renegotiations exceeding initial cost estimates by 175% may be disapproved by resolution of either House;) (proposed financial assistance to synthetic fuel projects in Western Hemisphere outside United States may be disapproved by resolution of either House;) (President's request to suspend provisions requiring build up of reserves and limiting sale or disposal of certain crude oil reserves must be approved by resolution of both Houses).

E.

RULEMAKING

27. Education Amendments of 1974, Pub. L. No. 93-380, § 509, 88 Stat. 484, 567, 20 U. S. C. 1232(d)(1) (Department

of Education regulations may be disapproved by concurrent resolution).

28. Federal Education Campaign Act Amendments of 1979, Pub. L. No. 96–187, § 109, 93 Stat. 1339, 1364, 2 U. S. C. 438(d)(2) (Supp. III 1979) (Proposed rules and regulations of the Federal Election Commission may be disapproved by resolution of either House).

29. Act of January 2, 1975, Pub. L. No. 93-595, § 2, 88 Stat. 1926, 1948, 28 U. S. C. 2076 (Proposed amendments by Supreme Court of Federal Rules of Evidence may be disapproved by resolution of either House).

30. Act of August 9, 1975, Pub. L. No. 94–88, § 208, 89 Stat. 433, 436–37, 42 U. S. C. 602 note (Social Security standards proposed by Secretary of Health and Human Services may be disapproved by either House).

31. Airline Deregulation Act of 1978, Pub. L. No. 95–504, § 43(f)(3), 92 Stat. 1705, 1752, 49 U. S. C. 1552(f) (Supp. III 1979) (Rules or regulations governing employee protection program may be disapproved by resolution of either House).

32. Education Amendments of 1978, Pub. L. No. 95–561, §§ 1138, 1212, 1409, 92 Stat. 2143, 2327, 2341, 2341, 2369, 25 U. S. C. 2018, 20 U. S. C. 1221–3(e) (Supp. III 1979) (Rules and regulations proposed under the Act may be disapproved by concurrent resolution).

33. Civil Rights of Institutionalized Persons Act, Pub. L. No. 96–247, § 7(b)(1), 94 Stat. 349, 352–355 (1980) (to be codified in 42 U. S. C. 1997e) (Attorney General's proposed standards for resolution of grievances of adults confined in correctional facilities may be disapproved by resolution of either House).

34. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96–252, § 21(a), 94 Stat. 374, 393 (to be codified in 15 U. S. C. 57a–1) (Federal Trade Commission rules may be disapproved by concurrent resolution).

35. Department of Education Organization Act, Pub. L. No. 96–88, § 414(b), 93 Stat. 668, 685 (1979), 20 U. S. C. 3474

(Supp. III 1979) (Rules and regulations promulgated with respect to the various functions, programs and responsibilities transferred by this Act, may be disapproved by concurrent resolution).

36. Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96–364, § 102, 94 Stat. 1208, 1213 (to be codified in 29 U. S. C. 1322a) (Schedules proposed by Pension Benefit Guaranty Corporation (PBGC) which requires an increase in premiums must be approved by concurrent resolution;) (revised premium schedules for voluntary supplemental coverage proposed by PBGC may be disapproved by concurrent resolution).

37. Farm Credit Act Amendments of 1980, Pub. L. No. 96–592, § 508, 94 Stat. 3437, 3450 (to be codified in 12 U. S. C. 2121) (Certain Farm Credit Administration regulations or delayed by resolution of either House.)

38. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96–510, § 305, 94 Stat. 2767, 2809 (to be codified in 42 U. S. C. 9655) (Environmental Protection Agency regulations concerning hazardous substances releases, liability and compensation may be disapproved by concurrent resolution or by the adoption of either House of a concurrent resolution which is not disapproved by the other House).

39. National Historic Preservation Act Amendments of 1980, Pub. L. No. 96–515, § 501, 94 Stat. 2987, 3004 (to be codified in 16 U. S. C. 470w–6) (Regulation proposed by the Secretary of the Interior may be disapproved by concurrent resolution).

40. Costal Zone Management Improvement Act of 1980, Pub. L. No. 96–464, § 12, 94 Stat. 2060, 2067 (to be codified in 16 U. S. C. 1463a) (Rules proposed by the Secretary of Commerce may be disapproved by concurrent resolution).

41. Act of December 17, 1980, Pub. L. No. 96–539, § 4, 94 Stat. 3194, 3195 (to be codified in 7 U. S. C. 136w) (Rules or regulations promulgated by the Administrator of the Envi-

ronmental Protection Agency under the Federal Insecticide, Fungicide and Rodenticide Act may be disapproved by concurrent resolution).

42. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97–35, §§533(a)(2), 1107(d), 1142, 1183(a)(2), 1207, 95 Stat. 357, 453, 626, 654, 659, 695, 718–20 (to be codified in 20 U. S. C. 1089, 23 U. S. C. 402(j), 45 U. S. C. 761, 767, 564(c)(3), 15 U. S. C. 2083, 1276, 1204) (Secretary of Education's schedule of expected family contributions for Pell Grant recipients may be disapproved by resolution of either House;) (rules promulgated by Secretary of Transportation for programs to reduce accidents, injuries and deaths may be disapproved by resolution of either House;) (Secretary of Transportation's plan for the sale of government's common stock in rail system may be disapproved by concurrent resolution;) (Secretary of Transportation's approval of freight transfer agreements may be disapproved by resolution of either House;) (amendments to Amtrak's Route and Service Criteria may be disapproved by resolution of either House;) (Consumer Product Safety Commission regulations may be disapproved by concurrent resolution of both Houses, or by concurrent resolution of disapproval by either House if such resolution is not disapproved by the other House).

F.

MISCELLANEOUS

43. Federal Civil Defense Act of 1950, Pub. L. No. 81–920, §201, 64 Stat. 1245, 1248, 50 app. U. S. C. 2281(g) (Interstate civil defense compacts may be disapproved by concurrent resolution).

44. National Aeronautics and Space Act of 1958, Pub. L. No. 85–568, §302c, 72 Stat. 426, 433, 42 U. S. C. 2453 (President's transfer to National Air and Space Administration of functions of other departments and agencies may be disapproved by concurrent resolution).

45. Federal Pay Comparability Act of 1970, Pub. L. No. 91–656, §3, 84 Stat. 1946, 1949, 5 U. S. C. 5305 (President's alternative pay plan may be disapproved by resolution of either House).

46. Act of October 19, 1973, Pub. L. No. 93–134, §5, 87 Stat. 466, 468, 25 U. S. C. 1405 (Plan for use and distribution of funds paid in satisfaction of judgment of Indian Claims Commission or Court of Claims may be disapproved by resolution of either House).

47. Menominee Restoration Act, Pub. L. No. 93–197, §6, 87 Stat. 770, 773 (1973), 25 U. S. C. 903d(b) (Plan by Secretary of the Interior for assumption of the assets the Menominee Indian corporation may be disapproved by resolution of either House).

48. District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93–198, §§303, 602(c)(1) and (2), 87 Stat. 774, 784, 814 (1973) (District of Columbia Charter amendments ratified by electors must be approved by concurrent resolution;) (acts of District of Columbia Council may be disapproved by concurrent resolution;) (acts of District of Columbia Council under certain titles of D.C. Code may be disapproved by resolution of either House).

49. Act of December 31, 1975, Pub. L. No. 94–200, §102, 89 Stat. 1124, 12 U. S. C. 461 note (Federal Reserve System Board of Governors may not eliminate or reduce interest rate differentials between banks insured by Federal Deposit Insurance Corporation and associations insured by Federal Savings and Loan Insurance Corporations without concurrent resolution of approval).

50. Veterans' Education and Employment Assistance Act of 1976, Pub. L. No. 94–502, §408, 90 Stat. 2383, 2397–98, 38 U. S. C. 1621 note (President's recommendation for continued enrollment period in Armed Forces educational assistance program may be disapproved by resolution of either House).

51. Federal Land Policy and Management Act of 1976, Pub.

L. No. 94–579, §§ 203(c), 204(c)(1), 90 Stat. 2743, 2750, 2752, 43 U. S. C. 1713(c), 1714 (Sale of public lands in excess of two thousand five hundred acres and withdrawal of public lands aggregating five thousand acres or more may be disapproved by concurrent resolution).

52. Emergency Unemployment Compensation Extension Act of 1977, Pub. L. No. 95–19, § 401, 91 Stat. 39, 45, 2 U. S. C. 359 (Supp. III 1979) (Preident's recommendations regarding rates of salary payment may be disapproved by resolution of either House).

53. Civil Service Reform Act of 1978, Pub. L. No. 95–454, § 515, 92 Stat. 1111, 1179, 5 U. S. C. 3131 note (Supp. III 1979) (Continuation of Senior Executive Service may be disapproved by concurrent resolution).

54. Full Employment and Balanced Growth Act of 1978, Pub. L. No. 95–523, § 304(b), 92 Stat. 1887, 1906, 31 U. S. C. 1322 (Supp. III 1979) (Presidential timetable for reducing unemployment may be superseded by concurrent resolution).

55. District of Columbia Retirement Reform Act, Pub. L. No. 96–122, § 164, 93 Stat. 866, 891–92 (1979) (Required reports to Congress on the District of Columbia retirement program may be rejected by resolution of either House).

56. Act of August 29, 1980, Pub. L. No. 96–332, § 2, 94 Stat. 1057, 1058 (to be codified in 16 U. S. C. 1432) (Designation of marine sanctuary by the Secretary of Commerce may be disapproved by concurrent resolution).

The CHAIRMAN. We also have a prepared statement of Hon. James J. Howard, chairman of the Committee on Public Works and Transportation. Without objection it will be admitted at this point.

[Mr. Howard's statement, as though read, follows:]

STATEMENT OF HON. JAMES J. HOWARD, CHAIRMAN OF THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

Mr. HOWARD. Mr. Chairman and members of the committee, I would like to thank you for the opportunity to testify on a matter of great concern not only to the Committee on Public Works and Transportation, but to the Congress as a whole. The views I express today are mine and those of Congressman Gene Snyder, the distinguished ranking minority member of the committee. They do not necessarily reflect the views of other committee members.

As represented in the opinions of those who have analyzed the *Chadha* decision, there are widely different perspectives on the extent to which the congressional legislative, review, and oversight practices have been impacted. Notwithstanding the differing views, I am concerned about the implications of that decision on both existing as well as future legislation.

For many years, the legislative veto has proven to be a convenient and effective congressional tool. Legislative veto provisions have generally arisen as accommodations between the White House and Congress. Congress agrees to give the President broad authority in an important area and, in return, the President gives Congress a convenient check on the use of that authority that could be exercised without the cumbersome requirement of bills, hearings, extensive floor debates, and rollcalls. The provisions themselves are approved by both Houses and signed by the President.

Our committee, like many others, has relied upon this procedure not only as a check against administrative action but also as a means of gaining broader support for legislative initiatives.

While there exists to date no definitive statement regarding the scope of the *Chadha* decision, two things, it seems to me, are clear: That a constitutional cloud now hangs over all legislative vetoes; and that steps should be taken to improve Congress' capability to respond to the issues which *Chadha* raises.

As the former, it cannot be overemphasized that the loss, or potential loss, of the legislative veto authority poses a great dilemma for Congress. Not only has the validity of numerous statutes been called into question, but serious questions have been raised about future relationships between the executive and legislative branches.

As to the latter, I want to express my appreciation to you and your committee for undertaking hearings on this matter and in so doing, taking the first step toward finding a meaningful response to *Chadha*.

In this regard, I would like to address "how" such a response should be formulated rather than "what" that response should be.

First, even though I might support the development of a measured institutional response, I believe Congress should avoid so-called blanket or generic solutions.

For the most part, legislative veto provisions are unique in form and purpose. Over the years, they have taken on several forms—including a one-House veto, two-House veto, and a committee veto—not to mention various refinements. Oftentimes, the form is dictated by the various objections or concerns that a particular veto power process to meet or satisfy. Coupled with this is the often complex interrelationship that exists between the legislative veto provision and the remainder of the statute; the degree of certainty or uncertainty that surrounds congressional intent; prior congressional and/or committee precedents; and the relationship that exists between committees and particular agencies regarding program implementation and execution.

In all, experience suggests that legislative vetoes are designed to meet differing circumstances and purposes. So, too, may be the case in developing solutions that address those provisions impacted by *Chadha*.

Second, I believe that Congress should be careful to distinguish between legislative veto provisions and those mechanisms for congressional review that do not implicate the constitutional concerns of *Chadha*.

For example, the Supreme Court in *Chadha* reaffirmed the legal standing of the so-called report and wait requirement which in its usual form delays the effectiveness of administrative action for a specified period to allow Congress time to consider passage of legislation.

In addition, certain House procedures which speak solely to the relationship of one committee—or one process—to another do not appear to run afoul of the *Chadha* holding.

Specifically, I am thinking about those laws and/or bills which make the appropriation of funds for a project or program contingent upon prior committee approval and authorization of such project or program. Such approval serves only to trigger or define the circumstances under which appropriations may be made for approved projects. In my view, this process falls squarely under the aegis of that clause of the Constitution granting Congress power to specify rules for the governance of its own internal legislative processes.

Third, and most importantly, in formulating a response, Congress should rely upon the expertise of those committees responsible for the drafting of the original legislative veto authority. They know the laws and their histories. They are most acquainted with the technicalities involved and the action that may be subject to veto. They are in the best position to provide any further clarification of the *Chadha* decision, specifically what laws and procedures are affected. In addition, they know the programs and the administering agencies, having developed relationships with the latter that often transcend time and partisan politics.

Last, they can best fashion an appropriate remedy which, in many instances, may require more than simply replacing unconstitutional legislative vetoes with constitutionally acceptable substitutes.

Mr. Chairman and members of the committee, as so many times in the past, the congressional response to *Chadha* may be shaped by decades of habit, the practicalities of the legislative process, and

the exigencies of the moment. Certainly it is a complicated situation in which we find ourselves—one compounded by *Chadha*'s abrupt and unexpected creation of potential power vacuums in a multitude of fragile policy areas. Recognizing this, the challenge for Congress is to fill those voids in a manner that facilitates the effective functioning of the legislative and administrative decision-making process.

Together, I believe we can meet that challenge.

Thank you.

The CHAIRMAN. We thank the witnesses for their valuable testimony today.

The committee stands adjourned until further notice.

[Whereupon, at 4:25 p.m. the committee adjourned subject to call of the Chair.]

LEGISLATIVE VETO AFTER CHADHA

WEDNESDAY, MARCH 21, 1984

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RULES,
Washington, D.C.

The committee met, pursuant to notice, at 10:05 a.m., in room H-313, the Capitol, Hon. John Joseph Moakley (member of the committee) presiding.

Present: Representatives Pepper, Moakley, and Wheat.

OPENING STATEMENT OF HON. JOHN J. MOAKLEY, MEMBER OF THE COMMITTEE ON RULES

Mr. MOAKLEY. The Rules Committee will now come to order.

I am pinch-hitting for Chairman Pepper who has been chairing most of these hearings.

Today, the Rules Committee continues its hearings on the impact of the Supreme Court decision in the case of *Immigration and Naturalization Service* v. *Chadha* which found the legislative veto unconstitutional.

In previous hearings, the committee examined the effect of the Supreme Court decision on particular policy areas and on the authorization/appropriation budget process. Today we will focus on the effects of the alternatives to the legislative veto on judicial review of agency rules.

Tomorrow at 2 p.m. we will resume our deliberations to look at the impact of expedited procedures on operations of the House. On April 11 and on May 10 at 2 p.m., we will examine the effect of the decision on the administrative process.

The committee today is particularly interested in the practical effect of the joint resolutions of approval or joint resolutions of disapproval on judicial review. Will, for example, the various alternatives to the legislative veto undermine the statutory mandate for judicial review under the Administrative Procedures Act?

A subsidiary issue in the hearing but one of no less importance is our continued exploration of severability. Currently a severability clause is considered boilerplate language routinely included in public laws.

In the light of the *Chadha* decision, it would seem reasonable to remove the severability clause from the domain of boilerplate, and to make it a clear and significant policy decision.

To assist in our examination today, we are pleased to have with us several distinguished Members of Congress as well as public witnesses. The first to appear will be Hon. Sam B. Hall, Jr., chairman

of the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary.

Mr. Hall's subcommittee has held 11 days of hearings on regulatory reform beginning in June 1983, with two additional hearings on the issue of the legislative veto.

Also, later this morning we will hear from Hon. Thomas N. Kindness, the ranking minority member of the Subcommittee on Administrative Law and Governmental Relations, who has supported my bill establishing a committee which would have jurisdiction to review rules. Moreover, the committee is honored to have a distinguished former colleague, Abner Mikva, who is currently U.S. Circuit Judge in the District of Columbia. Finally, this morning, we will hear from a renowned scholar in the field who, along with Professor Gellhorn, wrote a seminal study on the legislative veto. Prof. Harold H. Bruff, professor of law at the University of Texas at Austin.

Our first witness will be Hon. Sam Hall, Jr.

STATEMENT OF HON. SAM B. HALL, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. HALL. Thank you, Mr. Chairman. It is a pleasure to be here this morning. I appreciate the invitation to appear before you today to discuss the impact of the recent Supreme Court decision in *INS* v. *Chadha*, June 23, 1983, which held legislative veto to be unconstitutional.

In your invitation to testify, you stated that the focus of this hearing would be on the effect of proposed alternatives to legislative veto on the administrative and judicial processes. In particular, you are concerned about the consequences of joint resolutions of disapproval and approval in the context of agency rulemaking.

As you are aware, the Judiciary subcommittee which I chair has already held two hearings on these issues. As these hearings demonstrated, the consequences of either approach are, to a large extent, speculative. They would have to be resolved by the courts if either device were enacted. However, I would like to discuss some of the questions that are raised by these two devices.

One being the joint resolution of disapproval. The enactment of a joint resolution of disapproval for agency rules is viewed by most scholars as constitutional since such a resolution follows the basic steps for legislation. However, this device would have an impact on both the administrative processes and court review of agency rules.

The main impact of this device on the administrative process would be delay, because it would prevent the implementation of rules while they were being reviewed by Congress. I mention this because during the last 5 years one of the major complaints received by the Subcommittee on Administrative Law and Governmental Relations in its hearings on regulatory reform is that there is already too much delay in issuing agency rules. Delay has a particular impact on those who are required to comply with the law, but who must wait for regulations before they know how to comply. For example, a company which is building a new factory needs to know as soon as possible how to build that factory in com-

pliance with air pollution law. Otherwise expensive retrofitting may be required.

The main impact of a joint resolution of disapproval on court proceedings would be confusion over when agency rules would be ripe for judicial review. Would it be after agency promulgation or after the time for congressional review has passed? In addition, there is some concern over whether Congress could reject a rule only during the specific time limits set by the joint resolution device. In other words, must Congress act on the veto within the specified time in order for the veto to have legal effect?

The principal impact of a joint resolution of disapproval would be on the two Houses of Congress, an issue of which the Rules Committee is particularly aware. These devices nearly always include provisions for expedited procedures for consideration of disapproval resolution. As stated in a recent study by the Congressional Research Service, and I am quoting:

> [The joint resolution] popularity in large part rests on the procedures for expedited floor consideration that normally accompany it. The prospect of continued proliferation of such automatic discharge provisions has raised [the Rules] Committee concerns that the cumulative effect has the potential for disrupting the legislative process by giving high priority to many many measures, thereby "prevent[ing] the House from reaching matters of greater importance to which no special procedures attach." These factors plus the implications for the Rules Committee jurisdictional authority over floor access may limit the appeal of this review device.

Citing "Congressional Life After *Chada*," which is found in the data.

JOINT RESOLUTIONS OF APPROVAL

A joint resolution of approval raises some of the same questions as a joint resolution of disapproval, but it also raises a new series of concerns. Because this approach has been suggested primarily for major rules, my comments will be addressed to the use of this device for major rules only.

We will deal with the constitutionality. There are those who question the constitutionality of a joint resolution of approval for major rules. Their concern springs from the fact that this device operates to divest agencies of the authority to issue major rules. However, it does so without directly altering the authority of agencies to issue such rules. As stated by the Congressional Research Service, these opponents believe that:

First:

> A joint resolution of approval is the functional equivalent of a one-House veto. Under this joint resolution, an executive action could not commence unless and until both Houses of Congress expressedly approved it and the President signed the resolution, or his veto overridding. Thus, failure to obtain an affirmative vote in either chamber would annul the proposed action.

Citing the "Congressional Control of Executive Action: Alternatives to the Legislative Veto."

In this analysis if accepted by the courts, the joint resolution of approval will be unconstitutional.

Others argue that a joint resolution of approval is simply a limitation on agencies delegated authority and that it constitutes a repeal of the authority to issue major rules. If this line of reason-

ing is accepted by the courts, in all likelihood it will be constitutional.

THE POLICY IMPLICATIONS

In addition to constitutional concerns, there are several policy questions raised by the joint resolution of approval for major rules. I have already mentioned two in the context of joint resolutions of disapproval: Delay and the impact on the Houses of Congress. These same considerations apply to a joint resolution of approval.

However, a joint resolution of approval raises other considerations, some practical and some legal.

The first practical consideration regarding joint resolutions of approval for major rules is whether Congress has the time or expertise to deal with these rules. The Office of Management and Budget has submitted to my subcommittee a list of the major rules promulgated by executive branch agencies between 1981 and 1983.

At this time, I would like to have the permission of the chairman to make that a part of the record.

Mr. MOAKLEY. Without objection, that statement will be put in the record in full.

[The list prepared by the Office of Management and Budget follows:]

February 14, 1984
Revised March 30, 1984

MAJOR FINAL RULES REVIEWED UNDER EXECUTIVE ORDER 12291 1981 - 1983

Office of Management and Budget

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MAJOR FINAL RULES REVIEWED UNDER EXECUTIVE ORDER 12291
1981-83
Office of Management and Budget

Architectural and Transportation Barriers Compliance Board

Minimum Guidelines and Requirements for Standards for Accessibility and Usability of Federal and Federally-funded Buildings and Facilities (published 8/4/82).

Summary: This regulation made more cost-effective federal accessibility standards issued under the Architectural Barriers Act by the General Services Administration, Department of Housing and Urban Development, Department of Defense, and the U.S. Postal Service

Court Proceedings: None

*****

U.S. Department of Agriculture

Farmers Home Administration Emergency Loan Policies, Procedures and Authorizations, Insured Economic Emergency Loans (published 5/26/81.

Summary: Regulation provided for Farmers Home Administration (FmHA) insured economic emergency loans for farmers, ranchers, agriculture operators, etc., suffering economic emergencies.

Court Proceedings: Kjeldahl v. Block. Docket No. 82-2745 (DDC 10-5-83). Agricultural Adjustment Act of 1983 authorizes Secretary to disburse emergency loan funds. Rules of 5/26/81 allowed to expire on 9/30/81. Suit followed and, as a result, the FmHA was required to reopen economic emergency programs under these rules.

(NOTE: Plaintiff here sued due to non-implementation of a program, he did not challenge the rules themselves.)

*****

Farmers Home Administration Disaster Assistance (published 5/26/81).

Summary: This regulation revised the FmHA regulation used to determine disaster area eligibility for FmHA emergency loans. With this rule, emergency loans are extended only if an area is designated eligible by County and State Disaster Emergency

Boards, rather than the FmHA State Directory. This action decreased the number of designated natural disaster areas and resulted in fewer emergency loans.

Court Proceedings: None

*****

1981 Wheat, Feed Grains, Soybeans and Upland Cotton Determinations, Regarding Target Prices, Loan and Purchase Rates (published 6/16/81).

Summary: This notice of determination announced 1981 crop established target prices for wheat, corn, sorghum, barley, and upland cotton; the loan and purchase rates for the 1981 crops of wheat, corn, sorghum, barley, oats, rye, and soybeans; and the absence of a special grazing and hay program for the 1981 crop of wheat.

Court Proceedings: None

*****

CCC Grain Price Support Regulations Governing the Wheat Reserve Program for 1981 and Subsequent Crops (published 8/13/81).

Summary: This rule stabilized wheat prices and support for farm income.

Court Proceedings: None

*****

Food Stamp Program--Household Composition Income Standards, Initial Month Benefits, Adjustments, Deductions and Outreach (published 9/4/81).

Summary: This regulation changed household definitions, food stamp eligibility, household benefits, income eligibility update schedules, and COLA deductions. This rule also implemented a minor provision of the 1980 Food Stamp Amendments.

Court Proceedings: Levesque v. Block (1st Circuit Court of Appeals; No. 83-1341; decided 12/20/83). In this New Hampshire case, the Court ruled that USDA violated the Administrative Procedure Act by publishing the rule as an interim rule without prior notice and comment. Though the court found that USDA should have published a proposed rule, it overturned a lower court's decision requiring the Department to republish the final rule of 11/19/82. It also ordered the Department to assume the liability for retroactive benefits owed between the publication of the interim rule and the final rule.

*****

Part 1980 and 1990--A Guaranteed Loan Program (published 10/18/82).

Summary: This final rule prohibited the FmHA from guaranteeing loans which involve tax-exempt bond funds, either directly or indirectly. This rule therefore put FmHA fund uses more in line with the original intent of FmHA's lending mandates.

Court Proceedings: None

*****

National Average Payment Factors, Elimination of October and March Estimates, Maximum Reduced Price Charge for National School Lunch and School Breakfast Programs (published 10/20/81).

Summary: This rule revised regulations regarding the "national average payments"--the amount of money the federal government gives states for meals served in the National School Lunch and School Breakfast programs. This rule also eliminated the October and March estimates and increased the price charged for each meal.

Court Proceedings: None

*****

National Average Minimum Value of Donated Food for Period July 1, 1981 through June 30, 1982 (published 12/8/81).

Summary: This notice reduced the value of commodity subsidies for federally subsidized meal programs authorized by the National School Lunch Act and announced the value of donated foods given for lunches in the National School Lunch Program from July 1, 1981 through June 30, 1982.

Court Proceedings: None

*****

FmHA Instruction 1944-A, Section 502 Rural Housing Loan Policies, Procedures and Authorizations (published 12/21/81).

Summary: This rule revised the income eligibility guidelines for rural housing loans by liberalizing them and setting area, rather than national, income limits.

Court Proceedings: None

*****

National Forest System Land and Resources Management Planning Function: Conservation and Land Management (published 9/26/82).

Summary: This rule streamlined the land management planning process to maximize net public benefits from National Forest System lands. It revised the content and purpose of the regional plan, reorganized material, and made other necessary technical revisions.

Court Proceedings: None

*****

CCC Grain Price Support Regulations Governing Feed Grain Reserve Programs for 1981 and Subsequent Crops and Alternative Program for 1980 and Prior Crops (published 3/4/82).

Summary: These rules govern farmer-owned reserves of wheat and feed grains, including eligibility criteria and criteria for release of grain from the reserve. The rule announced changes which simplified the farmer-owned grain reserve program and publicized the Secretary's announcement which authorized the immediate entry of 1981 crop seed grains into the grain reserve.

Court Proceedings: None

*****

Puerto Rico Nutritional Assistance Grant (published 7/27/82).

Summary: This rule converted the federal Food Stamp Program in Puerto Rico into a nutritional assistance block grant. It changed the method of benefits disbursement from coupon issuance to cash grants pursuant to the provisions of the Omnibus Budget Reconciliation Act.

Court Proceedings: None

*****

Adjusting Thrifty Food Plan Amounts (published 3/19/82, modified final rule 9/14/82) 2 rules.

Summary: This rule modified the Thrifty Food Plan adjustment schedule to reflect Consumer Price Index changes, in accordance with requirements of the 1981 Food Stamp and Commodity Distribution Amendments, P.L. 97-98.

Court Proceedings: None

*****

Monthly Reporting/Retrospective Budgeting Revisions to Model Food Stamp Forms (published 5/25/82).

Summary: This rulemaking provided guidance on implementing sections 107 and 108 of the Omnibus Reconciliation Act of 1981, P.L. 97-35, which required state agencies to implement a monthly reporting/retrospective budgeting system. In addition, this rule required that a family's food stamp allotment be based on its past, rather than future, financial circumstances.

Court Proceedings: Donna Saldivar v. McMahon (California Welfare Agency Director) (No. 83-4637) and McMahon v. Block and Heckler (U.S. District Court in the Northern District of California; No. C83-4637 SG). This case was a constitutional challenge alleging that not providing a household a notice of benefit reductions within ten days prior to such reductions, as the rule states, violated the due process clause of the Constitution. The case was decided in District Court in USDA's favor. The Court held that ten days was reasonable and not required if other due process procedures for benefit reinstatement existed. These did exist in the rule, as a provision for reinstatement of benefits within five days after a household request a hearing on their benefit reduction was clearly in place.

*****

Proration of Initial Month Benefits for Food and Nutrition Assistance Programs (published 5/14/82).

Summary: This regulation reduced costs of the food stamp program by prorating household benefits for the initial application month instead of making benefits retroactive to the first day of the month.

Court Proceedings: None

*****

Notice of Determination of Provisions Regarding 1982 Crop Cotton (published 6/15/82).

Summary: This rule announced price support and production adjustment provisions for 1982 cotton crop: the determination was published following enactment of P.L. 97-98.

Court Proceedings: None

*****

1982 Wheat Program--Determinations Regarding the Proclamation of 1982--Crop Program Provisions for Wheat (published 7/6/82).

Summary: This rule affirmed determinations announced by press release on 1/29/82 regarding provisions of the 1982 wheat program and implemented a 15 percent acreage reduction program.

Court Proceedings: None

*****

Price Support Loan Program for 1982 Crop Sugar Beets and Sugar Cane (published 10/20/82).

Summary: This rule announced price support, eligibility criteria and loan rates for 1982 crops of sugar beets and sugar cane as mandated by the Agriculture and Food Act of 1981.

Court Proceedings: None

*****

1982 Feed Grain Program--Determinations Regarding the Proclamation of 1982--Crop Program Provision for Corn, Sorghum, Barley, Oats and Rye (published 7/27/82).

Summary: This rule established subsidy, loan rates, and acreage reduction paid diversion for 1982 crops of corn, sorghum, barley, oats, and rye.

Court Proceedings: None

*****

1983 Feed Grain Program--Determinations Regarding 1983--Crop Program for Corn, Sorghum, Barley, Oats and Rye (published 4/11/83).

Summary: This rule established subsidy, loan rates, and acreage reduction paid diversion for 1983 crops of corn, sorghum, oats, barley and rye.

Court Proceedings: None

*****

CCC Grain Price Support Regulations Governing the Grain Reserve Program for 1982 and Subsequent Crops and Alternative Program for 1981 and Prior Crops (published 8/16/82, 10/8/82, and 11/14/83) 3 rules.

Summary: These rules implemented a new reserve program for 1982 crops as mandated by the Agriculture Act of 1981.

Court Proceedings: None

*****

1982-1983 Milk Price Support (published 9/24/82, revised 3/17/83) 2 rules.

Summary: This notice announced the 1982-83 support level for milk and the purchasing prices for butter, cheese and non-fat dry milk and the 50 cents deduction per hundred weight for all milk marketed commercially.

Court Proceedings: Multiple suits in varying stages of litigation. The first case, South Carolina v. Block (District Court of South Carolina; 82-31-72-0) was decided against the United States on 9/24/82. At that point the agency republished the rule effective 3/17/83, an action which the Courts have viewed favorably. Based on the Administrative Procedure Act, South Carolina has petitioned the Supreme Court for a writ of certiorari. (See footnote at end of section on Department of Agriculture for additional court actions involving all milk price related rules.)

*****

Household Composition, Income Standards, Adjustments, Deductions, and Outreach (Model Food Stamp Forms) (published 11/19/82).

Summary: This rule restricted eligibility for and reduced benefits of the Federal Food Stamp Program by implementing for fiscal year 1982 changes in the definition of a household, household food stamp eligibility requirements, primary and ultimate household benefits, and the date when the USDA made cost of living adjustments for benefits and allowable deductions.

Court Proceedings: Levesque v. Block (1st Circuit Court of Appeals; No. 83-1341; decided 12/20/83). In this New Hampshire case, the Court ruled that USDA violated the Administrative Procedure Act by publishing the rule as an interim rule without prior notice and comment. Though the court found that USDA should have published a proposed rule, it overturned a lower court's decision requiring the Department to republish the final rule of 11/19/82. It also ordered the Department to assume the liability for retroactive benefits owed between the publication

of the interim rule and the final rule. A petition for a rehearing has been filed and the issue of presenting the case to the Supreme Court is now being discussed.

*****

Determinations Regarding the Proclamation of the 1982 Program--Provisions for Rice (published 7/6/82).

Summary: This notice established subsidy, loan rates and acreage adjustment paid diversion for 1982 rice crop. The Secretary of Agriculture is required by statute to announce the 1982-Crop Rice Program provisions. Producers need to know these determinations in making their planting decisions.

Court Proceedings: None

*****

Mechanically Processed Species Product (published 6/29/82).

Summary: This rule amended the federal meat inspection regulations to relax labeling and compositional requirements for mechanically separated species products, and permit its use in a wider variety of products. These changes would permit more efficient use of meat producing animals, with savings expected to accrue to meat packers and to consumers.

Court Proceedings: Consumer Nutrition Institute v. Block, Secretary of Agriculture, Federal District Court, D.C. Civil Action 82-2009. The court found that Agriculture's actions were not arbitrary and capricious. CNI has appealed this decision, and the case is pending.

*****

Special Program of Payment-In-Kind for Acreage Diversion for 1983 Crops of Wheat, Corn, Grain Sorghum, Upland Cotton, and Rice--7 CFR Part 770 (published 1/10/83 and 3/4/83, modified)--Two rules.

Summary: This rule pays producers for not producing crops (corn, wheat, tobacco, etc.). Payment is made in kind, not in dollars.

Court Proceedings: There are three cases pending. One case seeks inclusion of popcorn as a commodity covered by the program. A writ of certiorari (83-1239) has been filed with the Supreme Court. The other two cases pertain to the statutory optional $50,000 limitation on the value of commodities which any one producer may receive. The first case, Eastern District of California No. S-83-1349 RAR, seeks application of the limit to 1983 crops. The second, Eastern District of Washington No. C-84-073-RJM, seeks exemption of the 1984 crop from the limitation.

*****

1982-1983 Milk Price Support (published 9/4/82).

Summary: This rule announced the milk price support level for 1982-83 at the same level as the previous year, and announced the first fifty cent per hundredweight deduction on the price received by the producer. These announcements became effective on 10/1/82.

Court Proceedings: Multiple suits in varying stages of litigation. The first case, South Carolina v. Block (District Court of South Carolina; 82-31-72-0) was decided against the United States on 9/24/82. At that point the agency republished the rule effective 3/17/83, an action which the Courts have viewed favorably. Based on the Administrative Procedure Act, South Carolina has petitioned the Supreme Court for a writ of certiorari. (See footnote at end of section on Department of Agriculture for additional court actions involving all milk price related rules)

*****

Determinations Regarding the Proclamation of 1983--Crop Program Provisions for Wheat (published 5/11/83).

Summary: This rule sets commodity support factors such as subsidy, loan rates, target prices, and acreage control for 1983 wheat crops.

Court Proceedings: None

*****

Water and Waste Disposal Development (published 5/5/83).

Summary: This rule provided grants and loans for water and waste disposal system development projects in areas of high unemployment. Under Public Law 98-8, the Emergency Jobs Bill, the rule determines eligibility for recipient localities and applies other restrictions on uses of funds.

Court Proceedings: None

*****

Monthly Reporting and Retrospective Budgeting (published 12/8/83).

Summary: This rule changed the basis of a household's food stamp allotment. A household's future financial circumstances are now considered in the computation of benefits rather than its past circumstances. The rule also required the monthly reporting of these circumstances by households.

Court Proceeding: None

*****

Dairy Price Support Program (published 8/1/83).

Summary: This rule announced revised rules for collecting the two fifty cents per hundredweight deductions from prices received by producers and provisions for the refund of the second fifty cents.

Court Proceedings: Multiple suits in varying stages of litigation. The first case, South Carolina v. Block (District Court of South Carolina; 82-31-72-0) was decided against the United States on 9/24/82. At that point the agency republished the rule effective 3/17/83, an action which the Courts have viewed favorably. Based on the Administrative Procedure Act, South Carolina has petitioned the Supreme Court for a writ of certiorari. (See footnote at end of section on Department of Agriculture for additional court actions involving all milk price related rules.)

*****

1982-83 and 1983-84 Milk Price Support Program (published 8/2/83).

Summary: This notice of determination established support levels for the 1982/83 and 1983/84 Milk Support Program. It announced the second fifty cents per hundredweight deduction for September 1983 and the 1983/84 marketing year as well as set the milk price support level for 1983/84 at $13.10.

Court Proceedings: Multiple suits in varying stages of litigation. The first case, South Carolina v. Block (District Court of South Carolina; 82-31-72-0) was decided against the United States on 9/24/82. At that point the agency republished the rule effective 3/17/83, an action which the Courts have viewed favorably. Based on the Administrative Procedure Act, South Carolina has petitioned the Supreme Court for a writ of certiorari. (See footnote at end of section on Department of Agriculture for additional court actions involving all milk price related rules.)

*****

Food Stamp Program--Adjusting the Thrifty Food Plan and Deductions (published 10/5/83).

Summary: This rule adjusted the food plan for a family of 4 which serves as the basis for food stamp allotments for FY 84. There were no significant changes from the food plan from FY 83.

Court Proceedings: None

*****

Price Support Loan Program for 1983 through 1985 Crops of Sugar Beets and Sugar Cane (published 10/5/83).

Summary: This interim rule set price support, eligibility criteria, and loan rates for 1983-85 crops of sugar beets and sugar cane.

Court Proceedings: None

*****

1983-84 Milk Price Support Program (published 1/3/84).

Summary: This rule establishes procedures for deducting 50 cents per hundred weight of milk from prices paid to producers.

Court Proceedings: Multiple suits in varying stages of litigation. The first case, South Carolina v. Block (District Court of South Carolina; 82-31-72-0) was decided against the United States on 9/24/82. At that point the agency republished the rule effective 3/17/83, an action which the Courts have viewed favorably. Based on the Administrative Procedure Act, South Carolina has petitioned the Supreme Court for a writ of certiorari. (See footnote at end of section on Department of Agriculture for additional court actions involving all milk price related rules)

*****

Milk Price Support Level and CCC Purchase Prices (published 12/16/83).

Summary: This rule lowered support price and purchase price for milk by 50 cents per hundredweight effective December 1, 1983 through March 31, 1985.

Court Proceedings: None

*****

New National Forest Timber Sale Procedures (published 4/15/82).

Summary: This rule revised policy affecting bid prices for timber sales in three western states.

Court Proceedings: None

*****

Price Support Purchase Program for 1982 Crop Sugar Beets and Sugar Cane (published 2/24/82 interim and 5/28/82 final) 2 rules.

Summary: This rule implemented a price support purchase program for 1982 crop raw cane sugar and refined beet sugar as mandated by the Agriculture Act of 1981.

Court Proceedings: None

*****

Milk Diversion Program (published 1/4/84).

Summary: This rule established procedures for milk producers to participate in ASCS program which pays producers $10 per hundredweight for each hundredweight of reduced product.

Court Proceedings: None

*****

1981-1982 Milk Price Support (published 9/24/82).

Summary: This notice announced the 1981-82 support level for milk and the purchase prices for butter, cheese, and nonfat dry milk.

Court Proceedings: Multiple suits in varying stages of litigation. The first case, South Carolina v. Block (District Court of South Carolina; 82-31-72-0) was decided against the United States on 9/24/82. At that point the agency republished the rule effective 3/17/83, an action which the Courts have viewed favorably. Based on the Administrative Procedure Act, South Carolina has petitioned the Supreme Court for a writ of certiorari. (See footnote at end of section on Department of Agriculture for additional court actions involving all milk price related rules)

*****

Commodity Credit Corporation Interim Rule Implementing Deductions from Dairy Farmers (published interim final 9/13/82).

Summary: Interim rule established the Administrative Procedure for deducting 50 cents per hundred weight from dairy farmers' proceeds and remitting the monies to the Commodity Credit Corporation.

Court Proceeding: Multiple suits in varying stages of litigation. The first case, South Carolina v. Block (District Court of South Carolina; 82-31-72-0) was decided against the

United States on 9/24/82. At that point the agency republished the rule effective 3/17/83, an action which the Courts have viewed favorably. Based on the Administrative Procedure Act, South Carolina has petitioned the Supreme Court for a writ of certiorari. (See footnote at end of section on Department of Agriculture for additional court actions involving all milk price related rules.)

*****

Standards for Grades of Carcass Beef Standards for Grades of Slaughter Cattle (Withdrawal of NPRM 9/28/82).

Summary: In response to comments received, decision was made to withdraw proposal.

Court Proceeding: None

*****

Commodity Credit Corporation Final Rule Implementing Deductions from Dairy Farmers (published interim final 11/23/82).

Summary: Established the administrative procedure for deducting 50 cents per hundredweight from dairy farmers' proceeds and remitting the monies to the Commodity Credit Corporation.

Court Proceeding: Multiple suits in varying stages of litigation. The first case, South Carolina v. Block (District Court of South Carolina; 82-31-72-0) was decided against the United States on 9/24/82. At that point the agency republished the rule effective 3/17/83, an action which the Courts have viewed favorably. Based on the Administrative Procedure Act, South Carolina has petitioned the Supreme Court for a writ of certiorari. (See footnote at end of section on Department of Agriculture for additional court actions involving all milk price related rules)

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Footnote to Milk Price Support rules: Besides the South Carolina case discussed under **Court Proceedings** above, there are 10 other cases in various stages of litigation.

-Northern District of New York, 82-CV-1191. This case is on appeal with 2nd Circuit Court of Appeals. The decision of the lower court partially supported the United States--the government asked for summary judgment on most of the complaint with the remainder yet to be decided.

-Utah District Court, NC-82-0222W. See above.

-Eastern District Court of Wisconsin, 82-C-1602. Judgment rendered in favor of the United States.

-Middle District Court of Pennsylvania, 83-0476. Decision yet to be made, although government has prevailed on several elements.

-Western District Court of Texas, 7A83CA179. Case dismissed.

-Western District Court of New York, CV-83-0022T. Case is pending, an appeal has been filed.

-District Court of Puerto Rico, 83-0519(RA). Presently, there is a motion for summary judgment.

-Northern District Court of New York, 83-CV-83. Case is pending, awaiting the South Carolina appeal to the Supreme Court and the decision on the 82-CV-1191 case above.

-District Court of Idaho, 82-4187. Judgment in government's favor.

-Southern District Court of New York, 83-CIV-4531-MEL. Pending on summary judgment.

Department of Commerce

Interpretation of the Term "Directly Affecting the Coastal Zone", Notice of Suspension of Effective Date, Notice of Proposed Rescission, Notice of Withdrawal of Final Rule (published final 7/9/81, withdrawal 1/29/82).

Summary: The Coastal Zone Management Act of 1972 provides that "each federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state coastal zone management programs." On July 9, 1981 the Department of Commerce issued final regulations to define the term "directly affecting." On January 29, 1982 the Department withdrew this final rule.

Court Proceedings: On January 11, 1984 the U.S. Supreme Court issued its decision in Secretary of the Interior et. al. v. California et. al., No. 82-1326 that the sale of Outer Continental Shelf oil and gas leases is not an activity "directly affecting" the coastal zone.

*****

Ocean Thermal Licensing Regulations (published 7/31/81).

Summary: These regulations established the procedures for licensing ocean thermal energy production facilities.

Court Proceedings: None

*****

Deep Seabed Mining Regulations for Exploration Licenses (published 9/15/81).

Summary: These regulations established the procedures for obtaining licenses to permit the exploration of the deep seabed for hard mineral resources that could be commercially recovered.

Court Proceedings: None

*****

Continued Suspension of Final Rules--Channel Islands and Point Reyes--Farallon Islands National Marine Sanctuaries (published continued suspension 9/30/81, withdrawal 4/30/82) 2 rules.

Summary: On April 29, 1981, the Department of Commerce published final regulations governing the management of the Channel Islands and Point Reyes--Farallon Islands National Marine Sanctuaries. On March 31, 1981 Commerce suspended those portions of the regulations prohibiting hydrocarbon development within either sanctuary. On April 30, 1982 Commerce published a notice stating that it had completed its review of the regulatory impact analysis supporting this suspension of hydrocarbon development and concluded that there was no reason to continue the suspension. The April 30, 1982 notice stated that the suspension was discontinued effective March 30, 1982.

Court Proceedings: On September 28, 1982 the Western Oil and Gas Association filed suit challenging the Department of Commerce's authority to designate marine sanctuaries and prohibit hydrocarbon development. All parties have agreed not to pursue the case pending the outcome of Congressional action on the Department of Commerce's authority under the marine sanctuary program.

*****

Elimination of Quantitative Limitations on Exports of Refined Petroleum Products (published 10/6/81).

Summary: The rule eliminated quantitative restrictions on the export of all refined petroleum products and thereby reduced the

reporting and recordkeeping requirements imposed on petroleum exports.

Court Proceedings: None

*****

Handicap Amendment to Civil Rights Requirements on EDA Assisted Projects (published 4/23/82).

Summary: These regulations implement the prohibition against handicap discrimination, as provided in Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S. Code 794). Section 504 was made applicable to the General Revenue Sharing program by its inclusion in the 1974 amendments to the Revenue Sharing Act.

Court Proceedings: None

*****

Pacific Halibut Fisheries (published 6/18/83).

Summary: Rule imposed a moratorium on the entry of certain fishermen and vessels into the halibut fishing industry in waters off the coast of Alaska.

Court Proceedings: None

*****

Department of Energy

Fuel Use Act Regulation Revisions (published 12/7/81).

Summary: This regulation reduced the requirements for obtaining Fuel Use Act prohibition exemptions for owners and operators of new and existing electric powerplants as well as major fuel burning installations.

Court Proceedings: None

*****

Variable Net Profit Share Bidding System for Outer Continental Shelf Oil and Gas Leases (published 6/2/81).

Summary: This rule created a new bidding system for use in lease sales and established a procedure for determining net profit share payment for Outer Continental Shelf oil and gas leases.

Court Proceedings: None

*****

Residential Conservation Service--Revision of Rules (published 6/17/82).

Summary: DOE amended RCS program regulations to provide greater state and utility flexibility and permit reductions in program implementation costs.

Court Proceedings: None

*****

Residential Conservation Service Federal Standby Plan (published 9/27/83).

Summary: This regulation implements a federal RCS program for utilities in those states that do not have an adequate RCS plan.

Court Proceedings: None

*****

Energy Conservation Program for Consumer Products (published 8/30/83).

Summary: This rule would establish "no-standard" standard for each of the six appliance categories under consideration.
Court Proceedings: NRDC and Others v. DOE, D.C. Circuit Court of Appeals (Docket Nos. 83-1195 and Others).

*****

Environmental Protection Agency

RCRA--Withdrawal of Midnight Regulations (published 10/20/81).

Summary: This rule proposed to suspend the effective date of the January 1981 permitting standards for existing incinerators and storage surface impoundments pending reexamination. It did not, however, pertain to voluntarily submitted permit applications. Standards were reinstated before the rule became final.

Court Proceedings: EPA originally suspended permitting standards without notice and comment. EDF filed suit, but before the case was resolved EPA issued the proposed rule suspending the standard. Nevertheless, the D.C. Circuit Court overturned the original action.

*****

Standards for Owners and Operators of Hazardous Waste Land Disposal Facilities (withdrawn 4/21/82).

Summary: The Environmental Protection Agency (EPA) is required by the Resource Conservation and Recovery Act (RCRA) to issue standards applicable to owners and operators of hazardous waste management facilities. These standards are to be used in issuing permits for facilities that store, treat, or dispose of hazardous waste.

Court Proceedings: In regard to Land Disposal litigation, 15 separate petitions have been filed by both industry and environmentalists. Since parties are trying to negotiate an agreement, no briefs have yet been filed.

*****

Standards for Owners and Operators of Hazardous Waste Land Disposal Facilities (published 7/26/82).

Summary: This interim final rule amended existing regulations to establish standards for new and existing hazardous waste management facilities that store, treat, and dispose of hazardous waste. The facilities include landfills, land treatment facilities, waste-piles, and surface impoundments.

Court Proceedings: Twenty separate petitions have been filed by both industry and environmentalists. EPA and the petitioners are currently attempting to negotiate an agreement; no briefs have yet been filed.

*****

National Oil and Hazardous Substances Contingency Plan (published 7/16/82).

Summary: The revised NCP implements the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). CERCLA requires that actions taken in response to release of hazardous substances to the extent practicable be consistent with the NCP.

Court Proceedings: EDF et. al. v. EPA, Dockets #82-2234 and 2238, D.C. Court of Appeals. The Environmental Defense Fund sued EPA for lack of specificity in the plan in D.C. Circuit Court. The suit has been settled, and EPA has agreed to make certain amendments to the plan.

*****

Premanufacture Notification and Review Procedures (published 5/13/83).

Summary: This rule establishes premanufacture notice requirements and review procedures under section 5 of the Toxic Substances and Control Act. Under section 5 of TSCA, persons must notify EPA at least 90 days before they begin to manufacture or import a new chemical substance. Section 5(d)(1) defines the contents of the notice to EPA. EPA reviews the notice to determine whether regulatory action under section 5(e) or 5(f) is warranted. EPA may grant test-marketing exemptions to applicants if they show that a new chemical substance will not present an unreasonable risk to health or the environment.

Court Proceedings: None

*****

Iron and Steel Manufacturing Point Source Category Effluent Limitations Guidelines (published 5/27/82).

Summary: This rule set mass-based effluent standards, establishing the maximum amount of a pollutant which may be discharged per 1,000 pounds of product, and set a compliance date for the steel industry categorical pretreatment standards.

Court Proceedings: Existing regulations result from a 1976 court remand and amendments to the Clean Water Act. EPA has published a proposed settlement agreement of the current litigation (National Steel Corp. v. EPA, No. 82-3225).

*****

Department of Health and Human Services

Aid to Families with Dependent Children (published 9/21/81 interim and 2/5/82 final) 2 rules.

Summary: This rule implemented changes made in the Aid to Families with Dependent Children (AFDC) program by Title XXIII of the Omnibus Reconciliation Act of 1981 (P.L. 97-35). It provided for greater state flexibility in developing work alternative and incentive programs, established improved need assessment standards, and improved program administration.

Court Proceedings: Approximately 150 suits have been filed. HHS won the procedural challenges to the interim final rulemaking. HHS is prevailing in about 50% of the the cases and is in the appeals courts in the remaining cases (two cases have been appealed to the Supreme Court).

*****

Reduction in Payments to the States--Medicaid (published 9/30/81).

Summary: This regulation implemented section 2161 of the 1981 Budget Reconciliation Act and specified how states may reduce funding losses resulting from provisions of the Act. The regulation describes conditions under which offsets are permitted against federal financial participation reductions in Medicaid.

Court Proceedings: None

*****

Determination of Reasonable Charges for Medical and Health Care Services (published 12/31/81).

Summary: This rule amended regulations concerning the payment of reasonable charges for services furnished under Part B of the Medicare program. Section 946 specifies that medical or other health care service payment will be based on customary and prevailing charge screens in effect at the time the services are furnished rather than at the time of claim or payment request. The statute also requires that HHS not go back further than the immediately preceding fee screen year to determine reasonable charges for claims filed after long delays.

Court Proceedings: None

*****

BPP-215-FC Limitation of Reasonable Charges for Services in Hospital Outpatient Settings (published 10/1/82).

Summary: This regulation establishes limits on Medicare payments for certain types of physician services furnished in hospital outpatient settings based on the charges for similar services furnished in physicians' offices.

Court Proceedings: None

*****

Limitations on Payment for Services Furnished to Employed Aged and their Spouse (published 4/12/83).

Summary: This final notice made Medicare payments secondary to benefits payable under an employer group health plan for services furnished to employed individuals and their spouses age 35 through 69.

Court Proceedings: None

*****

Payment for Physician Services Furnished in Hospitals, SNFS, and CORF's (published 3/2/83).

Summary: These regulations revised coverage conditions and reimbursement methods for physician services compensated by medicare providers in hospitals, SNFS, and CORF's. They include special conditions for anesthesia, radiology, and pathology services.

Court Proceedings: The College of American Pathologists (CAP) sued HHS unsuccessfully in D.C. District Court. District Court Opinion, CCH, Medicare/Medicaid Guide, TP 32932 (D.D.C.). CAP has appealed to D.C. Court of Appeals, but no hearing has been held. HHS is attempting to modify CAP with changes to carrier guidelines. College of American Pathologists, et. al. v. Heckler, No. 83-1706 (D.C. Cir.). In addition, a group of anesthesiologists sued HHS in D.C. District Court. HHS has filed a motion for summary judgment and the plaintiffs have not responded. Donovan Campbell, MD et. al. v. Heckler, et. al., Civ. No. 83-2352 (D.D.C.).

*****

BPP-9-F, Hospital Insurance Entitlement and Benefits (published 3/25/83).

Summary: These regulations implemented 13 legislative amendments concerning Medicare entitlements, post-hospital nursing and home health services, beneficiary co-insurance, and amounts of and enrollment by premium paying Medicare recipients. They also simplify and redesignate certain existing Medicare regulations.

Court Proceedings: None

*****

Prospective Reimbursement for Dialysis Service and Approval of Special Purpose Renal Dialysis Facilities (published 5/11/83).

Summary: These regulations (1) establish a prospective payment method for maintenance dialysis furnished at home or in a hospital based or independent renal dialysis facility, (2) establish a mandatory monthly capitation payment for physician's services related to maintenance dialysis, (3) discontinue provisions for target rate payment for home dialysis and 100% requirement for home dialysis.

Court Proceedings: A suit is pending in D.C. District Court brought by National Association of Patients and Hemodialysis and Transplantation, Renal Physician Association, and Bio-Medical Application. The case has been briefed fully and is awaiting the

judge's decision. National Association of Patients & Hemodialysis & Transplantation, et. al. v. Heckler, Civ. No. 83-2210 (D.D.C.).

*****

Prospective Payments for Medicare Inpatient Hospital Services (published interim 9/1/83, final 1/3/84).

Summary: These regulations implement Title VI of the Social Security Amendment of 1983 which changed the method of payment for inpatient hospital services from a cost-based, retrospective reimbursement system to a prospective payment system based on diagnosis.

Court Proceedings: This rule has experienced a broad-based challenge to the method of determining base year cost and weight assigned to DRGs. These suits were brought in January by hospital providers who have not yet exhausted administrative procedures. In addition, a case was brought in January on behalf of those groups delivering labor/delivery room service seeking to have base year rate calculations redetermined. D.C. District Court.

*****

Department of Housing and Urban Development

One-Time Mortgage Insurance Premium, Amendment to Part 203 for Certain Single Family Morgtages Insured under the National Housing Act (published 6/23/83).

Summary: This rule established a new system for collecting certain single family mortgages which HUD insures under Section 203 of the National Housing Act. Under this new system, the borrower pays a single premium when the mortgage loan is closed so that lenders are not forced to collect and remit to HUD monthly installment mortgage insurance premiums.

Court Proceedings: None

*****

Department of Interior

1981-83 Migratory Game Bird Hunting Regulations (published 1981 thru 1983). Twelve final rules.

Summary: The Service established hunting seasons, daily bag and possession limits, and shooting hours for designated groups or species of migratory game birds in the contiguous United States, Alaska, Hawaii, Puerto Rico, and the Virgin Islands.

Court Proceedings: None

*****

Oil and Gas Leasing (Amendment Increasing Noncompetitive Fee) (published 1/20/82).

Summary: This rule increases the filing fee for a non-competitive oil and gas lease application from $25 to $75.

Court Proceedings: Thompson v. Watt, D.C. Circuit Court of Appeals, Docket No. 82-1528.

*****

Oil and Gas Leasing--National Petroleum Reserve--Alaska (published 11/9/81).

Summary: This rule outlined procedures for oil and gas leasing in the National Petroleum Reserve--Alaska--and instituted a competitive bidding system for awarding leases on lands in the reserve determined suitable for oil and gas leasing.

Court Proceedings: None

*****

Acreage Limitation (43 CFR 426) (published 12/6/83).

Summary: This rule established policies and procedures for administering acreage limitation and other provisions of the Reclamation Reform Act of 1982.

Court Proceedings: None

*****

Conversion to Hydrocarbon Leases (published 5/24/82).

Summary: Provides for procedures to connect existing oil and gas leases and valid claims to combined hydrocarbon leases in specified tar sand areas.

Court Proceedings: None

*****

Intergovernmental Review of Department of Interior Programs and Activities (published 1/14/83).

Summary: This rule revised DOI's program for coordination with state and local governments.

Court Proceedings: None

*****

Department of Labor

Suspension of Pension Benefits (published 12/4/81).

Summary: Section 302(a)(3)(B) of the Employee Retirement Income Security Act of 1974 (ERISA) sets forth the circumstances under which ERISA permits a retiree's pension benefit payments to be suspended by reason of the retiree's re-employment. The Department's "suspension of benefits" regulation, 29 CFR 2530.203-3(b)(5), states, as one of the suspension rules, that a plan may provide that an employee must either certify that he is unemployed or supply factual information sufficient to establish that any employment does not include service for which benefits may be suspended.

Court Proceedings: Bonner, et. al. v. Donovan CV-83-5413-LTL(BX) (D.D. Ca). On August 19, 1983, a lawsuit against the Secretary of Labor was filed on behalf of the trustees of the Retirement Fund Trust of the Plumbing, Heating and Piping Industry of Southern California (the "trust" or "plan"), seeking a declaratory judgment with respect to certain rules and policies of the trust relating to the verification of employment of retirees who may be ineligible for benefits from the trust by virtue of their post retirement employment. On two previous occasions, the Department's staff had opined that under the "suspension of benefits" regulation, the trustees of the plan would not be permitted to withhold the payment of pension benefits to a retiree due to the retiree's failure to comply with the trust's current verification of employment rules, which require the retiree to furnish annually the complete front page and signature page of his or her federal income tax return and, where earned income is claimed to be attributable to employment of the retiree's spouse, the W-2 forms of the spouse. At issue is whether the plan exceeded its authority by requiring the retiree to furnish all of that federal tax information. The Department is currently engaged in settlement discussions with attorneys for the plaintiffs.

*****

Suspension of Pension Benefits (published 9/30/81).

Summary: This rule deferred the effective date of regulation governing the circumstances under which pension plans may impose forfeitures of pension benefits due to employment activity.

Court Proceedings: Bonner, et. al. v. Donovan CV-83-5413-LTL(BX) (D.D. Ca). On August 19, 1983, a lawsuit against the Secretary of Labor was filed on behalf of the trustees of the Retirement Fund Trust of the Plumbing, Heating and Piping Industry of Southern California (the "trust" or "plan"), seeking a declaratory judgment with respect to certain rules and policies of the trust relating to the verification of employment of retirees who may be ineligible for benefits from the trust by virtue of their post retirement employment. On two previous occasions, the Department's staff had opined that under the "suspension of benefits" regulation, the trustees of the plan would not be permitted to withhold the payment of pension benefits to a retiree due to the retiree's failure to comply with the trust's current verification of employment rules, which require the retiree to furnish annually the complete front page and signature page of his or her federal income tax return and, where earned income is claimed to be attributable to employment of the retiree's spouse, the W-2 forms of the spouse. At issue is whether the plan exceeded its authority by requiring the retiree to furnish all of that federal tax information. The Department is currently engaged in settlement discussions with attorneys for the plaintiffs.

*****

Labor Standards Provisions Applicable to Contracts Federally Financed (not ever published).

Summary: This rule is authorized under Reorganization Plan No. 14 of 1950 and the Leland Act in order to coordinate the administration and enforcement of the labor standards provisions in the Davis-Bacon Act and the related Acts by the Department of Labor and the Federal Contracting Agencies.

Court Proceedings: Rule was enjoined by U.S. Court of Appeals before publication. (See Procedures for Determination of Wage Rates--Davis Bacon below.)

*****

OSHA Hearing Conservation Regulations (published 8/21/81).

Summary: This rule established the occupational noise standard and specifies elements of hearing conservation programs (such as requirements for monitoring employee noise exposure, annual audiometric testing for employees exposed above certain levels, and the guidelines for selection of hearing protectors).

Court Proceedings: Forging Industry Assoc. v. Secretary of Labor, No. 82-1232 (4th Cir.) The Forging Industry Association filed its petition for review on May 6, 1983. The National

Arborist Association intervened on the side of the petitioner. The parties and intervenor submitted briefs. The parties are awaiting oral argument; no date has been set.

*****

Procedures for Determination of Wage Rates--Davis Bacon (published 5/28/82).

Summary: This rule establishes procedures for determination of prevailing construction wages to be paid by federal government.

Court Proceedings: The Department issued its final rules on May 28, 1982. This rulemaking was challenged in a suit filed in the U.S. District Court for the District of Columbia (Building and Construction Trades Department, AFL-CIO, et. al. v. Raymond J. Donovan et. al.). In its decision of December 23, 1982 (543 F. Supp. 1282), the district court enjoined the following sections of the regulations: 29 CFR 1.3 (exclusion of Davis-Bacon construction in wage determinations); 1.7(b) (exclusion of metropolitan data in wage determinations), 1.7(d) helpers; 3.3 (b) (elimination of the requirement for weekly submission of payrolls by contractors); 5.2(n)(4), 5.5(a)(1)(ii)(A), and 5.5(a)(4)(iv) (helpers); and 5.5(a)(ii) and 5.6(a)(2) and (3) (Copeland Act requirements).

The Department appealed this injunction. By separate notice in the Federal Register of April 29, 1983, the Department implemented those provisions of the final rules to the extent permitted by the injunction and deferred the enjoined provisions until further notice pending the outcome of the appeal.

On July 5, 1983, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision largely upholding the enjoined provisions. 712 F. 2d 611. However, the appeals court held invalid one aspect of the helper regulation as well as the regulatory changes concerning the Copeland Act requirements contained in sections 5.5(a) (3)(ii) and 5.6(a)(2) and (3), which would have allowed contractors to submit weekly statements of compliance in lieu of payroll information on each employee.

On October 26, 1983, the Building Trades filed a petition for writ of certiorari in the U.S. Supreme Court for a review of the appeals court decision. On January 16, 1984, the U.S. Supreme Court denied the petition, thus permitting the Court of Appeals to issue its mandate lifting the injunction of those regulations which were upheld by the appeals court decision. Once that mandate is issued, and the district court enters a modified injunction, the Department will publish a Federal Register notice which will implement and announce the effective data of the regulations from which the stay will be lifted.

*****

OSHA Hazard Communication (published 11/25/83).

Summary: This rule required employers in manufacturing firms to implement a hazard communication program, including use of safety sheets, labels, and training.

Court Proceedings: United Steelworkers of America v. Auchter, No. 83-3554 (3d Cir.). Challenges based on issues including preemption, trade secrets, scope, specificity, and hazard determination procedures currently are being heard in eight Circuit Courts. Eight petitions for review of this standard have been filed in five circuits. The first petition filed is that listed above. The Secretary is taking action to transfer all cases filed in other circuits to the Third Circuit and to have the transferred cases consolidated. On the Secretary's motion, the Third Circuit has held the briefing schedule in abeyance pending transfer of all cases to the Third Circuit.

*****

OSHA Occupational Exposure to Lead (published 12/11/81).

Summary: This rule established a standard which would limit exposure to 50 ug/cubic meter and blood lead levels to 60 ug/100 ml.

Court Proceedings: United Steelworkers of America v. Auchter, No. 83-1022 (D.C. Cir.). The Steelworkers filed their petition for review of the stay on September 20, 1982, in the Third Circuit. The action was later transferred to the D.C. Circuit and consolidated with another petition filed by the Steelworkers which raised the same issues. Several interested parties intervened--the Battery Council, United Auto Workers, Lead Industry Association RSR Corp., ASARCO, and the National Association of Recycling Industries. The parties and intervenors submitted briefs and oral argument was held on January 18, 1984. The parties then submitted supplemental memoranda. The parties are awaiting the Court's decision.

*****

Occupational Noise Exposure, Hearing Conservation Amendment (published 3/8/83).

Summary: This rule supplements the occupational noise standard and specifies elements of hearing conservation programs (such as requirements for monitoring employee noise exposure, annual audiometric testing for employees exposed above certain levels, and the guidelines for selection of hearing protectors).

Court Proceedings: Chocolate Mfrs. Assoc. v. OSHA, No. 81-1210 (4th Cir.). The CMA filed its petition for review on March 13, 1981. The case was later consolidated with another challenge to the noise standard filed by the U.S. Chamber of Commerce. The American Iron and Steel Institute and the Forging Industry Association intervened. The briefing schedule was held in abeyance pending the Secretary's rulemaking on hearing conservation amendments. Following promulgation of the hearing conservation amendment, both petitioners withdrew their petitions for review. The petitions for review having been withdrawn, the case is closed.

*****

Service Contract Act Recordkeeping and Reporting Requirements (published 10/27/83).

Summary: This rule provides a method to determine the prevailing wages for services purchased by the federal government.

Court Proceedings: The Department issued its final regulation on October 27, 1983. This rulemaking was challenged in a suit filed in the U.S. District Court for the District of Columbia (AFL-CIO, et. al. v. Donovan, et. al.). On Friday, January 27, 1984, the Department received a favorable decision from the district court, upholding in all respects the regulations. The regulations went into effect on the same day. \They were originally scheduled to go into effect on December 27, but pursuant to agreement with the plaintiffs, the Department deferred the effective date until January 27.} The Department has been advised that an appeal of the district court's decision was filed in the U.S. Court of Appeals for the District of Columbia on or about February 1, 1984.

*****

National Science Foundation

Nondiscrimination on the Basis of Handicap in Programs and Activities Benefitting from Federal Financial Assistance (published 3/1/82).

Summary: This rule implements section 504 of the Rehabilitation Act of 1974, 29 U.S.C. 794, providing for non-discrimination against handicapped persons. Institutions receiving NSF support will be required to consult with handicap organizations, prepare a self evaluation plan, and correct practices inconsistent with NSF's rules.

Court Proceedings: None

*****

Office of Management and Budget

Controlling Paperwork Burden on the Public (published 3/31/83).

Summary: This rule implements the provisions of the Paperwork Reduction Act of 1980 concerning collections of information and is designed both to "minimize the federal paperwork burden for individuals, small businesses, state and local governments, and other persons" and "to maximize the usefulness of information collected by the federal government."

Court Proceedings: None

*****

Small Business Administration

Small Business Investment Companies (published 9/30/83).

Summary: This rule revised and reorganized regulations governing small business investment companies.

Court Proceedings: None

*****

Department of Transportation

Delay of Implementation of First Phase of the "208 Standard" (Passive Restraints) (published 4/9/81).

Summary: This rule delayed implementation of NHTSA's 208 standard to allow time for rulemaking to consider rescinding the standard.

Court Proceedings: Center for Auto Safety Petition dismissed due to late filing (D.C. Circuit).

*****

Rescission of NHTSA's "208 Standard" (Passive Restraints) (published 10/29/81).

Summary: NHTSA rescinded a standard that would have required all new passenger cars to be equipped with an air bag or other passive restraint for occupant protection.

Court Proceeding: The rescission was declared arbitrary and capricious by both the Court of Appeals and the Supreme Court.

State Farm Mutual Automobile Insurance Co. v. DOT, 680 F.2d 206 (D.C. Cir. 1982); Motor Vehicle Manufacturers Association v. State Farm, 103 S.Ct. 2856 (1983).

*****

Suspension of NHTSA's "208 Standard" (Passive Restraints) (published 8/29/83).

Summary: NHTSA suspended the 208 standard in August 1983 to allow time for rulemaking in response to a Supreme Court decision finding the agency's prior rescission of the standard arbitrary and capricious.

Court Proceedings: None. The Supreme Court vacated NHTSA's rescission of the 208 standard in Motor Vehicle Manufacturers Association v. State Farm, 103 S.Ct. 2856 (1983). In response, NHTSA decided to conduct further rulemaking.

*****

Metropolitan Washington Airports Policy (published 11/27/81).

Summary: This amendment revoked portions of the rule issued September 15, 1980 regarding the following aspects of National Airport operations: the number and types of aircraft operations, operation and scheduling hours, passenger number limits, noise levels, nonstop service parameters, aircraft equipment restrictions, and hourly operation allocation among different user classes.

Court Proceedings: City of Houston v. FAA, 679, F.2d 1184 (5th Cir. 1982), the Court rejected a challenge to the validity of the 1000 mile perimeter rule (i.e. nonstop service parameters). ATA and several carriers also filed lawsuits, but these were withdrawn voluntarily after discussions with FAA.

*****

Nondiscrimination on the Basis of Handicap (published 7/20/81).

Summary: This interim final rule eliminated the mass transit accessibility requirements of Subpart L of 49 CFR Part 27. The rule required that federally-funded transit operators instead make "special efforts" to provide transportation services for the elderly and handicapped. Subsequently, section 317(c) of the STAA of 1982 required DOT to establish minimum service criteria for providing accessible transportation. DOT issued a proposal implementing section 317(c) on 9/8/83.

Court Proceedings: Paralyzed Veterans of America v. Smith, C.D. Calif. Civil No. CV-79-1979-WPG, challenged the interim DOT rule. A request for preliminary injunction was denied.

*****

Part 581 Bumper Standard (published 5/20/82).

Summary: This rule replaces the 5 mile-per-hour automobile bumper standard with a 2 1/2 mph standard.

Court Proceedings: Center for Auto Safety v. Steed, pending before the D.C. Circuit, Docket No. 82-1782. Oral argument was held 12/5/83.

*****

Minimum Levels of Financial Responsibility for Motor Carriers (published 6/11/51).

Summary: This rule established the minimum levels of financial responsibility required for motor carriers of property operating in interstate or foreign commerce, and for motor carriers transporting hazardous materials in intrastate or interstate commerce.

Court Proceedings: National Tank Truck Carriers v. Lewis, 550 F.Supp.113 (D.C.C. 1982). Case dismissed due to lack of standing.

*****

Railroad Power Brakes (published 8/23/82).

Summary: This rule revised FRA's power brake regulations by eliminating or modifying five sections of 49 CFR 232.

Court Proceedings: None

*****

Design Standards for Highways and for Resurfacing, Restoring, and Rehabilitating Streets and Highways (published 6/10/82).

Summary: These rules permit states to develop resurfacing, restoration, and rehabilitation criteria. They replaced an earlier policy statement concerning federal construction standards and exemption granting.

Court Proceedings: Center for Auto Safety v. FHWA, D.D.C. Civil No. 82-2824. Case settled (dismissed without prejudice) after the STAA of 1982 and an FHWA policy statement addressed the issue the Center had raised.

*****

Driver's Log (published 11/26/82).

Summary: The Driver's Log is a daily record of working hours kept by an estimated 565,000 truck and bus drivers. DOT's rule provided considerable flexibility in format, eliminated several data requirements, and limited the record retention period for both motor carriers and drivers.

Court Proceedings: None

*****

Buy America Requirements--Surface Transportation Assistance Act of 1982 (published 9/15/83).

Summary: This "Buy America" rule specifies the conditions under which U.S. produced steel, cement, and other manufactured goods must be used for a project financed with UMTA (mass transit) funds.

Court Proceedings: None

*****

Amendment of NHTSA's Safety Standard No. 108 to Require a Supplemental Stop Lamp (published 10/18/83).

Summary: This rule requires a high-mounted, third brake light on the rear of all new passenger cars.

Court Proceedings: None

*****

Department of Treasury

Interim Regulation Related to Handicap Discrimination under the Revenue Sharing Program (published 10/17/83).

Summary: These regulations implement the prohibition against handicap discrimination, as provided in section 504 of the Rehabilition Act of 1973, as amended (29 U.S. Code 794).

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Section 504 was made applicable to the General Revenue Sharing program by its inclusion in the 1974 amendments to the Revenue Sharing Act.

Court Proceedings: Court order required the issuance of the final rule.

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U.S. Postal Service

Nine-Digit Zip Code Proposal (published 6/29/81).

Summary: This rule establishes an incentive for companies using the bulk rate mail program by allowing a discount for the use of a nine digit zip code.

Court Proceedings: None

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Mr. HALL. This list of 107 rules, a copy of which, as I say, I have included with this statement, does not include the major rules of the independent regulatory agencies. In fact, OMB estimates that if both types of agencies are considered, Congress would be required to act on 50 to 60 major rules each year. These rules cover many complex, often technical matters. For example, three of the major rules on the OMB list are: First, "1981 Wheat, Feed Grains, Soybeans, and Upland Cotton Determinations, Regarding Target Prices, Loan and Purchase Rates;" that is out of the Department of Agriculture; Second, "Iron and Steel Manufacturing Point Source Category Effluent Limitations Guidelines," EPA; and Third, "Variable Net Profit Share Bidding System for Outer Continental Shelf Oil and Gas Leases," out of the Department of Energy.

We must ask ourselves whether the Congress has the time and expertise to carefully consider this volume of rules each year.

A second practical consideration raised by the device is the question of accountability. Who would actually be responsible for a regulatory decision and how would the public know who is responsible? If the public does not know, how can it effectively participate in the rulemaking process? As stated by Assistant Attorney General Theodore B. Olson, and I am quoting:

> Moreover, instead of increasing the involvement of elected officials in decisionmaking, the practical effect of legislative vetoes is to impose an additional bureaucracy consisting of committee and subcommittee staffs over the existing agency bureaucracy. As a result, the process becomes even more mysterious and kafkaesque, intelligible only to lobbyists.

The second deals with legal considerations. The legal effect of a joint resolution of approval is that agency major rules are really just recommendations to Congress. They have no legal force and effect unless passed by both Houses and signed by the President. Under *Chadha,* an act of Congress which has the purpose and effect of altering the legal rights, duties and relations of persons

outside the legislative branch is, by definition, legislation, citing *Chadha*. If this conclusion is applied to joint resolutions of approval, such actions will be laws, and not rules. If this analysis is correct, there are considerable implications for the existing system of administrative law.

First, since the rule would really be a law, the only remaining legal challenge would be on the grounds of constitutionality. There is no requirement that Congress follow any particular procedures in deciding what laws to pass, and certainly that is the God's truth. [Laughter.] Thus the requirement of the Administrative Procedures Act might have no legal significance for major rules. As expressed in the CRS report by Frederick Kaiser, to which I referred above, and I am quoting:

> This feature, according to critics of its application to regulations undercuts the Administrative Procedures Act requirements for agency rulemaking. It arguably would make such standards moot, since agencies would no longer be promulgating rules but would become advisory bodies, issuing proposals for legislative action and eventually for public laws.

Even if the device included a provision which specifically preserved procedural challenges, I believe it unlikely that courts would overturn rules on procedural grounds such as whether a rule was an emergency or whether the rulemaking file was adequate, when those rules have passed both Houses of Congress and have been signed by the President. Thus in a very basic sense, a joint resolution of approval would work against recent efforts to make agencies more thoughtful and exact in making major decisions and, in fact, would operate to legally shield careless, inexact or superficial agency work.

There are a number of other legal questions raised by this device, examples being:

When would a major rule be ripe for judicial review, after the agency decision or after enactment of the resolution?

How would major rules be repealed or amended? Would an Act of Congress be required to effect this?

Since major rules would take effect only if adopted by Congress and signed by the President, what would be the legal consequence if an agency promulgated a nonmajor rule which was arguably major? Would the regulated party have to comply with the rule anyway?

What would happen if the time limit for approval ran out before Congress approved the rule or before the President signed it? What would happen if both occurred after this time limit? On those occasions, would the rule have any legal effect?

Finally, you have asked me to address the impact of both types of resolutions on court workload and de novo review. I believe the impact on either at this point is purely speculative. However, I would like to mention one area where workload would be increased, possibly substantially.

Because a joint resolution of approval for major rules means that an agency's promulgation of a major rule has no legal effect and force, the determination on whether a rule is major will be critical. If an agency decides that a rule is major, those who support the rule may seek judicial review to overturn that decision so that the Congress and the President will not have to approve that rule. If

the agency decides a rule is nonmajor, those who oppose the rule may seek judicial review to overturn the decision so that Congress and the President will have to approve the rule.

Not only will a multiplicity of cases ensue, but almost certainly because of the legal consequences of the Court decision, a court ruling will have to be made before the agency proceeds with that rule. This will not only delay the rule but also may force the courts to make these rulings on the expedited basis. That will certainly increase the workload of the already overburdened court system.

In conclusion, I would like to comment that I have mentioned only a few of the considerations raised by the proposed alternatives to legislative veto in area of agency rulemaking. From these few examples, I believe it is clear that the consequences of adopting these proposed alternatives should be carefully considered before we accept either approach.

I will be happy to answer any questions.

I would like to make this additional comment, Mr. Chairman, and I would like to refer to a presentation that you, the chairman of this committee today, made before the House Judiciary Committee on July 21, stating that Members should not immerse themselves in every item of agency regulation and adjudication, a task which this institution has no capacity to manage. Rather, individual situations should be met by measured representatives tailored to the particular circumstances.

Mr. Chairman, you further concluded that a long range strengthening of the Congress will require facing the need for major structural changes in congressional oversight techniques and the manner in which Congress legislates.

Thank you, Mr. Chairman.

Mr. MOAKLEY. Actually, a lot of your statements were things that I agree completely with. I think that many times we would be reversing the process, I feel, if we were to be riding herd on a lot of these regulatory agencies because we would not have the time to read these rules and regulations. We would have to hire more staff, and we would just be reversing. We would make them the legislators down there and us the regulatory agencies up here.

I just feel if Congress faced the issue squarely and when we were reporting out legislation, instead of weaving a lot of gray areas so that we can get the bill through committee, if we addressed it squarely and bit the bullet when we were writing the legislation so that not only would other Members of Congress know what we meant by that piece of legislation, the regulators would know what we meant by that legislation, I am sure a lot of our problems that we ultimately find ourselves in would be cured.

I think the joint resolution of approval is the way to go. I think that the Supreme Court decision made it perfectly clear that anything we did with any kind of legislative veto in it after that would not be looked upon with any degree of happiness by the Supreme Court. So I think we have to be very careful.

Yet, I do not think we have to throw every piece of legislation into turmoil that has a legislative veto in it. I disagree with the chairman of the full committee on this. He thinks that we got to go out and fix a lot of these things that we have done in the past.

I think a lot of them will iron themselves out, and I just think that we got to be very careful with any legislation coming forward after that Supreme Court decision came down.

The committee welcomes your testimony, and thank you very much for appearing this morning.

Mr. HALL. Thank you, sir.

Mr. MOAKLEY. The next gentleman I have the pleasure of introducing is a former colleague, held in great respect and esteem by the Congress, and when he was tapped for that nomination to serve on the U.S. Court of Appeals, we bid him adieu in a very sad way, and we are very happy to have him back this morning testifying on this very important issue.

The Honorable Abner Mikva.

STATEMENT OF HON. ABNER J. MIKVA, U.S. COURT OF APPEALS

Mr. MIKVA. Mr. Chairman, thank you. It is a distinct privilege to be here. I admit I do not feel quite as trepidatious as I used to feel when I came before the Rules Committee when some piece of legislation that I had nursed carefully through a committee was hinging by its threads as to whether there were enough votes in the committee to get it out. I am more relaxed. That is true about my general lifestyle. So I particularly welcome the opportunity.

Mr. MOAKLEY. You become more expert the further you get away from the Halls of Congress. [Laughter.]

Mr. MIKVA. If I may, I hope you will accept my statement for the record, and I would just like to summarize it.

Mr. MOAKLEY. Without objection the entire statement will appear in the record.

Mr. MIKVA. First of all, I very much want to associate myself with the remarks of my former colleague, Congressman Hall. I think he nailed down many of the points that I tried to make in my statement. With you, I doubt that there is any real question that a joint resolution, a real joint resolution, would be held constitutional.

Now, if sponsors are talking about a joint resolution that bypasses the presentation clause, then, of course, you are back in the same bind.

Mr. MOAKLEY. You would not have a joint resolution if it bypassed the presentation clause.

Mr. MIKVA. Right. It is a two-House veto, and that would run just as afoul of *Chadha* as the one-House veto. But if you are talking about a joint resolution, I do not think there is any question that it would pass constitutional muster; in that sense, if Congress really did use the joint resolution process to approve every major rule of the agencies, I might get my golf handicap down to a very low number because that would remove just about all of the judicial review that now exists.

We do not, and I repeat emphatically, we do not review the procedures by which Congress handles its own processes. There are some very firm, established constitutional doctrines, judicial doctrines—such as the enrolled bill rule and the journal entry rule—which say that if Congress has passed a law and it has been signed by the President, we do not go back behind it to see whether you

gave the witnesses due process or whether you heard all the evidence.

I think whatever complaints may be made by my branch of government, we do understand the primacy of the legislative branch. I cannot resist telling an anecdote about my court. Not too long ago one of your colleagues complained about the manner in which Speaker O'Neill had allocated the slots on this committee, as a matter of fact, as well as the Ways and Means Committee and the Appropriations Committee, complaining that the Speaker had not followed the mathematical ratios that were established by the last election.

The counsel for your colleague got very wound up in trying to say why the court should set the Speaker straight and he waved his fist at the panel and he said, "We want this court to tell Speaker O'Neill that he has to be fair, that he cannot do things like that, that he has got to follow the mandate of the people."

One of my colleagues leaned forward and said, "Is there anything else you want us to tell the Speaker while we are at it?" [Laughter.] It should not surprise you to know that the court declined to exercise that invitation.

So the good news is that you would reduce substantially the amount of judicial review. The bad news is that it would, as you pointed out, Mr. Chairman, totally upset the administrative processes as we know it in this country.

I do not think that the Congress could meaningfully exercise that kind of reviewing authority to decide when a major rule should be approved and when it should not.

Mr. MOAKLEY. I think what we would have to do, Judge, is that we would have to get the people down at the regulatory agency and put them on our congressional payroll so they could give us the advice.

Mr. MIKVA. Absolutely.

Mr. MOAKLEY. We could just be changing hats.

Mr. MIKVA. You would be changing hats. I voted, and I suspect you did, too, Mr. Chairman, I voted to exercise the legislative veto in the *Chadha* case. I was a Member of the House then. I went back and looked at the Congressional Record for that day.

Mr. Chairman, for the life of me, I cannot remember why I voted to override the decision of the administrative law judge. Even after someone has explained it to me since, I am still not sure why I did it; I suspect why I did it was because the chairman of the subcommittee of the judiciary committee came to the floor—and there were probably a half a dozen people present on the floor—and he said this is important that we vote this way to exercise our appropriate authority and jurisdiction; when the rest of us came onto the floor from our committees or offices or wherever we were when the bells rang, someone was standing at the door saying vote aye, and if it was a bellweather that we trusted, we voted aye.

Mr. MOAKLEY. I am always impressed with the people who are explaining legislation from afar in telling what the legislative intent was when people on the subcommittee and the committee sometimes do not know what the legislative intent was.

Mr. MIKVA. That is right.

Which is why I might say I really do think now as a matter of policy, if not as a matter of constitutionality, that there were excesses to the way that the Congress used the legislative veto, and I think *Chadha* was one. That looked so much like a judicial proceeding; it looked very much like Congress was ex post facto and post hoc and without anything resembling due process interfering with an individual's rights to stay in this country and saying, "Get out." That is something Congress should not do, and I think the courts probably exercised the appropriate constitutional judgment in saying you should not.

I wish they had limited their decision to the facts at hand. Unfortunately, as Justice Powell said, they painted with a very broad brush and they may have thrown out a lot more than is necessary.

Mr. MOAKLEY. I am convined, too, Abner, that the court on other occasions has sidestepped even addressing the legislative veto because I do not think they wanted to tackle it. It is my belief that the reason they did come in with a broad brush and jumped into the middle with both feet is because of the veto legislation was speeding through the Senate and the overwhelming number of Members that were on the generic legislative veto which, again, is a different situation than addressing each piece of legislation on a case-by-case basis and then determining whether a legislative veto should apply rather than just giving the legislature a broad generic legislative veto which I think throws the whole process out of whack.

Mr. Mikva. I think you put your finger right on the problem. One of the reasons that I have reluctantly declined to sit on any of these cases is that I was part of a dog and pony show with Congressman Levitas—as you recall, he was one of the sponsors of generic veto legislation—I was one of the opponents, and I kept expressing the same concern that you are now expressing that we were taking a good idea that maybe should be used very, very selectively and trying to apply it to all agency rules. It just made no sense.

I would hope that as Congress addresses the problem that has been created by *Chadha* that they exercise their options very selectively. I think that the worst thing of all would be to subject all major rules of all agencies generically to some kind of congressional review.

First of all, the notion that Congress has been rendered totally impotent by *Chadha* is just nonsense. The first and foremost power of the Congress is the oversight function, and it is exercised in thousands of ways.

I have always found it amazing how an appropriate committee—I was going to say Appropriations Committee, but it does not even have to be the Appropriations Committee—an appropriate committee can very much get the attention of an agency when it really wants to.

If they make it known to the agency, whether it is the Federal Trade Commission or the Internal Revenue Service or whoever that Congress is looking very closely at their procedures and their actions, you do not need a legislative veto to get that agency to start comforming to its mandate.

As you pointed out, if Congress will do its job better in the first place and be more specific in the mandate they are handing down, most bureacrats, most agency officials are not looking for ways to spite Congress or to thwart the will of Congress.

When you send them a broad message saying to love justice, do mercy and walk humbly with their God, they obviously are not going to know very much of what you had in mind and they are going to do the best they can.

Mr. MOAKLEY. Especially if it is said through the Appropriations Committee, they would walk a lot more humbly.

Mr. MIKVA. They certainly do walk humbly there.

I think that in the long-run, the continued exercise by the Congress of its discretion in looking at what the agencies are doing and applying individual judgments to individual pieces of legislation is a much better way of getting at this problem than any kind of generic approach, particularly since we do so much in this country by administrative law. It is a fourth branch of government whether we like to admit it or not.

We could not begin to run the complicated agencies, the complicated functions that the Congress has decreed should be run, if it were not for the administrative agencies, and we can talk about the pointy-headed bureaucracy all we want; without them there would be no government.

It seems to me that for Congress to now say, "Well, we are going to take back all that power and exercise it ourselves," is not realistic. I have not noticed the tremendous amount of spare time that Members of Congress have that they need to fill up with reading some of these complicated rules that Congressman Hall put in the record.

Mr. MOAKLEY. You can just imagine, too, a Member having some real undue pressure brought to him from some big corporation that has been adversely affected by a decision, whether rightfully or wrongfully, and the impetus if this gets on the floor, and because of the expedited procedures, you are, in effect, taking the gavel away from the Speaker, and some of the life and death matters would be put on the back burner to settle some kind of a regulatory proposal that just came out of one of the agencies.

Mr. MIKVA. It would be government by loud minority I am afraid. Whoever could make a lot of noise to an individual Member or a small group of Members could, in effect, carry the day, and that is not the way we want the government to run, and that is not the way the agencies run it.

There are elaborate protections, for instance, on the agencies to see to it that in their adjudicative process, when they are doing rulemaking and adjucations of this kind that they are protected from ex parte contacts, and all the kinds of things that not only are permitted but accepted as a part of the way that Congress does its work when Congress is dealing generally. I love that quote that Justice Powell used in his concurring opinion in *Chadha* in which he reminded you all that Chief Justice Marshall said that Congress' job is to deal in the large problems of the day—I am paraphrasing; Chief Justice Marshall said it much more eloquently. Congress does its job when it writes with a broad pen. The lesser

tasks should be allowed to others. I think that is certainly true of the specific rules.

I hope that when all is said and done and when Congress exercises its discretion, Congress will continue to act as the first branch of government, whether it passes some specific responses to *Chadha* or not.

Mr. MOAKLEY. No one needs to say that some people feel that Congress is almost impotent because of this rule and regulation. I can recall when I was in the field of practicing criminal law before I came to Congress, and when *Mapps* v. *Ohio* first came in where they did away with illegal search and seizure. Well, you would think that you took the badge and club and uniform away from the police department. They felt they would never be able to make an arrest because now they had to get a warrant before they broke those doors down that they had been doing for years.

I agree. I think that many of the things that probably carry a legislative veto that has been nullified by the Supreme Court I am sure will never be tested. The War Powers Act. What do we do? Dispatch an ambassador to some foreign country and then declare war and have him test it to see if the War Powers Act worked? I do not know how you do that.

But I think some of the Members have become a little too concerned with trying to go back into history and rectify some of the bills that carry legislative vetoes. I think on a case-by-case decision as they some up, that will all be taken care of.

Mr. MIKVA. Let me add, Mr. Chairman. I was delighted that, in your opening statement, you commented on the more intelligent use of the severability clause. I think that is a tool that Congress has not used for 200 years or almost that long.

Mr. MOAKLEY. That is right. If we just say that this is severable——

Mr. MIKVA. Or this is inseverable. For instance in *Chadha,* you could have gotten exactly the result you wanted simply by saying that if this portion that delegates the power to an administrative law judge is deemed unconstitutional, the whole delegation is inseverable.

Mr. MOAKLEY. That none of this is severable so it comes back to the Congress.

Mr. MIKVA. So it comes back to the Congress, and nobody has the authority to suspend. So I would hope that again the ingenuity of this institution is much greater than some of its critics or even some of its Members recall.

Mr. MOAKLEY. Well, coming from you I appreciate it very much. Thank you very much. Thank you for appearing before the committee.

Mr. MIKVA. Thank you.

[Mr. Mikva's prepared statement follows:]

STATEMENT OF
U.S. CIRCUIT JUDGE, ABNER J. MIKVA
DISTRICT OF COLUMBIA CIRCUIT
BEFORE THE
RULES COMMITTEE OF THE U.S. HOUSE OF REPRESENTATIVES
MARCH 21, 1984

Mr. Chairman and Members of the Committee, I appreciate the opportunity to join in this most important dialogue involving a fundamental structure of our government. Whether one agrees with all that Justice Powell said in his concurring opinion in Immigration and Naturalization Service v. Chadha, it is hard to fault his concern about the Supreme Court's use of a very broad brush to decide the case. As he put it, "The breadth of this holding gives one pause."

I had so freely expressed my own views on the use of the legislative veto when I was in Congress that I have not sat and will not sit on a case involving this issue that has or may come before my Court. So I claim that I have retained my right to express my views. First, I think that Congress did make excessive and unconstitutional use of the legislative veto in the rash of laws passed in the last 15 years. Second, I think the Supreme Court wrote with an overly broad pen in Chadha, depriving Congress of more authority than was warranted. But the sweeping language of Chadha does not justify engraving an equally sweeping and fundamental change in the system of government that has served us so well so long. I believe that Congress can reclaim much of its lost turf without drastic changes in the way Congress does its work.

The post-Chadha impotency of Congress in this arena is grossly exaggerated. Let me give you one example. You will recall that in Chadha, when the Court found the legislative veto constitutionally invalid, it went on to find that the legislative veto clause was severable from the grant of authority to the Immigration and Naturalization Service to suspend deportation in the first place. Suppose Congress had

specifically said that the clause was inseverable from the grant of authority. The result sought in Chadha specificially -- denial of the suspension of deportation -- would have been achieved.

In many cases, this will indeed throw out the baby and the bathwater, but there are so many variations on this theme -- particularly by creative use of the appropriations powers of Congress -- that I think courts will be hard-pressed to uphold a full application of Chadha.

There are other remedies being discussed. My colleague, Judge Stephen Breyer, who formerly toiled so ably in the vineyards of the Senate Judiciary Committee and who has testified before this Committee, has suggested a "fast-track" procedure, whereby Congress would "confirm" the exercise of executive action in a routine "fast-track" confirmatory action that would in fact be a legislative enactment presented to the President. If Congress chose not to confirm such executive action, i.e. "veto" the action, there would be a derailment from the fast-track by either House, and the "veto" (or "non-confirmation") would be effected.

Professor Larry Tribe has suggested all of the above alternatives as well as analogies to federal rules procedures, which he calls a "report and wait" mechanism. Bills have been introduced in both Houses which would codify the "report and wait" procedure as to all significant agency rules, and utilize the "fast-track" approach to oversight such rules.

There are difficulties with these proposals. The so called "fast-track" proposal would in effect preclude the agency from adopting any rule, or at least any significant rules. The agencies' sole power would be to "recommend" such rule for approval as a separate piece of legislation. The basic premise of administrative law has always been that Congress has neither the expertise nor the time to do all the rulemaking necessary to achieve a desired public goal. That premise is destroyed if Congress insists on keeping total control over rulemaking. Such a proposal also contemplates some drastic reviews of the parliamentary procedures of both

House and Senate. While such changes could be made, both bodies are understandably reluctant to tinker with their operating mechanisms. The House particularly needs the discipline of the present procedures. Any automatic bypassing of the Rules Committee and other screening devices could cause serious problems.

Let me emphasize that the so called "fast-track" solution entails the actual passing of a bill by both Houses and its presentation to the President for approval. Any joint resolution seeking to bypass the President would raise questions identical to those involved in the Chadha case. In other words, under the reasoning of the majority opinion, a two-house veto would not fare any better than a one-house veto.

Whatever the alternatives that Congress devises, I hope that the great policy debate that was ongoing when I left the most powerful branch of government is not put aside -- simply to joust with the Chadha case. There were excesses to the use of the legislative veto -- as a matter of policy and wisdom, if not as a matter of the Constitution. I voted to override the INS in the Chadha matter, and for the life of me I cannot tell you why -- even after I reread the Congressional Record for the day on which the House of Representatives "vetoed" a quasi-judicial decision by an Administrative Law Judge who first decided, on a factual basis, that Mr. Chadha should not be deported under the applicable legal standards. Congressional intervention in that kind of proceeding is exactly the kind of legislative veto that should not be sought nor used, whether constitutionally available or not. Indeed, it "looks like" Congress seeking to overturn a judicial decision, not as a precedent, not as a decision of legislative policy for the future, but as a retroactive, ex-post-facto judgment about an individual's rights under the law. Whether constitutionally permissible or not, those are the excesses to the legislative veto which Congress should avoid. One might have wished that the Court had limited its decision to such a narrower scope. One can hope that such a narrowing may yet occur.

I would hope that the Congress would act less precipitously and less sweepingly than the example that was set for you by my branch of government. Maybe there should be individual "report and wait" and "fast-track" approaches for some agencies and some rules. Maybe some concerns can be accommodated through judicious use of the severability clauses, or of the appropriations power. In any event, the fabric of administrative government and administrative law is so complex and sensitive to big changes, that I hope the Congress acts deliberately. The ultimate power is yours, and the policy judgments are yours to make. But there is an incredible amount of government necessarily and properly performed by executive agencies. The remedial measures that Congress takes can have a tremendous impact on how we all perform.

Unhappiness with the performance of some administrative agencies is not a new event. From the time the Interstate Commerce Commission was first created, Congress has sought ways to make the agencies carry out their statutory mandates more faithfully and more effectively. Recently, proposals have been made to require de novo review in the courts of all agency actions. I doubt that my branch of government could be very useful in that role. Again, the basic premise underlying the creation of administrative agencies was the need for a body of specialists-experts to adminster a statutory mandate. While judges sometimes claim great expertise, we are generalists, not specialists. For the same reasons that Congress cannot do the rulemaking, courts cannot do the rulemaking.

Whatever control rods are fashioned by the Congress that either replace or partially restore the legislative veto, the most important control Congress has is its oversight function. If the agency is not carrying out its mandate in any fashion, Congress can create a new agency or a new mandate. Sometimes it is amazing how fast a agency can respond when Congress indicates that it is giving its full attention to the performance of that agency. Justice Powell quoted Chief Justice Marshall about the need for Congress to perform as generalists: "It is the peculiar province of the legislature to

prescribe general rules for the government of society; the application of those rules would seem to be the duty of other departments." Oversighting is the best example of Congress performing in the manner that Chief Justice Marshall thought proper.

The options that Congress has available to remedy the excessive sweep of Chadha are numerous. The Constitution does not list Congress as the first branch of government by accident. I hope you exercise your options selectively.

Mr. MOAKLEY. I see Hon. Thomas N. Kindness has arrived. Mr. Kindness, once again, thanking you for making yourself available. I know that you worked firsthand on this matter for many, many years.

STATEMENT OF HON. THOMAS N. KINDNESS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. KINDNESS. Thank you, Mr. Chairman. As young as I am, I do not know that it could be so many.

Mr. MOAKLEY. Well, everything is relative. [Laughter.]

Mr. KINDNESS. I certainly appreciate the opportunity, Mr. Chairman, to, again, participate in the subcommittee's deliberations about the matter of the interaction between the legislative and executive branches and independent agencies with respect to rulemaking.

I am hopeful, as I am sure many are, that your hearings will result in a thoughtful and reasoned legislative response. As you requested, I will focus comments today on the effects and ramifications of the various legislative review mechanisms which have been put forward since the *Chadha* decision.

Increasingly, in recent years, agency rulemaking has been challenged in the various courts of appeals. Today almost every rulemaking of major import is appealed, and the appeal process has become a part of the rulemaking process. I think it may be useful to look at the causes of this development before considering the effects of new legislation on the judicial system.

Naturally, I think that a different point of view would be reflected from the judicial branch, but looking at it from the standpoint of the legislative part of our Government, it appears to me that informal rulemaking is, of course, the process utilized by the executive branch and independent agencies to produce regulations having the full force and effect of law. Hopefully, such regulations should reflect congressional intent and should be no more nor less extensive in their coverage of subject matter or persons than was intended by the Congress. An obvious reason for judicial involvement in rulemaking is to resolve the question of whether a rule is consistent with legislative intent.

Some have suggested that the *Chadha* decision will somehow force the Congress to be more specific in its enactments. While I would certainly agree with and laud any efforts for Congress to be more specific in its enactments, thus lessening the discretion of agencies and the opportunity for judicial involvement and eliminating the need for a congressional veto, perhaps, in the ultimate, while I strongly encourage more precise and explicit language in statutes, I am not confident that significant drafting improvement will really come about. This is so because the Congress, as we know, as a legislative body, naturally turns to less than exact language in many cases in order to gain compromise on, or passage of, controversial measures. I do not think it will ever be any different or substantially different. More than careful drafting would be required to overcome the loss of the legislative veto.

Another reason for the great presence or greater presence of the judiciary in rulemaking is the increasing complexity of the rules that are involved and the consequent need for more complete record to substantiate those rules. The procedures are becoming, in effect, more and more precise and more court-like in terms of how those rules are arrived at.

Here we find the required procedure in the Administrative Procedure Act being significantly supplemented by court-made law simply because Congress has not updated the Administrative Procedure Act to keep pace with the growing complexity and volume of rulemakings. This is an area in which I believe that Congress can act decisively. I commend the chairman of the Judiciary Committee's Subcommittee on Administrative Law, Mr. Sam Hall, who has testified here this morning, for his continuing efforts to find a workable bill to bring the Administrative Procedure Act up to date. I certainly am attempting and could continue to attempt to work with him and his staff to devise such a bill, but until we put into the statute clear and complete procedural requirements for rulemaking, the proliferation of court decisions on the current law will frustrate our efforts to regain control over rulemaking, I think.

All of this is necessary as a preface to my comments on the specific questions upon which you requested comment today. It is my belief that unless we understand where the conflicts between the Congress and the courts arise and act to circumscribe by law what elements of rulemaking are reviewable, our efforts to respond to the *Chadha* decision will be fruitless.

If we assume no changes in the Administrative Procedure Act, and that may be a realistic assumption, let us now examine what effect a joint resolution of approval would have and what effect failure to disapprove a rule would have on judicial review. First, and perhaps most significantly, we know that the courts, and not the Congress, will determine what effect these procedures will have. I am afraid that my opinion on the specific effect of the procedures would be just that, an opinion. Having said that, there are several fairly well established rules of construction which the courts would likely apply. First, in the case of joint resolutions of approval, the presumption of validity of a legislative enactment would restrict significantly the scope of judicial review.

The *Chadha* decision is based on the premise that there is only one way to effect legislation—bicameral passage and presentment

to the President. Therefore, any procedure devised by the Congress which uses bicameral passage and presentment to approve regulations is, in fact, legislation. As such, it would be subject to the same rules of judicial review. The basic rule of statutory construction of legislative enactments was expressed by Supreme Court Justice Bushrod Washington in 1827, saying:

> It is but a decent respect to the wisdom, integrity and patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond a reasonable doubt.

That is in *Ogden* v. *Saunders* at 12 Wheat. (25 U.S. 213.)

Mr. Chairman, I would but that the courts saw it that way today.

Thus, there would not, in the case of congressional approval resolutions, really be historically any inquiry permitted in the method, reasoning or basis for regulations so approved, as there is with current agency promulgations.

On the other hand, although it is risky to forecast what the courts will do, failure to disapprove a rule should be given little weight by the courts. In such a case, the current review of the rulemaking process would continue, for failure to disapprove is not much different from the current situation, where Congress has an inherent ability to enact legislation to overrule or overcome agency rules.

All the foregoing assumes no changes in the Administrative Procedure Act, however. Congress has the ability to change that act and to delineate the scope of permissible judicial review. I think the Congress should exercise that power and that responsibility. Congress could enact presumptions of validity, standards of review and even prerequisites to judicial review. I believe we should carefully examine and then express our intentions with regard to the judicial review in any reforms that are enacted.

I would think, Mr. Chairman, that we could establish a process such as the chairman and I have discussed on prior occasions in order for the Congress to respond to the present situation, a joint committee or perhaps simply a special House committee with perhaps comparable action being taken on the other side of the Hill to review major rules, those numbering somewhere between 50 and 100 per year, depending upon how you measure major rules. Some have estimated that it may be 150 a year. I think the lower end of the scale is probably a little close to right in the last 2 or 3 years. The higher end of the scale was probably more appropriate 4 or 5 years ago when activity in rulemaking was at a higher level.

But it would seem to me that, as has been discussed previously, a small staff of a joint or special or select committee could easily analyze the number of rules that are contemplated and confer with the committees of substantive jurisdiction within a reasonable period of time to deal with those major rules.

It would not be necessary for the congressional review to repeat the complicated and detailed analysis that would be done by the agency prior to promulgation of the rule. It would be sufficient to check the rules based on five criteria which, I believe, should be of concern to the Congress, No. 1, whether the rule is arbitrary or capricious; No. 2, whether the rule is in conflict with or duplicative of other rules; and No. 3, whether the costs or burdens of the rule are

unreasonable in light of the results proposed; No. 4, whether the agency has complied with the procedural requirements in promulgating the rule; and No. 5, perhaps most important, whether the agency has correctly implemented congressional intent and not exceeded its authority.

Mr. Chairman, it would come as no surprise to you, I suspect, that I believe that those criteria could be and would be applied by a committee to review rules much more accurately and effectively than would those criteria be applied by the committees having substantive jurisdiction and sort of a paternal interest in the agencies and the programs from which these rules emerge.

Finally, let me turn to the question on the effects of the various propcsals on de novo review in the courts. Here again, at the risk of being repetitive, the reason for the increasingly wide scope of judicial review of rules to the point of de novo review stems largely from the ambiguous and outdated provisions of the Administrative Procedure Act. I am convinced that improved procedural requirements can reduce de novo review in themselves. In addition, it is fully within our power in the Congress to give explicit instructions to the courts on the scope of judicial review in the provisions of an administrative procedures revision bill.

If used very widely, I am unsure about what limitations should be placed upon the scope of judicial review, but I think that is an area in which the legislative part of our tripartite-type government needs to draw itself together and to assure, on a long-term basis, that the proper role of representative government is performed in the legislative branch.

That is with all due respect to the judicial branch; but its function is, I think, in the view of many in the Congress, over-expanded in recent years in this rulemaking area, and in fact, judicial review has become a part of the rulemaking process itself.

I thank you, Mr. Chairman.

Mr. MOAKLEY. Thank you very much.

I do not know how many years it was ago that you and I sat down with the intent to do something on a select committee or a special committee which I think is needed today as much as we thought it was needed 3 or 4 years ago when we had that initial conversation.

I think that kind of a select committee to deal with major rules also could be the place where distraught or upset Members could go with their complaints, and I think also it would have the carrot-and-stick effect on the regulatory agencies that they would know that there was somebody up there that specifically is looking at them, and anytime they had a major rule I am sure they could check with the committee so that it does not come to that Draconian legislative veto that so many people like that was either yes or no and not get back to the drawingboard and let us fix this or let us fix that.

So I think that maybe one of the ways out of this thing is our joint idea that we had, whether it be a joint or House select committee to look at the rules. But having said that, I just do not feel—I do not know how much of the conversation you heard with Judge Mikva, but I just do not feel that the Congress has lost a great tool. I think we can work within the directives of the Su-

preme Court, and I think that we just got to be more careful in the way we spell out the legislation.

I agree with you that many times it is made very nebulous in order that we can get the bill through the subcommittee and get it through the committee and get it on the floor because of certain factors that I do not want to really make that a capital, and I will just keep it a small "1" and let people think what they want about it.

But I still think that we do have a message to be more precise in our legislative process and not give OSHA, for instance, the mandate to go out and write rules and regulations so that we can have a safe working environment. God knows what you can do with that.

Again, I want to thank you for your testimony before the committee. I am sure I am going to be working very close with you on some of these other proposals that may spring up as a result of these hearings.

Mr. KINDNESS. Thank you very much, Mr. Chairman. I appreciate your interest.

Mr. MOAKLEY. Congressman Wheat has joined us. Do you have any questions?

Mr. WHEAT. No, Mr. Chairman.

Mr. MOAKLEY. Tom, thank you once again.

Mr. KINDNESS. Thank you.

Mr. MOAKLEY. Our last and final witness is Prof. Harold Bruff from the University of Texas Law School.

Professor Bruff.

STATEMENT OF PROF. HAROLD H. BRUFF, UNIVERSITY OF TEXAS LAW SCHOOL

Mr. BRUFF. Thank you, Mr. Chairman.

If you prefer, I will submit my written statement for the record and speak more informally about some of the high points in the testimony.

Mr. MOAKLEY. Without objection, the statement of Prof. Harold Bruff will appear in full in the record.

Mr. BRUFF. Mr. Chairman, as we all know, the legislative veto was used in a very wide variety of disparate contexts by Congress, everything from the War Powers Act to important areas of regulation to the deportation decision involved in *Chadha*.

The Supreme Court's decision striking it down does, I believe, strike down all variants of the veto. It is, I think, too dead a horse to ride any further. Congress seems to feel some temptation to replace so widely available a tool with a widely available, widely applicable substitute such as those involved in the two bills under consideration here, directed, of course, only to regulation.

At the outset, I think that a generic response to *Chadha* is not necessarily called for on Congress' part because, as the prior speakers have emphasized, Congress does have the necessary tools of oversight. I do not think that the loss that was suffered in *Chadha* goes to the heart of Congress' capacity to control the agencies.

There is, though, before you, the question of whether a case-by-case approach to statutory delegations that had the legislative veto

should be used or whether you should do a generic substitute such as in the bills. A couple of thoughts on that. One is that, as your opening statement remarked and as the other speakers have emphasized, Congress, in attaching legislative vetos, often made a very casual addition of a severability clause without carefully thinking whether they really would care to have the rest of the statute enforced should the doubtful provision on the legislative veto be stripped away.

Mr. MOAKLEY. That is because that boilerplate was so easy to slap in, take it from another bill and just put the same language in there.

Mr. BRUFF. Absolutely, and the more the language started to look familiar the less effect it would have. Well, there it is now out there tempting the courts to decide—as they did in *Chadha*—what portion of a statute is now left. If the courts go about the business of deciding the severability cases without further communication from Congress, they are going to have quite a bit of discretion that one might not especially care for them to have in touching up statutes which now have holes blown in them by loss of a legislative veto.

So I do think Congress has the need to go back over those statutes and decide what it is you care to do, and that would be a natural time to decide whether to do at least some experimentation with the kinds of devices that we have been talking about here, a joint resolution of approval, a joint resolution of disapproval.

I think it is clear enough that either of those techniques is fully consistent with the mandate of *Chadha*. They meet the presentation clause. They are statutes. Indeed, as everyone prior to me has emphasized, the central difficulty with the joint resolution of approval is that it may seem to be a statute for all purposes, something that I would like to address in a moment.

But before I get there, I would like to say that in looking over the various kinds of statutes that have had legislative vetos, the contexts are so disparate that I should think Congress would want to consider using one technique in some places and the other in the other. Perhaps in some sensitive contexts such as War Powers, foreign arms sales, you might wish to use joint resolutions of approval when you might have already decided that they were not the thing to use for regulation so that a case-by-case approach might well be the way to go.

There is, from the standpoint of our inquiry here today, a problem with that approach. A thousand flowers may bloom—as they already have started to in the action of some committees attaching legislative veto substitutes to bills. The Consumer Products Safety legislation is just one example.

So that what Congress could wind up doing, going case-by-case and looking at the old legislative veto statutes, is encountering more of a burden by episodic reform than it really could perceive in any one case.

Therefore, in the generic ideas that are in the bills today there is surprisingly the capacity for Congress to hold the burdens on itself down, depending very much on what technique you use and how you control it.

For example, if the attempt is only to apply joint resolutions to major rules, that will hold down the number that you see per year, although, as everyone has said this morning, the burden is intimidating to anyone.

A couple of major points on the relationship with the courts of the joint resolutions. I think there ought to be no trouble in marrying congressional review by resolution of disapproval with judicial review, because the Supreme Court in last term's passive restraints case, the *State Farm* case, said unanimously that congressional action short of legislation, consideration of a legislative veto in that case, would not ratify an agency action in some fashion that would affect——

Mr. MOAKLEY. Excuse us.

The CHAIRMAN. Thank you, Mr. Chairman.

I want to thank my distinguished colleague here for carrying on and conducting this hearing. I was at another hearing.

You go right ahead.

Mr. BRUFF. Mr. Chairman, I was just starting to remark on the relationship of congressional review and judicial review for both joint resolutions of disapproval and resolutions of approval of regulations, and I was saying that I think that there is no serious problem in dealing with relationships with judicial review if the technique is the joint resolution of disapproval, because if the resolution passes, the rule is voided and there is nothing left for judicial review. If it fails, the Supreme Court has said unanimously in a case last spring, the passive restraints case, that congressional review that does not eventuate in legislation does not ratify an agency regulation, rejecting a court of appeals opinion that had said it had that effect.

So I think that if you consider a joint resolution of disapproval but do not pass it, you will not have ratified the agency action.

My fear, however, is that this is where clarity stops, and I share the difficulties that everyone this morning had, Mr. Hall, Judge Mikva, Mr. Kindness, with the legal effect of a joint resolution of approval.

All of them said, correctly in my view, that if a joint resolution of approval is treated as the equivalent of statute for all purposes, then the courts will accord it constitutional review only, all of them emphasizing that the courts do not review what underlies your process of legislation. If the approval resolution were then treated as a statute for all purposes, the courts would not look at the rule or the administrative record underlying it, because, it would simply be in the nature of a recommendation to you and would have only that status.

In my written statement, I tried to spell out an argument that would differentiate joint resolutions of approval from ordinary statutes. Indeed, you are thinking of them in a different way from ordinary statutes because the agency would set your agenda by the rule it decided to pass. It would come through Congress on a fast track and a closed rule, I presume. So it would be an up or down, quick decision. It would lack the guts of legislation which is the plenary "what should we add, what should we not," free-wheeling consideration that is the soul of congressional action.

So maybe we could decide that it meets the presentation requirements but it is some sort of a junior grade statute which could then be allowed to ratify the agency rule but not codify it. The difference is between enacting the agency rule into legislation and simply deciding that it was valid, if consistent with judicial review. Maybe the courts would honor that differentiation.

In my written statement, I spelled out in greater length why it is I think they could because it is theoretically distinct from what the courts review when they review legislation.

But I can promise you one thing. I do not know whether the courts would accept that theory and no one else can know either. There is at least the potential that joint resolutions of approval would be treated as statutes by the courts and would thereby disable judicial review, producing a new loss of control over the agencies.

For that reason, if joint resolutions of approval are to be used, I would strongly urge a limited period of experimentation to see what happens so that we do not have another *Chadha* event when a single Supreme Court decision throws into jeopardy at least many and perhaps the hundreds of statutes that *Chadha* did.

One other point before I ask for your questions. I would like to address a point that Mr. Kindness has made here and in his earlier testimony or rather in his earlier colloquies on the Administrative Law Subcommittee, and that is the nature of a review committee.

I agree with what Mr. Kindness said this morning to the effect that Congress can obtain some real values in using a review committee that is more broadly based than the legislative committees that oversee ordinary regulation. The analogy I would suggest to you is to your budget process. The budget process has had its difficulties. We all know that, but it surely is a start. We have no analog to that on the substantive side despite the fact that regulation can impose hundreds of millions of dollars of costs on the economy or it can have terribly important political effects on all our citizens.

So I think of this as an opportunity through whatever kind of review process replaces *Chadha* to look at the budget process for an analog to a coordinated review process through some kind of committee structure that is more broadly based than the substantive subcommittees that oversee the agencies.

Thank you. I would be glad to respond to your questions.

[Mr. Bruff's prepared statement follows:]

U.S. House of Representatives
Committee on Rules
March 21, 1984

Prepared Statement
Harold H. Bruff
Professor of Law
University of Texas at Austin

Mr. Chairman and Members of the Committee: I welcome the opportunity to discuss with you the effect of proposed replacements for the legislative veto on the relationship between Congress and the Judiciary. I shall focus on the provisions of two bills: H.R. 3939 (Mr. Lott) and H.R. 2327 (Mr. Hall). The former would require major agency rules to be approved by joint resolution (minor rules could be disapproved by joint resolution); the latter would subject major rules to disapproval by joint resolution. Both bills contain provisions designed to ensure that Congressional action, whatever its nature, would not affect judicial review of rules. My purpose today is to analyze the issues raised by these proposed mechanisms to coordinate Congressional and judicial review of rules.

I. Differentiating Congressional and Judicial Review Responsibilities.

A threshold question is whether the functions of Congressional and judicial review could at least theoretically be separated under the mechanisms in these bills. If not, Congress will need to choose between them. Concrete examples that should aid analysis of how the process of Congressional review might operate are provided by two major rulemakings that have attracted significant attention in Congress and that have reached the Supreme Court on review. One was highly technical, the other much less so; for both, the question is whether the issues surrounding the rulemaking could feasibly be divided so as to allocate roles to Congress and the courts that do not

conflict and that accord with the institutional competency of each branch.

In American Textile Manufacturers Institute, Inc. v. Donovan, 452 U.S. 490 (1981) (Cotton Dust), the Court upheld the essential features of an OSHA regulation designed to reduce the incidence of brown lung disease among textile workers, under a statutory standard that directed the agency to protect worker health "to the extent feasible." The Court accepted OSHA's position that this phrase authorized the agency to set the most stringent standard compatible with the industry's viability, rejecting the industry's argument that full cost-benefit comparison was required. The Court also held that OSHA's estimates of compliance cost and viability were adequately supported by the administrative record.

In Motor Vehicle Manufacturers Assn. v. State Farm Mutual Ins. Co., 103 S.Ct. 2856 (1983) (Passive Restraints), the Court invalidated NHTSA's attempt to rescind a regulation requiring automobile manufacturers to install passive restraints in order to comply with a statutory requirement to "meet the need for motor vehicle safety." The agency had based its rescission on the judgment that the rule, which allowed compliance by means of detachable passive seatbelts, would not be cost-justified because drivers would detach the belts, thereby vitiating their safety potential. The Court held that it was arbitrary for the agency to rescind the rule without considering alternatives such as requiring the installation of airbags or nondetachable belts.

Although both of these rulemakings involved technical issues, both also contained central normative issues that could feasibly have been isolated from issues of scientific or economic fact and prediction, and decided intelligently by Congress. Indeed, because these central normative issues were only arguably settled by the governing statutes, Congress would have been better suited to decide them than either the agencies or the courts. In Cotton Dust, the agency had decided that compliance costs of about a half billion dollars were justified

in order to reduce brown lung to a level where about 13% of industry workers would still develop a mild form of the disease without chronic involvement. In Passive Restraints, neither the agency nor the Court directly addressed the issue of government patronization-- whether an agency should force citizens to protect themselves, in light of a cheaper and at least equally effective voluntary option (standard seatbelts) that citizens resist.

How would the issues on Congressional review be delineated? In part, the answer depends on the materials presented to Congress in the review process. Rulemakings such as these produce three kinds of documents. First, the final rule itself is often long, complex, and forbiddingly technical to the generalist. Second, the accompanying preamble that exhaustively explains and justifies the rule can serve to introduce the generalist reviewer to the controversies surrounding the rule, the positions of contending interest groups, and the agency's reasons for resolving the matter as it did. (Indeed, the preamble has taken on these characteristics under judicial pressure for the agencies to produce something that will ease judicial review.) Third, there is the underlying administrative record, which commonly encompasses tens of thousands of pages for regulations such as these.

Both of the bills under consideration would require the rule to be transmitted to Congress. It is unlikely that any Member would have the time to read the rule itself or even the preamble, which is the most accessible explanation of the controversy. For the cotton dust rule, the preamble alone occupied 44 triple-columned pages in the Federal Register (43 Fed. Reg. 27350-94). Perhaps some unfortunate staff personnel of the review committee will be expected to review and digest the preamble, or the agency will be called on to do so. Of course the administrative record is beyond Congress's review capacity. It seems most likely that Members and staff will inform themselves mostly through the submissions of interested parties, including the agency, in the lobbying process that would attend consideration of any joint resolution.

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The foregoing suggests that only the central normative issues that a rule presents can feasibly be considered by Congress, and that judicial review could retain its current functions without duplicating Congressional review. The courts currently review rules to determine their constitutionality, their conformity to statutory authority, their procedural regularity, and their reasonableness on the basis of the administrative record. None of these inquiries is duplicated by Congressional review for political acceptability, although there are some complexities with regard to statutory authority that I examine below.

Moreover, all of the traditional judicial inquiries are suited to the courts and not to Congress. For example, in Cotton Dust, although Congress could have assessed whether the agency's rule would have been justifiable if its underlying estimates of cost, industry viability, and benefits to health were reliable, Congress was in no position to judge whether the estimates were supported by the administrative record, or whether the record was compiled by appropriate procedures.

In Passive Restraints, Congress could have been tempted to supply the missing adminstrative judgments concerning whether airbags or nondetachable belts should have been required, or to second-guess the agency's judgment that most drivers would detach passive belts, because of the relatively nontechnical appearance of these issues. Nevertheless, technical questions were still present, and their resolution by the agency and review by the courts would have been necessary to ensure an agency decision that Congress could reliably review to decide how best to pursue safety by means of passive restraints. (That is, the effectiveness of airbags in some kinds of crashes was still in issue, and the agency's survey data on driver resistance to passive belts was thin enough to provoke disagreement over its sufficiency on the Supreme Court.) The normative issue that Congress could have decided at this stage of the proceedings-- or at any other-- was whether passive restraints should be required at all.

II. Recommendations for Performing Congressional Review.

The foregoing analysis suggests that it is particularly important for Congress to structure its review process in ways that focus debate on the most important normative issues surrounding a rule, rather than drifting off into uninformed debate about the factual basis or consistency of reasoning underlying a rule. As I suggested above, the imperatives of time and review capacity should help keep review out of the mire of the administrative record. Interested parties, however, may seek to cloud the issue by raising questions more suited to judicial review. For this reason, review committees might wish to structure the debate during the review process by specifying the issues they wish to have addressed by the agency and the interest groups. An initial way to identify the issues best suited to Congressional review is to identify and exclude the issues that will occupy the courts.

In particular, Congressional review should not ask whether a rule is within preexisting statutory authority. That is a task for which the courts are institutionally better suited, and to which they might lay an exclusive constitutional claim. There is no need to exercise this function as part of a review process that itself meets the Constitution's requirements for a statute.

Perhaps there should be exceptions to my recommendation that Congress avoid duplicating any of the inquiries that the courts will make. If Congress believes that a rule raises serious enough constitutional doubts that it should be invalidated, Congress could relieve the courts from confronting the issue. It is always responsible for a Member of Congress to avoid perceived constitutional problems when drafting legislation; the situation should be no different here. There would be no need for Congress to make a full-scale constitutional decision of the kind the courts make.

Another possible exception would be illustrated by Passive Restraints. If Congressional review suggests that a rule's

rationale is seriously incomplete, as in the failure to consider nondetachable restraints in that case, Congress could save the courts and the agency time by forcing the agency to repair the rule right away. There is a difficulty with this exception, however, since it could easily draw Congressional review more deeply into the agency's rationale and record than this process can feasibly go.

At present, oversight of regulation is performed principally by the committees with legislative responsibility for the program in question. Should joint resolutions be referred there, or should there be a special (and perhaps joint) review committee? The answer depends on the purpose review is to serve. If the focus of review is not to be substantially broader than that of the promulgating agency, the legislative committee would be a natural agent. Since judicial review examines rules for consistency with other present and previous policies of the same agency, however, this form of Congressional review would be partially duplicated by what the courts do now (see Passive Restraints).

In any event, the legislative committee might not seem to be a sufficiently detached body to provide meaningful review. Most agency rules have at least substantial support within that committee, else they would never have appeared. And there are sometimes disturbing enough signs of alliances formed by agencies, interest groups, and Congressional committees, to warrant consideration of an "outside" review process, even without regarding all regulation as the product of a closed confluence of special interests and their public supporters.

Moreover, there is a positive value to broadening the focus of review, and with it the base of political accountability within Congress. Although Congress has coordinated its budget process for the past decade, there is no analogue to the budget committees for substantive legislation or regulation, despite the potential for a regulation to impose major compliance costs on the economy, or to raise normative issues that are important to every Member. For example, intelligent appraisal of the cotton dust rule should include the inquiry whether the

projected health benefits would be justified in light of the opportunity costs society would incur in order to achieve them. Perhaps the half billion dollars projected for compliance costs would be better devoted to other health needs. At a similar level of generality, the need for a passive restraint rule raises fundamental questions about the role of government in American life. Neither the agency, a reviewing court, or a legislative subcommittee is in a position to make a comprehensive judgment on these issues.

It is not clear, of course, that anyone can make these ultimate judgments satisfactorily. Since we have inescapably raised the questions, however, by creating the edifice of modern regulation, it is critical that the broadest possible political input be sought. Some form of special review committee, presumably having subcommittees organized by broad subject matter areas of regulation, seems appropriate. Many of the States have such legislative review committees; an appraisal of the State experience might be helpful.

How many rules could Congress review in this fashion? It seems unlikely that Congress could hope to devote serious review to more than the 40 or 50 rules per year that the bills would define to be major (using criteria similar to the existing review process under Executive Order 12291). Given the press of other Congressional business, making review meaningful even for this limited number of rules would be difficult. Also, anyone's judgments about how the process will in fact work, how burdensome it will be for Congress, and whether it can escape clashing with judicial review, are at present necessarily speculative. Accordingly, it seems wise to precede a generic review process of the kind these bills would create with a period of more limited experimentation. One way to select a limited number of major rules for the new review process would be to consider those rulemaking programs to which legislative vetoes were attached. These programs were often sensitive and controversial-- thus the reservation of veto authority-- and Congress needs to reexamine these grants of power anyway, in response to Chadha.

III. The Interrelation of Congressional and Judicial Review.

Both of the bills contemplate that Congressional review will precede judicial review. This sequence is probably mandatory, in view of the traditional refusal of the courts to review administrative actions that are not final, see Hayburn's Case, 2 Dall. 409 (U.S. 1792), or to render advisory opinions, see Muskrat v. United States, 219 U.S. 346 (1911).

Nevertheless, having Congress review first does present some problems. First, it may be necessary for Congress to review a rule twice if a court sets the rule aside and remands it to the agency. Passive Restraints illustrates this--Congress would have had an inadequately examined agency rule before it when the rescission action first emerged from the agency, since important alternatives had not been considered. Especially because Congress cannot hope to enmesh itself deeply in the controversy and documentation surrounding a rule, it is important that the rule meet the standards that are enforced on judicial review before the process of Congressional review finally concludes. Indeed, under the scheme of the propored review process, agency expertise is preserved and relied on only in the agency's opportunity to formulate the questions that will confront Congress in the way that it casts its regulation.

The outcome of Congressional review can thus foreclose judicial review in a way that may forfeit some benefits of regulation. When Congress fails to approve a rule (under H.R. 3939) or enacts a joint resolution of disapproval (under either bill), it may have done so in part because the agency did not do its work correctly, and produced a defective product, as in Passive Restraints. Judicial review might have produced a more acceptable product on remand, but unless the agency has the courage or the statutory duty to try again, the question would be moot because there would be nothing left for the courts to review.

Both bills provide that Congressional rejection of a disapproval resolution should not be construed as approval of a rule. In Passive Restraints, the Supreme Court gave a strong indication that it would be willing to take such disclaimers at face value. The Court unanimously disapproved a Court of Appeals holding that various Congressional actions short of legislation, including the failure of legislative veto resolutions to pass, constituted endorsement of the rule. The Court emphasized that inchoate Congressional action is almost always ambiguous, and contrasted situations in which Congress, in passing legislation, considers and ratifies an administrative practice. See, e.g., Haig v. Agee, 453 U.S. 280 (1981).

It is more difficult to judge the possible effects of passage of an approval resolution on subsequent judicial review. H.R. 3939 provides that there should be no consequent presumption of the rule's validity, nor any affect on judicial review. Arguably, this provision is unavailing. Because a joint resolution is the constitutional equivalent of a statute, perhaps the courts will treat it as a statutory codification of the rule, and will accord the rule only the deferential constitutional review that statutes receive. Should this happen, the reservation of approval authority by Congress could have quite counterproductive effects, since a perforce limited and often perfunctory Congressional review would entirely displace the comparatively rigorous judicial review of rules, leaving the agencies less controlled than before.

As my preceding analysis suggests, however, a strong argument can be made that Congressional review of the kind proposed should not be considered by the courts as the equivalent of a statutory codification, although it meets the necessary constitutional forms to have the force of law. First, this form of review is not plenary in the normal sense of statutory formulation, but is a restricted consideration of the acceptability of particular normative judgments formed in the agencies. Therefore, a principal reason for judicial reluctance

to review statutes closely, the strong potential to interfere with the heart of legislative priority-setting, is absent.

Second, I assume it is not the purpose of the review process to codify a regulation in the sense that it cannot be further altered by the agency without legislation. Codification would introduce unfortunate rigidities into regulatory programs that are often highly complex and may call for frequent adjustment; the potential burden for Congress is also obvious. The Supreme Court cases that recognize statutory ratification of agency practices do not appear to equate it with codification, perhaps for these reasons (see, e.g., Haig v. Agee.)

Also, as I have explained, the focus of Congressional review should be quite distinct from that performed by the courts, so that judicial fears of performing duplicative functions in the course of normal administrative law review should be assuaged. The constitutionality, procedural sufficiency, and reasonableness of a rule in light of the record would all be issues left for the courts by Congress, and would all remain essential to whether the rule should be allowed to take effect.

The issue of statutory authority presents special complexities, however. If Congress passes an approval resolution, it is difficult to argue that it has not amended the prior statute at least to the extent of authorizing the rule in question, whether or not the rule would otherwise have been within the authority granted by the statute. For example, if Congress were to approve the cotton dust rule or a passive restraint rule, would it not have given concrete content to the generalities of the statutes involved? Even if the legal effect of Congressional review were limited to ratifying the agency's action, as I have argued it should be, it is hard to see the point of having a court ask whether the rule would have been within the authority of the enabling statute. Indeed, there is every reason to conclude that the courts would refuse to decide such a question as hypothetical. This limited legal consequence

of enactment of a resolution may be both inescapable and good, since its effect would be to diminish the amount of uncertainty that today attends the meaning of many statutes, such as those in the passive restraint and cotton dust examples.

Finally, Congress should consider the consistency of the review mechanisms in these bills with the other provisions in the bills. For reasons already stated, there seems no inconsistency with the requirements for regulatory analysis and hybrid rulemaking procedures to be performed by the agencies, because these serve purposes distinct from Congressional review. The proposals to tighten judicial review of rules, however, do need to be considered together with those for Congressional review. In particular, the emphasis on having the courts take a narrower view of an agency's statutory authority needs to be reconsidered, since it may be a primary legal consequence of the Congressional review process to provide further articulation of agency authority, at least under approval resolutions. Therefore, tightened judicial review of the issue could duplicate this function. If Congress is to carry this burden, the courts should be relieved of it.

Mr. MOAKLEY. Yes. I am very happy you made those last remarks because that actually was the kind of committee that I put forth a couple of years back, and the committee would be made of members of the existing committees that deal mostly with the rules that are going down in the Congress, your major committees.

So you would have people from each one of those committees involved in the process of dealing with the chairman of the regulatory agencies. When some of these regulations appear to be coming forward, they could call up the chairman of the agency, have him state under oath that he has read the proposed rule, and then have some kind of dialog with him before this thing really actually is promulgated.

They can assist in writing legislative intent on that strata anyway as to what the Congress meant by certain things and probably it could straighten out a lot of problems before they actually happen.

Tom Kindness and I talked about this a few years back. It just never got anywhere, but now because of *Chadha,* maybe somebody will start looking at that view.

The statement you made on your joint resolution, trying to make something to differentiate between the joint resolution as it applies to a rule and a joint resolution as it applies to legislation is quite an idea, but I do not know if the courts would look behind it saying that it went through both houses and it was signed by the President, therefore, it is law and we cannot apply judicial review because it now is a statute.

How could you flag it so that they could then go beyond it? Or would you then be weakening the entire legislative process?

Mr. BRUFF. The idea essentially would be to focus on the fact that when Congress reviews, all it has time to do is to look at the most central value questions that surround a regulation.

For example, in the passive restraints regulation, do we want to have a passive restraints regulation at all? They cannot get into the mire of the administrative record. The regulations alone are dozens of pages in the Federal Register. You cannot even read those.

So that the idea would have to be that the congressional review just went to the heart of the value questions, and all of the ordinary questions for judicial review were left for the courts.

But again, we would have to be sure that the courts understood that, were willing still to exercise their review. The one thing I can be sure about is that we do not know quite how they would react.

What I have in my statement by way of a differentiation between ordinary statutes and these is a theory and only that.

Mr. MOAKLEY. It is an interesting theory. Thank you.

The CHAIRMAN. Mr. Wheat?

Mr. WHEAT. No questions, Mr. Chairman.

The CHAIRMAN. Professor Bruff, I am sorry I did not get to hear the first part of your testimony. I will certainly read it in the record.

It seems to me that the Supreme Court, in the *Chadha* case, has done a great injustice to the Congress of the United States. Congress has done the best it could to find a way of dealing with the

complexities of a great country like this, a great free society like ours.

Now, Congress has the authority to fix every freight rate, fix every airplane tariff, fix every application for an interstate radio or television station and the like, but obviously it cannot do that. We do not have the time to do that.

So the Congress has, over the years, set up these agencies as the designate of the Congress. Congress created and not the executive branch generally speaking, and Congress vested in them its authority to fix rates, to regulate and do all the various things that these agencies do.

Now, then the Supreme Court takes completely away from the Congress what I regard as any reasonable authority to oversight, to exercise oversight over what these agencies do.

They have said the only thing we can do up here, we have one function that we can perform, and that is to legislate by the passage of a joint resolution meeting the requirements of the Constitution and submitting those joint resolutions to the President of the United States. That is all we can do.

That is nothing in the world but enacting another legislation. They said, in substance, if you do not like any incident of any legislation you pass, you got to pass other legislation.

Well, now, that takes the time, if it is going to be done with any excellence, takes the time of committees to hear it and the time of the two Houses to consider it and all that sort of thing, and the mass of it, it makes almost impossible the performance of that job adequately by the Congress of the United States.

Now, if the joint resolution is the process that is employed, I do not suppose anybody can make any question about the constitutionality of it because it conforms to the constitutional requirements so there is nothing to be heard on there, and if they are not going to reexamine the content and reguess the Congress in the legislative action we take, if they are not going to transgress upon the legislative function with judicial authority, there is nothing much they can do in that case.

So here is the Congress presented with a dilemma of whether to turn loose all these great agencies, all these agencies that have enormous power, as you said, to spend money, to impose burdens upon the people, to affect the lives of the people, enormous power, and yet we do not have any right to reexamine and to say, "We did not intend you to go that far. We did not intend you to do that. We do not like that."

Now, they will not let the Congress say, "Well, if one of our bodies finds it objectionable for an agency to do that, we will take that as sufficient objection on the part of the Congress to indicate our disapproval."

No, they say you cannot do that. The only way we can correct a rule or correct anything is to pass another law in conformity with the Constitution of the United States of America.

I cannot believe that that will remain the decision of the Supreme Court of the United States, and that is the reason, I think, we would be justified in cases where we think committees have a reasonable and just reason to exercise a veto that we pass bills.

As far as I am concerned, as a member of this committee, I am willing to let those bills be turned out by the committee. Let them go for consideration to the floor of the House and let them eventually find their way up to the courts again.

That situation about the immigrant, that does not represent all the cases that have come up under this exercise of the veto power, and I would like to see Congress have an opportunity to the right of supervision, a right of oversight without having to pass a new statute. We just do not have time to do all that that they are requiring of us.

Do you think, maybe, that this is the last word in the area of legislative authority to supervise or exercise oversight over legislation? Do you think *Chadha* is the last word that will ever be spoken by the Court?

Mr. BRUFF. I am afraid it will be, Mr. Chairman, because the opinion has so many signs of the Court wanting to have done with this issue once and for all. The opinion is so much broader than it needed to be to deal with what you rightly referred to as this little deportation controversy.

I think that the Court's action since in summarily dealing with lower court decisions on legislative vetoes is what they will continue to do so that although it is surely always in the Congress' prerogative to try again, I think that it is unlikely that the Court will take a legislative veto question on the merits anytime soon, if at all.

The CHAIRMAN. But what about the War Powers Act? What are we to regard as the law relative to the War Powers Act?

Mr. BRUFF. That certainly is the most difficult one, and if there is an argument for a special case, maybe that is the one. I do think that the Court, as you emphasized, tends not to appreciate the burdens of daily life in Congress which are so evident to you here, especially in this committee.

But I would emphasize, that in *Chadha* there is not only a defeat for Congress but also an opportunity for you to go back and look at the oversight tools that the Court so casually emphasizes that you have and which are ultimately enough power, and to ask yourselves: Are there ways that we can improve these kinds of techniques?

For example, the kinds of things that Mr. Moakley and Mr. Kindness were talking about with special review committees and so on.

The CHAIRMAN. What was that? I did not hear what they said.

Mr. BRUFF. This would be the possibility of a special review committee for regulation, perhaps a joint committee that would be again perhaps an analog to the budget committees, a more broadly based committee with more clout than the subcommittees that oversee the agencies in daily life.

The CHAIRMAN. You mean that kind of a committee would have the right to strike down an administrative action of one of the agencies?

Mr. BRUFF. It would not be possible, I think, to give it old legislative veto style authority. It could be granted either joint resolution authority of approval or disapproval, because that would be presented——

The CHAIRMAN. I do not think that is the right interpretation, with all respect to the Court. I think Congress can exercise some functions other than passing joint resolutions. I think we have to find what it is. Maybe what you are talking about is the way to do it.

What I favor is for us to have our committee review very carefully every legislative veto in a bill. Is it necessary to do it? Is there no other reasonable way we can accomplish the same results? Is it highly desirable? And would we want this bill passed even without that provision in it?

Let them be sure that they find those facts before they pass a bill with a legislative veto in it. I would have it clearly understood that we would not have passed this bill if we had not intended all of it to be effective.

Mr. BRUFF. My fear, Mr. Chairman, is that the legislative veto would likely be attached only to those statutes that Congress felt were most important, perhaps a revision of the War Powers resolution.

Those would be the statutes for which there would be the greatest confusion and chaos if a lower court then struck down the legislative veto, especially without a severability provision, thereby hobbling the entire statute. So that my main emphasis would be that that is a most heroic road to walk in the wake of *Chadha,* and I would prefer myself to see Congress try other avenues.

The CHAIRMAN. Thank you very much, Professor, we appreciate your coming.

The committee will recess until 2 p.m. tomorrow when we will continue this hearing.

[Whereupon, at 11:23 a.m., the committee adjourned to reconvene at 2 p.m., March 22, 1984.]

LEGISLATIVE VETO AFTER CHADHA

THURSDAY, MARCH 22, 1984

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RULES,
Washington, D.C.

The committee met, pursuant to call, at 2:04 p.m. in room H-313, the Capitol, Hon. Claude Pepper (chairman) presiding.

Present: Representatives Pepper, Moakley, and Wheat.

OPENING STATEMENT OF HON. CLAUDE PEPPER, CHAIRMAN OF THE COMMITTEE ON RULES

The CHAIRMAN. Today the Rules Committee will explore the impact of expedited procedures on the operation of the House. Many of the proposed alternatives to the legislative veto are accompanied by expedited procedures which would enable the legislation to move out of the committee jurisdiction and onto the floor, bypassing the Rules Committee.

Expedited procedures might have far-reaching consequences on, No. 1, the control of the committee of jurisdiction over its own agenda schedule and workload; No. 2, the utility of committees of jurisdiction as screening devices that protect Members from measures they need not consider and measures they do not want to consider; No. 3, the ability of a majority to control the floor agenda; No. 4, the majority's leadership influence in control over scheduling; No. 5, the opportunities for a minority to compel floor action on an issue, and No. 6, the Members' right to debate and amend.

Considering their potential impact, expedited procedures must be evaluated by asking whether the value of insuring the opportunity for a quick floor vote is sufficient to justify departures from the established patterns embodied in regular procedure.

To assist us in our examination of the impact of expedited procedures on operations of the House, we have with us today our good friend and colleague, Hon. John J. Moakley, chairman of the Subcommittee on Rules of the House, as well as Hon. Elliott H. Levitas.

We are also privileged to have with us a distinguished panel of experts: Dr. Roger H. Davidson, Dr. Stanley Bach, Dr. Louis Fisher, and Dr. Walter Kravitz.

So we have a very distinguished group of witnesses today, and we are very proud to hear the first one, my distinguished colleague and friend, Hon. John J. Moakley.

STATEMENT OF HON. JOHN JOSEPH MOAKLEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. MOAKLEY. Thank you very much, Senator. I wish to commend you for scheduling this hearing on the issue of particular concern to this committee's jurisdiction in its review of the institutional implications of the Supreme Court's decision in the matter of *INS* v. *Chadha,* the special rules of the House which have become virtually a boilerplate part of most legislative vetoes.

Mr. Chairman, on Monday, December 8, 1941, the Congress met in joint session to receive a message from the President to request that the Congress adopt a declaration of war against Japan. Majority Leader McCormack was advised by Mrs. Rankin of Montana that, as a pacifist, she would be constrained to object to a unanimous-consent request. Congress proceeded to declare World War II on the day that it did, Mr. Chairman, only because the Japanese had been accommodating enough to bomb Pearl Harbor on the day prior to a day on which the rules of the House permit suspensions.

To this day, the rules of the House accord to a declaration of war none of the high privilege and special procedural protections which attach to resolutions to disapprove Federal Trade Commission regulations telling banks the type size in which to print their annual percentage rates.

Even within individual statutory rules, there is little consistency. Any individual Member may force a House vote on a District of Columbia criminal ordinance raising the local fine for jaywalking by $5. But the House would be required to await a report from committee to act on local legislation to build a concrete wall around the Capitol.

These practices have grown from two tendencies in this Chamber which should be viewed with alarm.

The first, Mr. Chairman, is that, increasingly, Members have come to view the rules as a pointless procedural thicket to be mowed through with a machete when they interfere with the desire of individual Members to be able to reach a specific class of matters without interference from the committee elected by the House to weigh such matters.

The House's leading advocate of expedited procedures, who is not a member of the Committee on Energy and Commerce, has always viewed any review of Federal Trade Commission regulations as meaningless unless it provides special rules of the House that enable 87 Members to overrule the reporting and scheduling judgment of that committee and the leadership. However, the gentleman, who is a member of the Committee on Public Works and Transportation, has proposed legislation which makes virtually every ministerial act of the General Services Administration, with respect to purchase and construction of public buildings, subject to approval by that committee in a manner which insulates that committee's judgment from any review of the House of Representatives.

The second, Mr. Chairman, is an equally understandable desire by Members, confronted with difficult political situations, to massage the immediate problem, without adequate regard for the institutional implications of any such resolution. In this regard, the

various committees have increasingly found the jurisdiction of the Committee on Rules a convenient arena in which to negotiate policy issues they have found difficult to resolve within the scope of their own jurisdiction.

Last year, for example, well-intentioned legislation was proposed to prohibit most trade with South Africa. Opponents argued that the approach was too draconian, so the legislation was modified to permit Presidential waivers of some trade restrictions. Supporters of the ban argued that the present administration would issue waivers wholesale and gut the intent of the bill, so it was further modified to require congressional approval of waivers. Opponents then argued that the approvals would get bottled up in the House Foreign Affairs Committee. At this point, the whole thing had become so complicated that the customary congressional practice was followed and a rule of the House was tossed into the bill to provide for special discharge. The net result of the approach, however, would be to postpone the writing of any clear policy on South Africa, instead allowing Congress, over a period of years, to shape an ad hoc policy, voting company by company, product by product, krugerrand by krugerrand.

Now, both of these tendencies have saddled the House with dozens of special rules for processing a wide variety of legislation which are of doubtful consistency with the general rules of the House or, for that matter, with each other.

In recent years, our subcommittee has focused its attention on regulatory reform legislation which proposes generic application of a legislative veto to each rule issued by each executive or independent agency of the Federal Government. This is probably the form in which the veto is least acceptable.

With only slight awareness of what's really in the Federal Register, Congress says it wants to be able to veto any single rule. A rule, for example, on sugar-content requirements for grading of applesauce will pose little difficulty. The sugar and food processing industries will square off against each other, but they are both old hands at that and somewhat enjoy it. After some discussion of their cases, we will set aside the budget of the United States, bankruptcy reform, port development legislation, social security, or whatever matter we are working on and vote on applesauce.

It makes a joke out of the high purpose of a national legislature and it is a major inconvenience—but we could live with it and so could the Nation if this kind of procedure were limited to a few cases. But proposals for generic legislative vetoes carry enormous potential for mischief.

Of particular concern to our committee, and the focus of these hearings today, are the expedited procedures recommended in most legislative veto bills. Under most such proposals, any reported disapproval resolution would be highly privileged and eligible for 2 hours of debate. And each disapproval resolution, on the demand of 87 Members, can displace the leadership's legislative program for 1 hour on a motion to discharge.

The scale of this is hard to picture. During the entire 87th Congress, the House of Representatives considered 704 bills and joint resolutions—of which 529 became law—and considered 354 simple and concurrent resolutions. In the same timeframe, Congressional

Research Service estimates that 15,000 regulations were published in the Federal Register. Each of these 7,500 rules a year would be subject to 1 hour of debate if any Member who opposed a rule, or perhaps simply the legislative schedule, could find 86 allies. To put this in perspective, the total amount of time that elapses from one New Year's toast to the next is 8,760 hours.

I believe that much of the demand for special expedited procedures implies some insensitivity to the lessons of congressional history.

Over the centuries that our rules have evolved, a system of procedure has developed that works reasonably well. From time to time, reforms are needed and should be responsibly implemented.

But inefficiencies derive from the two divergent goals of having rules at all. The rules are intended to protect the rights of minorities to be heard, both the minority party and ideological minorities within or across party lines. But equally they are intended to protect the obligation of a majority to act, again both the majority party and majorities which may form across party lines.

The rules protect the House and they protect each Member of the House. But there is a growing and, I think, dangerous tendency to regard the rules as some kind of unnecessary inconvenience, to be mowed down and cut through.

Certainly, reforms are always needed, but any such change must be viewed carefully to maintain a balance between the legitimate rights of the institution and of its Members.

The early Congresses met under rules not dissimilar to those used today by most associations and clubs. A Member, having been struck by some suitable inspiration, stood on the House floor and explained it to his colleagues with no particular limitation on the time available to debate it or the scope of action available to the House. If the legislative proposition was generally acceptable and fairly simple and straightforward, the House would then and there pass it. If the enthusiasm of the Member was not shared by his colleagues, it would then and there be voted down. If the matter was viewed as having merit, but seemed to require more detailed examination, a committee was created solely to examine that one bill and report it back to the House for final action.

By 1880, under vastly expanded membership, workload, and parliamentary opportunities for obstruction, the House had sat helplessly for some years at the brink of complete paralysis under both Democratic and Republican leaderships when the greatest of Republican Speakers, Thomas Brackett Reed, began the most significant procedural reforms of our history. The committee system, the function of the modern Rules Committee, orderly floor procedure, indeed the ability of Congress to act at all, derive from those great reforms.

There is no doubt in my mind that the net result of the House rules which collectively attach to legislative vetoes, and any significant expansion of their use, drag the House procedurally back a century.

The intent of the veto proponents is to fashion a method by which Congress can address major issues raised in the Federal rulemaking bureaucracy. But the more than minor fallout from his proposal is that very small minorities increasingly are being armed

to displace the schedule of the House. Under a generic veto, that arsenal is expanded beyond the ability of the House to manage.

I am at some loss as to why majority Members would support such a proposition. Our caucus selects the Speaker and the chairmen of committees and, if the majority is dissatisfied with how legislation is reported and scheduled, they have the ability to change the leaderships that make those decisions.

Minority sentiment for expedited procedures is far more understandable. But equally, I think, the minority party makes a grave mistake if it sees this as an advantage. During the last Congress, I suspect that the minorities likely to use the device would more often have formed on my side of the aisle.

Under the format of most generic vetoes, if we were facing a new Gramm-Latta bill and a Member didn't want the House to vote on it, he could displace the schedule agreed to by the majority and minority leadership. With the help of only 86 cosigners, he could reshape the schedule of the House and force the day, week, or month to be spent on issues of no concern to a majority—indeed, of no concern to him except as a tool to prevent a majority from acting on something else. With what kind of issues could this hypothetical Gramm-Latta be replaced?

Should the California olive committee have 16 members or would a smaller or larger committee be better?

Should the Irish potatoes grown in Colorado be required to be no less than 4 ounces? The rule doesn't apply to Irish potatoes grown in Idaho nor to Idaho potatoes grown in Colorado, so I suppose the House would defer to the judgment of the Colorado delegation in such a case.

Should the FAA safety rule applicable to a certain model of Fokker aircraft go into effect? There is no reason why not, since the single such plane on the U.S. register was refitted to meet the rule while it was being written—but that wouldn't limit the right to force the House to spend an hour on the rule.

Should the Board of Directors of the Legal Services Corporation be allowed to move its October meeting to September? Should the Vice Chairman of that Board be allowed to preside if the Chairman is absent? Incidentally, if anyone wants to keep the October meeting but let the Vice Chairman preside at it, that can be accommodated: they are separate rules, and, under a generic legislative veto, a separate hour and a separate vote are available on each.

I would argue that many of these questions need not be decided in Congress at all and, if they do need to be, that should occur through action on a report from a committee elected by the House for the purpose of reviewing such matters.

If the need to address a regulatory issue is vital, and the appropriate committee proves insensitive to that need and to the will of a majority, that majority can overrule the committee and bring the matter to a vote. No committee, no committee chairman, and no Speaker can ever block the will of a majority of the House. Even in the face of a negative vote by a committee, no matter can be prevented from coming to a vote except by the decision of a majority of the House not to sign a discharge petition.

When a majority of Members decided they really wanted to repeal withholding on interest and dividends, they faced the united

opposition of the strong chairmen of important committees, the Speaker of the House, the majority leader of the Senate, and the President of the United States. But withholding was repealed, because that was the will of a bipartisan majority, and no sincere majority can ever be blocked in our legislative process.

The proposition would appear obvious that the legislative veto is doomed to strangle the House and even to strangle itself. It has been settled for over 100 years that an elaborate committee structure, tight procedural rules, and strong congressional leadership is needed for the House to have any hope of processing the flow of barely 700 laws enacted in a typical Congress.

Yet the advocates of the legislative veto would have us believe that 15,000 regulations can be sorted out on the floor of the House in that period by individual Members, acting as free agents outside the elected committee structure and the elected leadership of the respective parties.

The weaknesses of any legislative veto that fails to meet the basic structural problems of ad hoc floor management poses a danger to the House that at least outweighs the possible benefits of any proposed regulatory reform bill.

Mr. Chairman, these are just some of the observations that I wanted to make this morning and leave them with the committee.

And I hope that some of these statements have just shown the ridiculous ends that some of these procedures can bring us.

The CHAIRMAN. Well, Mr. Moakley, that was a very thoughtful presentation that you made upon matters that are not always considered by people that are even knowledgeable in the procedures of the House.

I don't have any questions about it. I think you have covered a very important segment of this matter.

Just in summary, do you feel that the legislative veto is essential to the exercise of the oversight or general examination procedure that the Congress should exercise over the activities of administrative and bureaucratic agencies?

Mr. MOAKLEY. I think a legislative veto that complies with the constitutional requirements as set down by the charter or the joint resolution and presented to the President is a very useful tool.

But absent that—I really think that what precipitated the Supreme Court's action on an issue of the legislative veto that they sidestepped so many times, and they finally decided in the *Chadha* case, was the groundswell that was coming from the House and the Senate on a generic legislative veto, which I think really imbalanced the whole—the sense of the balance between the Executive and the legislative—I think that legislative vetoes work best on a case-by-case situation when they are really needed to leverage one against the other.

The CHAIRMAN. Do you think we need to design any substitute for the legislative veto other than relying entirely on the joint resolution?

Mr. MOAKLEY. Well, I don't think we have many options. And I don't think that the legislative process is made impotent as a result of the Supreme Court decision. It kind of reminds me of the time when I was practicing criminal law in Massachusetts, and at that time the Boston Police Department had great latitude of breaking

down doors and finding evidence and then arresting somebody for being present when something was being done—and they had been doing that for years. And all of a sudden *Matt [?]* v. *Ohio* came out of the blue, and now they need to go to a court and instruct the magistrate of exactly what they felt that they were going to find there and the probable cause that was attendant thereto, and they thought that this was going to hamper all kind of law enforcement.

But, you know, they lived with it. And I think that we can also live with the Supreme Court decision as handed down in *Chadha.*

The CHAIRMAN. Thank you very much.

Mr. MOAKLEY. Thank you very much, Senator.

The CHAIRMAN. We have got much consideration to give to the whole subject, and you will be one of the important people doing that.

Mr. MOAKLEY. Thank you. I wish I could stay around, but I have things on the floor.

The CHAIRMAN. Thank you very much. Our next spokesman today is Hon. Elliott H. Levitas.

Mr. Levitas, we are delighted to have you, as always.

STATEMENT OF HON. ELLIOTT H. LEVITAS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. LEVITAS. Thank you, Mr. Chairman, I appreciate being back here before your committee. I have been here so often on this issue I feel like I am almost a temporary member of this committee.

The CHAIRMAN. Well, you have been about the longest one around here who has been talking about this.

Mr. LEVITAS. I have stated my position in prepared testimony on a number of occasions before the committee, and I don't see anything to be served by simply repeating what I said before.

I would like to address in more detail one aspect of the legislative veto proposals and then would be happy to respond to any questions on that or anything else. I am referring, Mr. Chairman, to the use of expedited procedures for considering congressional review resolutions.

The expedited procedures approach is a means for making certain that the Members of the House would at some point be able to work their will. Not just the will of one individual, but if there was enough significance to the issue, where one-fifth or one-fourth of the membership wanted to see an approval, or disapproval resolution considered, that the resolution could be brought to the floor.

There are a variety of factors that show the need for expedited procedures. The first is that in the referral of an approval or disapproval resolution, it goes to the committee which has legislative jurisdiction over the agency, the program, or the issue involved.

Historically, it's fair to say, frequently there is a closeness between the committee that has legislative jurisdiction and the agency, and not infrequently the agencies look to their legislative committees almost as their protectors and their congressional agents.

Therefore, there would be no assurance that the House membership would be able to express itself on these issues, except, as Mr. Moakley said, through a discharge petition—but I think it is also

pretty clear that discharge petitions are difficult to use. They are not very good procedures, and it takes an issue of some monumental importance, nationwide significance—like the repeal of withholding of interest—to move a discharge petition.

In such cases, expedited procedures simply give us a means for actually getting a chance to vote on something that has enough importance that the Members should express themselves on it without relying on the whim of the chairman, who might not even call up a legislative regulatory approval or disapproval resolution. In that event there could be no vote on the resolution at all.

The discharge petition would be too cumbersome and unworkable, and on the other extreme, simply to let it be automatically discharged, in the case of any resolution, would bring too many potential matters to the floor. The expedited procedures, as originally conceived under the veto mechanism, I felt, and I think a majority of the people who voted on this issue felt, were a way to assure that there would be some consideration of the matter.

Now, in the legislation which I introduced last year, there was a compromise approach to the legislative veto, which was worked out between those of us who wanted to see expedited procedures and legislative veto, and representatives of those who didn't, and actually brokered by the Speaker's staff—Mr. Weiss. I think that this legislation balanced many of the concerns that Mr. Moakley was talking about along with the interest that I have in seeing that there be some possibility for the House to consider these resolutions. Essentially the way the compromise worked is that if the veto resolution was not reported within 45 days, then it could be discharged with the signatures of 34 Members of the Senate or 150 Members of the House, and there would be certain days set aside in the calendar where those resolutions that were discharged in that fashion only could be heard.

So the resolutions wouldn't just be popping up any time of the day or night that somebody had a chance to get a discharge out of a committee.

There was a regular procedure set up, there was a calendar that was set up for considering disapproval resolutions; it was very orderly.

I think the fact that the Speaker and his staff worked very closely on this with the Parliamentarian to make the procedure workable speaks to the fact that it wasn't my invention, or the invention of those of us who would like to see a legislative veto.

The situation is different now. In order to meet the challenge of the *Chadha* case, Mr. Chairman, we are looking at two approaches or a two-track approach, which I totally support. I am a cosponsor of H.R. 3939, which deals with two methods of legislative veto. The first is the approval of major rules and regulations—and I know you have heard a lot of discussion about that.

An approval resolution would only apply to major rules or regulations, ones that have, by definition, at least $100 million annual impact on the economy of this Nation. These are relatively few in number, according to the estimates that have been provided to us by OMB. The approval resolution would take the action of both Houses and signature of the President for those major regulations to go into effect.

In a sense, I see less need for expedited procedures in that instance of approval resolutions than I do in the case of disapproval resolutions, for the obvious reason that if the regulation is going to go forward, if it is going to be imposed, then there has to be an interest some place in the legislative committee that has the approval resolution to move it to the floor. My concern about it being pigeonholed or backpocketed is much less in the case where you have to affirmatively approve something before it can go into effect.

And while H.R. 3939, as I recall, provides for an automatic discharge of the approval of major rules, because they are so few in number I don't see a real problem there. But I simply would state my view that there is less need for expedited procedures in those cases.

In the case of the joint resolution of disapproval for nonmajor rules, I think you still have the same need for expedited procedures, because, again, if the committee chairman or the subcommittee chairman doesn't agree with the disapproval, it will never see the light of day, and the time period for action by the Congress will run out before there is any opportunity to act.

So I think that expedited procedures for nonmajor rules and the joint resolution of disapproval are still needed. Otherwise, the whole legislative veto, or son of legislative veto, becomes an empty and hollow remedy rather than being an effective orderly means for dealing with the problem.

The CHAIRMAN. Mr. Levitas, it strikes me that this is a big country that we are legislating for, 230 or 240 million people now—and, of course, there will be more; the most dynamic economy in the world, and a great variety of interests and areas and people and everything. So as the Nation developed, social problems, economic problems emerged, and they came within the scope of the legislative branch of the Government. For example, all the various regulations that had to be observed—and I am one of those who think we didn't do too wisely when we deregulated too much—but we had to devise a system of regulations. We have the power to fix all the freight rates and bus fares and airplane fares—everybody knows we can't do that. So we had to set up agencies to represent the Congress to do those things.

Now, a lot of people have felt that we just couldn't turn loose these powerful agencies that we have set up; they sometimes were overzealous in their effort to perform their duties; sometimes they were unwise, according to the opinion of Congress, in what they did.

But, after all, we sort of felt that these folks had no master—the Executive really didn't run them, he didn't have supervision over them. The only person that was their boss was the Congress.

And the citizen abused or wronged, in his opinion, couldn't do very much to those agencies. He looked back to the Congress to see—I want you to restrain these people from doing too much, or make them do what they do more wisely, and the like.

So it was natural that Congress should begin to exercise some sort of supervisory jurisdiction over these people, and say, after all, you know, you are exercising our authority. It's like a parent

giving a child a wide range of discretion—but wait a minute, son, I didn't intend for you to go that far.

So now then it may be that Congress became overzealous in stepping into it too much, maybe we wanted to become too active in the details and look at all the rules and regulations and the like.

But then, of course, all this takes a lot of time; there are a lot of these rules and regulations, there is a great many decisions that are being made. And it is a massive matter.

And we all know that we are busy anyway with the ordinary chores that we undertake to do, our ordinary duties that we undertake to discharge here in the Congress.

So it seems to me that it was rather a natural thing for Congress to say, well, now, you can go on and do this, issue your rules and regulations, do this, that, and the other, but we are going to have either of the Houses taking a look at what you are doing. And if either House considers that you are going too far or are not wise, why, we don't have time for both Houses to spend on this kind of thing, so we are by a joint resolution presented to the President authorizing either House to question what may be done by these people.

So you can see how the one-House legislative veto developed.

Now, along comes the Court and says that we can't have a one-House legislative veto, because the only way we can veto what our creatures do is by passing a law; in other words, we can't change a rule promulgated by an agency that we set up without the Congress of the United States passing in constitutional form a law and presenting it to the President of the United States and constitutionally meeting any objection the President may have to that.

Well, it seems to me that that imposes a very heavy burden upon the Congress. If we are going to pass a joint resolution, it's not going to be worth anything if it is just going to be a pop judgment—we have got to have hearings or some deliberations to be given to what we do if it is going to be deserving of any respect.

And to require the constitutional form of legislation for every review or every oversight or every suggestion that we want to make to those dependent upon us seems to me to impose an excessively heavy burden.

And then we have things like the War Powers Act that is vital to the country's interest, I think, the jeopardy of which is considered now.

I think we discussed it when you were here before.

Mr. LEVITAS. Yes, sir.

The CHAIRMAN. I wonder if it isn't going too far to say that the Congress can exercise no oversight, no review, or no second look, as it were, without legislating in the constitutional sense.

Mr. LEVITAS. Well, the truth of the matter is that the Supreme Court's decision, I have said publicly and recently in two Law Review articles, demonstrated a real abysmal ignorance of the way our Government works. This one was working pretty well, I thought.

The genius or the beauty of the two-House approval mechanism, Senator, is that it really gets us back to where we want to be. It would create a one-House veto but do it within a constitutional form.

If a regulation, a major regulation, something that has tremendous impact, before it gets imposed on the American public, has to go through both Houses to be approved, obviously if one House says no, then that's the end of the line. So you have actually gotten a simplified method of achieving what we had to begin with, but within the legal and constitutional language of the *Chadha* decision.

And you mentioned the War Powers Act. I don't think there is any point to be served by our discussing what happens specifically with that, but I am convinced that the *Chadha* decision applies to the War Powers Act, to nuclear nonproliferation, to budget impoundment and control—I could go down the list for a long time, and we have a list of them.

Now, if we in Congress are going to continue to want to exercise some control, say, over foreign arms sales—you know, the $25-million limit—that is covered by the *Chadha* decision. I think the only way we can resume our rightful responsibility and authority is to say, if the President wants to sell arms in quantities of $25 million or more, then it has to be approved by both Houses of Congress and signed by the President, which would then give us the opportunity to exercise the type of control we do now under War Powers or under foreign arms sales.

I think that control is terribly important.

I would like to say one other thing, Mr. Chairman. You are not, and some members of this committee are not living in a fool's paradise. There are a lot of Members of the House of Representatives who to this day don't understand what the *Chadha* decision has done. There are some 89 separate laws out there today that have legislative veto provisions in them, and this is what the courts have done so far: They have held the legislative veto to be unconstitutional under the *Chadha* concept, but then have said the rest of the law can stay out there, and remain valid without the veto.

Now, think about that for a minute. Think of the number of times that you personally know that you would have never voted for that particular piece of legislation if Congress didn't have another bite at the apple, or another chance to see what the agency did—you would have never voted for it.

What we are finding today is that the courts are separating the two—separating the veto and the delegated authority it was attached to.

Let me give you the worst example of all that I have come across, and there are many others. Congress, starting back with President Hoover, gave the President the right to have reorganization of the executive branch of Government. The President could propose a reorganization plan which would take effect, unless either House of Congress vetoed that plan.

Now, when a reorganization plan comes in, it results in the repeal of laws, the rewriting of new laws, the shifting of personnel and functions—it is a massive change.

The reason it was structured that way—and there is plenty of legislative history—is that it was considered simpler to let the President propose it; if Congress didn't like it, they could say, "no."

There is a district court decision that was handed down a couple of months ago—the name of the case is *Allstate Insurance Compa-*

ny v. *the Equal Opportunity Employment Commission.* EEOC was restructured under the law, that reorganization law. In that case, the court said:

> Obviously the President wouldn't have been given the power to change the whole statute book, repeal laws and write new ones, without a legislative veto attached, with Congress acting upon it—and since the legislative veto is invalid, then the rest of the law is invalid.

That makes sense.

But let me tell you what happened. In another case that was decided, the court ruled that Congress would have given the President the power to reorganize even if we had nothing else to say about it. So what the latter court said under the reorganization law, is the power of the President, any President—Jimmy Carter, Ronald Reagan, whoever our next one is down the line— to reorganize the Federal Government, change the laws, and Congress can't even say we have a right to act on it, even though we wrote it originally into the law.

It is terribly important, Mr. Chairman, that somebody begins to act on these matters. That is why I am so pleased to be here and so praising of what you are doing.

If you don't have expedited procedures to go along with the veto mechanism, then you are just turning the power over, not just to the bureaucracy, but to a handfull of committee chairmen. If I were a committee chairman, or if it came to my subcommittee, and I didn't want to let Congress have a shot at it, all I have to do is put it in my pocket for a few days, and the time will run.

So I urge you, Mr. Chairman, to grab this bull by the horns. What you do in this committee will have as great an impact on the way our Government works from now on as any other single structural change since the 14th amendment to the Constitution.

The CHAIRMAN. Well, thank you, Mr. Levitas. You are one of the thinkers in this House and in this Congress on this very vital subject. And I, as chairman of this committee, want the privilege of our committee working with you and want to solicit your working with us.

Mr. LEVITAS. I appreciate that.

The CHAIRMAN. In what we eventually evolve.

Mr. LEVITAS. I am grateful for that opportunity, Mr. Chairman, and you will have my complete time and attention. The fact that you have included me in the meetings that we have had up to this point shows that for the first time there is someone who is really serious about this, and I think that's you. Up to this point—I have heard a lot of conversation about it, but I don't think anybody's been serious.

The CHAIRMAN. Thank you very much, Mr. Levitas. We sure appreciate what you have said and done.

Now, next we have a distinguished panel here. I will ask if the panel will please come forward here to the table. First is Dr. Roger H. Davidson, Congressional Research Service; Dr. Stanley Bach, Congressional Research Service; Dr. Louis Fisher, Congressional Research Service; and Dr. Walter Kravitz.

Gentlemen, we are delighted to have you here, and I will welcome your statement.

STATEMENTS OF ROGER H. DAVIDSON, CONGRESSIONAL RESEARCH SERVICE; STANLEY BACH, CONGRESSIONAL RESEARCH SERVICE; LOUIS FISHER, CONGRESSIONAL RESEARCH SERVICE; AND WALTER KRAVITZ

Dr. FISHER. Mr. Chairman, I will go first, and then Stanley Bach, then Roger Davidson, and then Dr. Kravitz.

The CHAIRMAN. All right, that's fine.

Thank you very much. Our first witness will be Dr. Fisher.

STATEMENT OF DR. LOUIS FISHER, CONGRESSIONAL RESEARCH SERVICE

Dr. FISHER. Mr. Chairman, when I talk about expedited procedures, I find in my own mind a question as to what it means, because it is a very broad topic, a broad topic with many effects. Does it benefit Congress? Does it benefit the President?

And, as Congressman Levitas just pointed out, expedited procedures might mean one thing if you are talking about an affirmative action, a joint resolution of approval, and would mean something else for the joint resolution of disapproval.

So for me I felt it important to talk about expedited procedures in one area, to make it more tangible. And I selected reorganization authority, because that is where the legislative veto began, in 1932, and it is a history of more than 50 years that will give us some lessons about expedited procedures.

And the question that arose in——

The CHAIRMAN. Excuse me just a minute. That's interesting that you mentioned the year 1932, because there was a difference in the attitude of the country and the people running the Government itself toward the functioning of the Government. The Federal Government began to take a very much more active and intimate part in the administration of the affairs of the country along at the same time that reorganization occurred.

Dr. FISHER. The attitudes are very important to keep in mind, and we can ask whether those attitudes still apply today, 1984, on procedures.

The question then, in 1932, in the Great Depression, was how can we allow the President to change the legal structure of Government without coming to Congress? That was the issue.

And the answer to that was to give him reorganization authority, subject to a one-House veto. Either the House or the Senate could disapprove his Executive orders.

So what we find at first, back in 1932, when we speak of expedited procedures, we are talking about something that would benefit only the President; we would allow him to circumvent the Congress.

And what happened on that first delegation of authority is that President Hoover sent up 11 Executive orders reorganizing about 58 functions, and the House of Representatives disapproved them.

It is interesting that the statute did not include expedited procedures for legislative disapproval. Nevertheless, the House of Representatives was able, through its own internal rules, to act very quickly and very promptly to disapprove all of them—it acted on

its own rules and it acted through this committee in expediting floor action.

One thing I found, that even though a statute does not contain expedited procedures for legislative action, Congress can still act expeditiously through its own internal rules. On the other hand, just because you put expedited procedures in a statute doesn't mean that Congress will use them. In my paper I give the example of the National Emergencies Act of 1976. The procedure was that the President would proclaim a national emergency, and by statute Congress would have to, every 6 months, consider a concurrent resolution disapproving the emergency.

Nevertheless, in 1979, when President Carter issued a proclamation in the Iranian crisis, Congress did not use those procedures; Congress did not discharge a concurrent resolution and didn't even introduce one.

So the main point is that when Congress wants to act, it can do so through its own internal rules; it does not need to have expedited procedures in statute, and the fact that they are in statute does not mean that they will be used.

What I also found in looking at reorganization authority is that Congress looked at what it did in 1932 in disapproving the Hoover Executive orders and decided that the only way you could get reorganization was to take Congress completely out of the picture, not even give it a one-House veto.

And that is what they did in 1933: They delegated to President Roosevelt complete authority over reorganization; there would be no legislative veto; the only way the Congress could control it would be through a public law, through a joint resolution of disapproval.

What Congress found—that was a 2-year grant of authority—what Congress found is that it was not comfortable with that delegation. It had surrendered too much.

And from the late 1930's up to the present time, Congress has consistently used expedited procedures to favor congressional action and congressional control. And it did it first in 1939, the reorganization statute; instead of requiring action by a public law, it allowed action by a concurrent resolution of disapproval, a two-House veto.

In 1949, they simplified it even more, a one-House legislative veto—either the House or the Senate.

In 1957, they simplified it even more, going from a constitutional majority to a simple majority.

Throughout this period Congress had to vote either yes or no on a reorganization plan, with no opportunity to amend it. What they did in 1977, they allowed the President to send up amendments, and it opened the door for committees and Members to participate in what that amendment would be.

And now, last year, was the final step in changing the process. The bill reported out by the House Government Operations Committee requires that a reorganization plan be approved by a joint resolution, a joint resolution of approval.

So we have gone over a 50-year period from a process that favored only the President to one that makes it easier for Congress

to disapprove. Along the way we have gotten very close to what the regular process would be.

The question is why on reorganization authority wouldn't the regular process be satisfactory? What is wrong with the President submitting a reorganization proposal in regular bill form and letting it go through the regular process, through committee review and floor amendment?

The answer goes back to some attitudes we had in the 1930's. It was assumed in the 1930's that giving the President reorganization authority would allow him to save very sizeable amounts on the budget. But the record of 50 years shows that reorganization is not a tool for economy or retrenchment, that if you want to cut the budget, you have to cut functions—you just don't reorganize agencies.

Another attitude back in the 1930's was one of distrust of Congress, that you had to take Congress out of the picture because Congress would not support any reasonable proposal. The record I think is very clear—and I give some examples in my statement—that when Presidents do not have reorganization authority, and they have to submit a bill to you, Congress acts through the regular process responsibly and expeditiously—and I give a couple of examples even during the Reagan administration where in bill form the President can submit to you a proposal to reorganize or transfer, and it can be done through the regular process.

I close the statement in my paper by reviewing the *Chadha* case, because what the *Chadha* case, the Supreme Court, told Congress: You cannot use shortcuts; you must use the regular process. As you have said, you have to go through the whole public law process.

So if Congress may not use shortcuts, the question is why should you continue to allow the President shortcut methods of circumventing Congress or doing through the executive branch what he cannot do through the regular bill process, which would give Congress an opportunity to examine something very carefully in committee, through its own system, and allow Congress to act on the bill and amend it and perfect it on the floor?

That's my statement, Mr. Chairman, on the relationship between the branches. Mr. Bach will talk about the issue in terms of internal procedures between the committees and floor party leaders.

[Dr. Fisher's prepared statement, with attachment, follows:]

Congressional Research Service
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Washington, D.C. 20540

STATEMENT OF LOUIS FISHER

CONGRESSIONAL RESEARCH SERVICE

BEFORE THE

HOUSE COMMITTEE ON RULES

March 22, 1984

Chairman Pepper and Members of the Committee:

It is very risky to generalize about "expedited procedures." Some of them have favored the President. Others give Congress an advantage. To avoid misleading abstractions, I will discuss expedited procedures as they apply to one area: executive reorganization. It is in this area that the legislative veto first gained a foothold.

The record over the past half century contains many valuable lessons for executive-legislative relations. How have expedited procedures altered the balance of power between Congress and the President? What is that balance likely to be in the future without the legislative veto?

As used in executive reorganization, expedited procedures helped circumvent the delays inherent in the legislative process. Here we confront a basic policy choice, a question of philosophical preference. For those who view Congress as an obstructionist body, expedited procedures smooth the way for presidential initiatives. They are a way of making government more "efficient."

Another perspective is to regard legislative inaction not as a negative or obstructionist tool, but as a legitimate and effective way to dispose of unpopular, unworkable, and undesirable proposals. Inaction is used routinely and responsibly by all three branches of government: executive, legislative, and judicial.

In the 1930's, Congress agreed to an expedited approach for executive reorganization. Failure to act meant that presidential proposals would become law. I want to review the evolution of this process and discuss the effect of expedited procedures on legislative prerogatives.

In the midst of the Great Depression and mounting Federal deficits, Congress decided to delegate reorganization authority to President Hoover. Statutory language in 1932 permitted him to issue Executive orders for the transfer and consolidation of executive functions. Unlike the regular legislative process, he would not have to obtain congressional approval through a public law.

Both branches looked for shortcut methods of changing the statutory structure of agencies. There was broad agreement that power had to be concentrated in the President's office. Members of Congress had lost faith in their own institution. Senator Reed explained the motivation: "The only way by which we will get results is by putting the power into the hands of somebody who will assume the responsibility and use it. . . . Leave it to Congress and we will fiddle around here all summer trying to satisfy every lobbyist, and we will get nowhere." 75 Cong. Rec. 9644 (1932).

The resulting statute allowed either House of Congress to disapprove an Executive order within 60 days. It did not provide expedited procedures for congressional action. 47 Stat. 413-15 (1932). Expedited procedures in this instance were designed strictly to favor the President.

In December 1932, after his defeat in the general elections, Hoover submitted 11 Executive orders consolidating 58 governmental activities. Before the House voted on a disapproval resolution, it adopted a rule to limit debate to two hours. No amendments were permitted. The resolution of disapproval required the House to take a single vote on Hoover's recommendations, en bloc, without opportunity to vote on individual proposals. After adopting the rule and rejecting a motion to recommit (which would have instructed the House Committee on Expenditures to consider each Executive order separately on its individual merits), the House agreed to the disapproval resolution by voice vote. 76 Cong. Rec. 2103-26 (1933).

In this initial experiment with legislative vetoes, Congress saw no need to place expedited legislative procedures in the statute. Instead, they were supplied by the rule accompanying the disapproval resolution. The absence of expedited procedures in the statute did not prevent Congress from moving quickly to disapprove Hoover's proposals. Whenever Congress feels the need to act expeditiously it can do so, with or without special procedures.

On the other hand, expedited procedures have not forced Congress to act when it did not want to. For example, the National Emergencies Act of 1976 required each House of Congress, not later than six months after a national emergency declared by the President, to consider a vote on a concurrent resolution to terminate the emergency. The concurrent resolution was to be referred to the appropriate committee, reported from committee with recommendations within 15 calendar days (unless each House determined otherwise by yeas and nays), and any concurrent resolution reported "shall become the pending business . . . and shall be voted on within three calendar days after the day on which such resolution is reported, unless such House shall otherwise determine by yeas and nays." Other expedited procedures dealt with House-Senate differences. P.L. 94-412, sec. 202, 90 Stat. 1256.

Despite these requirements and various mandates for congressional action, no concurrent resolution of disapproval was ever introduced, much less acted upon, after President Carter declared a national emergency over the Iranian crisis in 1979. The Senate Foreign Relations Committee and the House Foreign Affairs Committee merely wrote letters to President Carter stating action on a resolution of disapproval was unnecessary. 126 Cong. Rec. 11270-71, 11537 (1980).

Expedited procedures in the reorganization statute have passed through major stages since 1932. After Franklin D. Roosevelt entered office, Congress renewed the President's reorganization authority. The disapproval resolution by the House of Representatives convinced a number of legislators that reorganization would never occur if either House could veto a presidential initiative. The Senate debated a bill that would require disapproval by concurrent resolution. Senator Vanderberg urged his colleagues to confront "the precise situation and the realities. . . . We have just witnessed the impossibility of achieving even an incidental step in that direction by presidential order so long as Congress with its diverse interests, retains the veto." 76 Cong. Rec. 2587 (1933). In floor action, the Senate deleted the legislative veto — even its two-House form.

The legislative veto was removed for two reasons: to facilitate action by the President, and to eliminate some constitutional doubts that had been raised by Attorney General Mitchell. Id. at 3538. As enacted into law, the bill granted the President reorganization authority for two years without the encumbrance of a legislative veto. The only constraint on the President was a 60-day waiting period, during which time Congress could pass a public law to disapprove an Executive order. 47 Stat. 1517-19 (1933).

Members of Congress expected Roosevelt to use reorganization authority to force major economies. In fact, he used the authority sparingly and only then for noncontroversial purposes. He never regarded reorganization as a means for achieving savings. He believed that budget cutbacks require the elimination of programs, not their reorganization.

Roosevelt's interest in reorganization was rekindled in 1936, following a number of setbacks in the Federal courts. Legislation introduced in 1937 sought to restore the President's reorganization authority. As with the 1933 statute, the administration's bill did not give Congress a legislative veto.

Consideration of the bill coincided with Roosevelt's attempt to pack the Supreme Court, an effort that prompted critics to warn of a "presidential dictatorship." In this climate, Congress was unwilling to delegate reorganization authority without some type of legislative check short of disapproving by public law.

An amendment by Senator Wheeler, to prevent Executive orders from becoming effective unless Congress enacted a joint resolution of approval within 10 days, was narrowly rejected, 43 to 39. 83 Cong. Rec. 3645 (1938). When the House of Representatives refused to delegate reorganization authority to the President, Roosevelt agreed to accept a concurrent resolution of disapproval. This change allowed Congress to maintain control by majority vote in each House rather than by extraordinary majority (needed to override a presidential veto).

Some Members objected even to this form of delegation. An amendment by Congressman Summers, to permit either House to disapprove a reorganization plan, was agreed to 176 to 155 in Committee of the Whole, only to lose 193 to 209 in the full House. 84 Cong. Rec. 2498-2502 (1939). Senator Wheeler offered his amendment again -- requiring a joint resolution of approval -- and won support (46 to 43) before the Senate reversed itself a day later (44 to 46). Id. at 3048-50, 3093.

The Reorganization Act of 1939 placed upon the President the responsibility for submitting reorganization plans. They would become law unless Congress disapproved them by concurrent resolution within 60 days. The statute provided expedited procedures for congressional action: committee discharge, limited floor debate, and no floor amendments. Each House would vote up or down on the President's plan. 53 Stat. 564-65 (1939).

Prior to 1939, expedited procedures had benefited only the President. His plans for reorganization would become law unless disapproved by Congress. There were no statutory provisions to facilitate congressional action. With the 1939 Act, expedited procedures now served the interests of both branches.

Even so, some Members of Congress thought it served the interests of the President more than Congress. They disliked the quid pro quo. Congressman Hoffman wanted Congress to act in an affirmative manner, using a concurrent resolution to approve presidential proposals. 91 Cong. Rec. 9442 (1945). Other Members of Congress continued to view Congress as essentially irresponsible. Congressman Rich remarked: "I know if you are going to save this Nation, if you are going to get any economy in Government, if you are going to reorganize, the only way to get results is to do it this way [a concurrent resolution of disapproval], even if it is the wrong way, because I do not have the faith in Congress that they will do it. They are afraid to do the job. That is the reason I am going to take a chance on President Truman. If he does not do it, God save America." Id. at 9447. The House rejected Hoffman's amendment by a vote ot 111 to 145. Id. at 9450.

Another way to strengthen congressional control was the one-House veto. Congressman Judd objected that even if one House vetoed a plan by a margin of 10 to 1, if the plan squeaked by in the other House by a single vote it would take effect. To illustrate his point, he said that the House of Representatives by a substantial margin had disapproved a plan to reorganize the Civil Aeronautics Authority, and yet the proposal became law because the Senate failed to veto it. Judd's amendment fell by the close vote of 145 to 159. Id. at 9445-53.

The bill reported from the Senate Committee on Judiciary in 1945 provided for a one-House veto. That position was reversed on the floor, by the Byrd amendment, which supported the concurrent resolution of disapproval. Id. at 10713. The Reorganization Act of 1945 continued the reliance on the two-House veto and retained the procedures for committee discharge and limited debate. 59 Stat. 613.

The move toward a one-House veto finally prevailed in 1949, when Congress renewed the President's authority to submit reorganization plan. There had been intense pressure to exempt various agencies from the President's authority. The Senate Committee on Expenditures concluded that the only way to avoid these exemptions would be to make it easier for Members to veto plans that jeopardized favorite programs. The solution was a one-House veto. S. Rept. No. 232, 81st Cong., 1st Sess. 15 (1949). The administration did not raise a constitutional objection, for it realized that a demand for the two-House veto would probably stimulate a long list of exemptions. Id. at 19-20. The Reorganization Act of 1949 allowed either House to disapprove a reorganization plan. Provisions for committee discharge and limited debate were retained. 63 Stat. 203.

The next step in expediting congressional disapproval came in 1957. Congress rewrote the reorganization statute to permit either House to veto a plan by "simple majority" (a majority of the Members present and voting) instead of by the previous system of "constitutional majority" (a majority of the authorized membership of either House). 71 Stat. 611.

The disapproval resolution -- allowing the President to change statutory law without congressional action -- continued to trouble Members of Congress. Some of them considered the procedure abdication rather than responsible delegation. For decades there had been strong support for an affirmative vote on reorganization proposals. In 1971, during debate on extending the President's reorganization authority, Congressman Jack Brooks criticized the existing statute as an "unconstitutional delegation of legislative power." To provide a better balance of power between the branches, he recommended that Congress approve reorganization plans by a two-thirds majority in each House.

He offered two reasons for the supermajority. First, reorganization plans "bypass a major portion of the legislative process. They cannot be amended on the floor. There are strict time limitations within which they must be considered. In fundamental terms, they are the creature of the executive rather than the legislative branch, which has little, if any, opportunity to affect their character." Second, since government reorganizations were "fundamentally a legislative function of the Congress rather than a prerogative of the President," a two-thirds vote would be consistent with the extraordinary majority needed to overcome a President's veto of regular legislation. "Extending the President's Reorganization Authority," hearings before the House Committee on Government Operations, 92d Cong., 1st Sess. 9, 28-29 (1971).

The Reorganization Act of 1977 retained the simple resolution of disapproval, but it added a feature that gave Congress an opportunity to alter the shape of a reorganization plan. During the first 30 days after a plan had been submitted to Congress, the President could offer amendments or modifications. 91 Stat. 31, sec. 903(c). This provision allowed the President to amend his plan in response to congressional objections. H. Rept. No. 10[illegible], 95th Cong., 1st Sess. 7-8 (1977).

The possibility of presidential amendments (some forced by congressional pressure) brought the reorganization procedure a step closer to the regular legislative process. Another step occurred on May 16, 1983, when the House Government Operations Committee reported the Reorganization Act Amendments (H.R. 1314). The bill required that a reorganization plan would take effect only if both Houses passed a joint resolution of approval. The time period for presidential amendments was extended to 60 days. H. Rept. No. 128, 98th Cong., 1st Sess. (1983).

Given these major changes in reorganization authority over the past half century, the need to delegate this authority seems less compelling. First, the supposed budget savings from this delegation have not been borne out by events. Representatives from both the legislative and executive branches have admitted for many years that reorganization is not a significant source for retrenchment.

Second, the delegation of reorganization authority rested on the premise that Congress would not act on President's proposals through the regular bill process. The recent record does not support that assumption. In 1981, for example, at a time when President Reagan lacked reorganization authority, his proposal to transfer the Maritime Administration from the Commerce Department to the Transportation Department was introduced on July 6, passed both Houses that month, and was signed into law on August 6. The regular process worked. Expedited procedures were not necessary.

To take a more recent example, a reorganization bill to transfer certain functions from the Office of Management and Budget to the General Services Administration was introduced on April 19, 1983, passed the House of Representatives under suspension of the rules on June 1, passed the Senate on October 28, and was signed into law on November 29. Not only did the regular process suffice, both Houses used internal rules to facilitate action. Expedited procedures, mandated by statute, were not needed.

At least in the area of executive reorganization, the record raises the question whether there is any need to require expedited action by statute. For modest reorganization proposals, the record of recent decades suggests that Congress will act on them responsibly and expeditiously through the regular process. If reorganization is to be used for major changes, it can be addressed through the regular legislative process, allowing Congress to shape the bill during committee review and by floor amendments. Especially since Chadha, Congress may want to protect its prerogatives by requiring the President to submit reorganization proposals in bill form, subject to the regular legislative process. If there are to be no "shortcuts" for Congress, as the Supreme Court has ruled, why give shortcuts to the President?

Presidential Reorganization Authority: Is It Worth the Cost?

LOUIS FISHER
RONALD C. MOE

The president's authority to propose executive reorganization plans to Congress, subject to veto in either house, expired 6 April 1981.[1] Both houses, at the request of President Ronald Reagan, must once again consider the value of this process and the wisdom of extending it.

Like most students of government, we had long assumed that the president's reorganization authority served the interests of both branches. The more we explored the subject, however, the more we doubted our preconceptions. As our research continued, we gained more respect and appreciation for the arguments against granting this power to the president. We now conclude that the drawbacks of the reorganization plan process are so serious, and the premises behind it so weak, that both branches would benefit by not renewing the authority.

The nation functioned reasonably well throughout most of its history without the reorganization plan authority. Indeed, through at least a third of its fifty-year existence, the reorganization plan authority has been allowed to lapse without any evident threat to the polity. In short, the law is not a critical element

[1] The one-year extension of the president's reorganization authority (P.L. 96-230) to 6 April 1981 was not viewed by the chairman of the Senate Governmental Affairs Committee as a ringing endorsement of the concept or of the law. Rather, it was renewed "in case minor adjustments" needed to be made. The year was to be used by the committee as a time for "further study" of the law and its procedures. U.S., Congress, Senate, *Congressional Record*, 96th Cong., 2d sess., 2 April 1980, 126: S3502 (daily edition).

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in our system. This being the case, the burden of proof for its renewal rests with the proponents, who should be prepared to prove that the law meets a demonstrated need and that it does not engender significant unanticipated and undesirable side effects.

Our studies indicate that from the passage of the first reorganization act in 1932 to the present certain fundamental issues have resisted resolution. Key questions raised long ago and never satisfactorily answered are seldom addressed today. It is not even clear who benefits, if anyone, from this legislation. What is certain, however, is that the successive reorganization laws have tended to degrade the institutional relationship between the president and Congress.

"Economy" in Government

The issue of renewing the president's reorganization authority in 1981 needs some historical perspective.[2] The decision in 1932 to give the president authority to submit reorganization proposals did not emerge out of whole cloth. It was the logical outgrowth of two powerful concepts that enjoyed favor at the time—the notion that a theory of administration could be developed that was at once apolitical and scientific, and the idea that the president should actively "manage" the executive branch. Both strains of thought found expression in the broader movement to reorganize the executive branch.

"To Herbert Hoover," noted Herbert Emmerich, "belongs the undoubted credit for the invention and espousal of the important peacetime reorganization device—presidential initiative subject to the legislative veto."[3] This "invention" was not a pure creative act. Herbert Hoover, a product of the Progressive Era, believed in the tenets of Frederick W. Taylor's "Scientific Management" movement. Taylor wrote that there was One Best Way to manage a manufacturing activity. Although he was specifically concerned with managing the work process in the factory, he was convinced, as were his followers, that the principles of Scientific Management were applicable to public administration as well.[4]

Scientific Management was influential not so much because of its specialized procedures as the fundamental idea it fostered—namely, the infinite perfec-

[2] For a detailed historical discussion of successive reorganization acts, see Louis Fisher and Ronald C. Moe, "Delegating With Ambivalence: The Legislative Veto and Reorganization Authority," in U.S., Congress, House, Committee on Rules, *Studies on the Legislative Veto*, 96th Cong., 2d sess. (committee print, 1980), pp. 164-247.

[3] Herbert Emmerich, *Federal Organization and Administrative Management* (University, Ala.: University of Alabama Press, 1971), p. 43.

[4] Many public administrators, over several decades, would pin their hopes and aspirations for a better world on Taylorism. "Our administrators of the future," John Pfiffner declared in 1940, "must be good managers. They must know the techniques of scientific management. Indeed, it may well be that the principles of Frederick W. Taylor, adopted to social ends, will some day free the world of drudgery. . . . What is needed is the development of a school of management research technicians who possess the just, wise, and omniscient qualities of Plato's guardians" (*Research Methods in Public Administration* [New York: Ronald Press, 1940], p. 25).

tibility of human institutions.[5] The public administration community was persuaded, as were most political reformers, that the proper vehicle to achieve this infinite perfectibility was the institutionalized presidency. In the 1920s the president gradually emerged as the dominant force in supervising the administrative agencies.[6] It was also during these years that Herbert Hoover became the most "prominent theoretician-practitioner in American public administration."[7]

Shortly after Hoover entered the White House in 1929, the Great Depression descended upon the nation. Hoover had long been a proponent of the idea that Congress should delegate to the president authority to propose reorganizations in the executive branch.[8] In 1929, the new president asked Congress to give him authority to reorganize the executive branch, subject to some form of congressional disapproval.[9] Congress was unreceptive to this entreaty. In 1932, however, with the presidential campaign under way, both political parties called for drastic reductions in federal spending as a means to combat the depression.

Congress decided to shift to the president the authority to initiate reorganizations rather than tolerate the delays in the legislative process attributed to the influence of interest groups. Although legislators expressed apprehension about delegating such power to the president, they were disillusioned by their own performance. Congressional sentiment is reflected by Senator David Reed:

> Mr. President, I do not often envy other countries their governments, but I say that if this country ever needed a Mussolini it needs one now. I am not proposing that we make Mr. Hoover our Mussolini, I am not proposing that we should abdicate the authority that is in us, but if we are to get economies made they have to be made by some one who has the power to make the order and stand by it. Leave it to Congress and we will fiddle around here all summer trying to satisfy every lobbyist, and we will get nowhere. The country does not want that. The country wants stern action, and action taken quickly. . . .[10]

Hoover received authority to reorganize the executive branch, subject to a simple resolution of disapproval (one-house veto). When Congress reconvened on 5 December, he issued eleven Executive orders consolidating some fifty-eight governmental activities. But by that time Hoover had been repudiated in the

[5] Leonard D. White, *Introduction to the Study of Public Administration*, 4th rev. ed. (New York: Macmillan Company, 1955), p. 21.

[6] Peri E. Arnold, "Executive Reorganization and Administrative Theory: The Origins of the Managerial Presidency" (Paper presented at the 1976 Annual Meeting of the American Political Science Association, Chicago, Ill., September 1976).

[7] Ibid., p. 12. See also Peri E. Arnold, "The 'Great Engineer' as Administrator: Herbert Hoover and Modern Bureaucracy," *Review of Politics* 42 (July 1980): 329.

[8] Speaking as secretary of commerce in 1924, Hoover had recommended that Congress give the president authority, under specified limits, to reorganize the executive departments and agencies. See U.S., Congress, Joint Committee on Reorganization of the Executive Departments, *Reorganization of the Executive Departments*, 68th Cong., 1st sess., 1924, p. 353.

[9] *Public Papers of the Presidents of the United States: Herbert Hoover, 1929* (Washington, D.C.: Government Printing Office, 1974), p. 432.

[10] U.S., Congress, Senate, *Congressional Record*, 72d Cong., 1st sess., 1932, 75, pt. 9: 9644.

general election. In the closing days of the lame-duck Congress, legislators decided to leave reorganization changes to the next occupant of the White House, Franklin D. Roosevelt. All of the Executive orders were disapproved by the House of Representatives.

Hoover, anticipating this vote, recommended that future reorganization efforts should be free of the legislative veto to avoid "merely make-believe politics."[11] Congress followed that advice by passing the Economy Act of 1933, enacted one day prior to Roosevelt's inauguration. The delegation of power in that act was extraordinary. The statute did more than allow the president to transfer functions. It authorized him, for a two-year period, to "abolish the whole or any part of any executive agency and/or the functions thereof." Moreover, it eliminated the check of a one-house veto.

The early reorganization acts coincided with a period in which Congress doubted its own capacity to act rapidly and in the "public interest." These feelings were most evident in matters involving administrative organizations and appropriations. Many legislators had abandoned hope that cutbacks in government spending could ever be realized with congressional participation. Senator Arthur Vandenberg spoke for many members in 1933 when, after they had disapproved Hoover's Executive orders, he remarked: "Let us confront the precise situation and the realities. We now face the necessity for drastic retrenchment and reorganization of the bureaus, departments, and so forth. We have just witnessed the impossibility of achieving even an incidental step in that direction by presidential order so long as Congress, with its diverse interests, retains the veto."[12]

Acting under this statutory authority, Roosevelt issued several Executive orders transferring various agencies and functions. But the actions were not very controversial or far-reaching.[13] Between 1933 and 1935, Roosevelt had little interest in executive branch reorganization; he permitted the authority to lapse in 1935.

Roosevelt's interest in executive reorganization was rekindled later in 1935, however, when the Supreme Court limited the president's authority to remove members of the independent regulatory commissions, a move the president viewed as severely restricting his administrative capacities. Roosevelt now turned to administrative reorganization "as a possible means of trying to integrate all of the separate independent agencies into major executive departments where they would clearly be subject to the president's administrative supervision."[14]

[11] *Public Papers of the Presidents of the United States: Herbert Hoover, 1932-33* (Washington, D.C.: Government Printing Office, 1977), p. 920.

[12] U.S., Congress, Senate, *Congressional Record*, 72d Cong., 2d sess., 1933, 76, pt. 3: 2587.

[13] See Lewis Meriam and Laurence F. Schmeckebier, *Reorganization of the National Government* (Washington, D.C.: Brookings Institution, 1939), pp. 200-212, and A. J. Wann, *The President as Chief Administrator: A Study of Franklin D. Roosevelt* (Washington, D.C.: Public Affairs Press, 1968), p. 193.

[14] Wann, *The President as Chief Administrator*, p. 193.

Roosevelt harbored no illusions about saving money through reorganization. In 1936, the president told Louis Brownlow and Luther Gulick: "We have to get over the notion that the purpose of reorganization is economy. I had that out with Al Smith in New York. . . . The reason for reorganization is good management."[15] Extensive economy, he told Congress two years later, "depends upon a change of policy, the abandonment of functions, and the demobilization of the staffs involved," all of which were outside the scope of his request for reorganization authority.[16]

In 1938, the House of Representatives refused to grant Roosevelt substantial new powers to reorganize the executive branch. The next year, a more modest bill, drafted by congressional leaders, became the Reorganization Act of 1939. Its preamble contained a statement of the Scientific Management ideal and the invocation of economy, the latter point having been added to the bill by Senator Harry Byrd.[17]

The preamble of the 1939 act had as its first objective: "To reduce expenditures to the fullest extent consistent with the efficient operation of Government." To make sure that cutbacks did not touch favored programs, Congress exempted a number of agencies, commissions, boards, and public corporations from the reorganization process. Also, Congress reserved to itself the right to disapprove reorganization plans by a concurrent resolution of disapproval to be passed by both chambers (two-house veto).

The objective of expenditure reductions remained in the preambles of all subsequent reorganization acts. The creation in 1947 of the first Hoover Commission reflected the belief that only a comprehensive reorganization effort could bring "economy and efficiency" to the federal government. Former President Hoover, chairman of the commission, held out the promise that the proposed changes could save billions of dollars. The commission recommended that Congress renew the president's reorganization authority, which Congress did in 1949; but as the price to pay for avoiding exemptions in the bill for favored agencies, Congress simplified the disapproval procedure by adopting a one-house veto.[18]

The Truman administration submitted forty-one reorganization plans under the 1949 statute. Only a handful gave any hope of saving money. When a member of Congress suggested to an agency official that it would be refreshing to hear the administration admit that a reorganization plan would not save

[15] Louis Brownlow, *A Passion for Anonymity*, vol. 2 (Chicago, Ill.: University of Chicago Press, 1958), p. 382.

[16] *The Public Papers and Addresses of Franklin D. Roosevelt*, vol. 5 (New York: Random House, 1938), p. 676.

[17] Richard Polenberg, "Roosevelt, Carter, and Executive Reorganization: Lessons of the 1930s," *Presidential Studies Quarterly* 9 (Winter 1979): 43.

[18] U.S., Congress, Senate, Committee on Expenditures in the Executive Departments, *Reorganization Act of 1949: Report to Accompany S. 526*, 81st Cong., 1st sess., 1949, S. Rept. 232, pp. 12–15.

money, the official replied, "It might be refreshing but it might also be disastrous."[19]

As it turned out, the principal achievement of the first Hoover Commission was to sanction the managerial presidency, not the achievement of "economy" in government. Peri Arnold summed up the commission's work: "It was the supreme political accomplishment of the first Hoover Commission that it masked the managerial Presidency with the older values of administrative orthodoxy and, to a significant degree, undercut the conservative and congressional opposition to the expansive executive. . . . In the end, Hoover and his Commission provided the bridge over which the congressional opponents of Franklin Roosevelt could embrace the managerial Presidency."[20]

Between 1949 and 1980, presidents submitted 103 reorganization plans to Congress, 83 of which became effective. Rarely, however, can reductions in expenditures be directly traced to these reorganization plans.[21] It appears, nonetheless, that the paucity of demonstrable savings has not substantially diminished the appeal of the economy premise for executive reorganizations.

In 1977, President Jimmy Carter requested that the itemized-savings requirement of the reorganization act be deleted; in its place the president offered to provide information on the improvements in management, efficiency, and delivery of federal services that his plan would produce. The Senate balked at this request and reinserted the old requirement that there be an itemized estimate of any reduction or increase in expenditures anticipated in the plan.[22] Furthermore, in 1980, at the request of the House Government Operations Committee, the president submitted a report on the "savings"—they were modest—that had resulted from his first nine reorganization plans.[23] Whatever else may have been accomplished by the reorganization plan process, the formal objective of substantially reducing government expenditures has not been achieved.

Constitutional Expediency

The delegation of reorganization authority to the president has been accompanied by statutory standards that are vague, outmoded, and in some cases dis-

[19] Quoted in William E. Pemberton, *Bureaucratic Politics: Executive Reorganization During the Truman Administration* (Columbia: University of Missouri Press, 1979), p. 62.

[20] Peri E. Arnold, "The First Hoover Commission and the Managerial Presidency," *Journal of Politics* 38 (February 1976): 49–50.

[21] "Of the reorganization plans transmitted to the Congress from 1949 through 1978, only six . . . were supported by precise dollar estimates of savings. . . . Granted executive branch reluctance to offer savings estimates which can be later used in evidence by the appropriations committees, it is clear that the failure to itemize expenditure reductions reflects the reality that economies are produced by curtailing services and abolishing bureaus, not by reorganization" (Harold Seidman, *Politics, Position, and Power*, 3rd rev. ed. [New York: Oxford University Press, 1980], p. 13).

[22] U.S., Congress, Senate, *Congressional Record*, 95th Cong., 1st sess., 1977, 123, pt. 5: 6147.

[23] U.S., Congress, House, Committee on Government Operations, *Extension of Reorganization Authority: Report to Accompany H.R. 6585*, 96th Cong., 2d sess., 1980, H. Rept. 805, pp. 3–4.

ingenuous. Ill-defined standards raise the question of an unconstitutional delegation of authority, while the legislative veto has been accommodated only with substantial discomfort and strained analyses.

Although Hoover was the first president to ask for reorganization authority, subject to a legislative veto, he was also the first to question the constitutionality of this disapproval procedure. Near the close of his term in 1933, Hoover vetoed a tax bill that contained a committee veto provision. To his veto message he attached an opinion by Attorney General William Mitchell, who said that the one-house veto in the reorganization act "raises a grave question as to the validity" of the entire procedure.[24] Senator James F. Byrnes, member of the Appropriations Committee, successfully offered an amendment in 1933 to delete the legislative veto from the reorganization authority after concluding that the attorney general was "probably correct."[25]

Roosevelt initially opposed the legislative veto. A draft bill by the administration in 1937, to revive the president's reorganization authority, did not include a one-house or two-house veto. Congressional disapproval would require a regular bill, subject to presidential veto. When the bill passed the Senate in 1938, Roosevelt argued that the only permissible constitutional route for disapproving an Executive order was by joint resolution (requiring action by both houses and signature by the president). He stated "categorically that if such a joint resolution were passed by the Congress disapproving an order, I would, in the overwhelming majority of cases, go along with carefully considered congressional action." His opposition to the two-house veto was unequivocal.

> But there are two cogent reasons why the [administration] bill should go through as it is now drawn. The first is the constitutional question involved in the passage of a concurrent resolution which is only an expression of congressional sentiment. Such a resolution cannot repeal Executive action taken in pursuance of a law. The second is the very remote possibility that some legislative situation might possibly arise in the future where the President would feel obligated to veto a joint resolution of the Congress and properly require a two-thirds vote to override his veto. I repeat that I visualize no such possibility between now and 1940, when the authority given is to end.[26]

The Senate bill met unexpectedly strong resistance in the House. Within a matter of days Roosevelt reversed his position. The administration now supported an amendment to allow Congress to reject any Executive order by a majority vote of both houses (a concurrent resolution). Congressman Martin Dies justified the amendment by referring to the president's willingness to abide by the concurrent opinion of Congress: "This being true, neither he nor anyone else should have any objection to the incorporation in specific terms of that provi-

[24] *Opinions of the Attorney General*, vol. 37 (1933): 63–64. For Hoover's veto, see U.S., Congress, House, *Congressional Record*, 72d Cong., 2d sess., 1933, 76, pt. 3: 2445–46.

[25] Quoted in U.S., Congress, Senate, *Congressional Record*, 72d Cong., 2d sess., 1933, 76, pt. 4: 3538.

[26] Quoted in U.S., Congress, House, *Congressional Record*, 75th Cong., 3d sess., 1938, 83, pt. 4: 4487.

sion in this law."[27] This rationalization ignored Roosevelt's description of a concurrent resolution as "only an expression of congressional sentiment." Such resolutions, he had insisted, "cannot repeal Executive action in pursuance of a law."

Other arguments were offered to support the administration's switch. The president would be acting as an "agent" of Congress, subject to the conditions established by the legislative branch. The legislative veto became the vehicle by which Congress could announce that the president had violated his power of agency.[28] Second, administration supporters distinguished between the use of a concurrent resolution applied to past laws and those to laws "in the making." The latter was constitutional; the former was not.[29] When another reorganization bill was offered in 1939, Executive orders were replaced by reorganization *plans*. The White House hoped that the notion of a "plan" would appear to be a less obtrusive request for authority than action through an Executive order.[30]

The lure of economy, always beckoning on the horizon, has caused some members of Congress to abandon certain constitutional principles. Congressman Robert Rich, a staunch advocate of tight legislative reins on the Treasury Department, told his colleagues in 1945 that he was willing to suspend his constitutional doubts about the legislative veto because of what he perceived to be a financial crisis facing the country: ". . . if this was 6 months ago," noted Rich concerning his support of the committee bill on renewing the reorganization act, "I would not do it. I know if you are going to save this Nation, if you are going to get any economy in Government, if you are going to reorganize, the only way to get results is to do it this way, even if it is the wrong way, because I do not have the faith in Congress that they will do it. They are afraid to do the job. This is the reason I am going to take a chance on President Truman. If he does not do it, God save America."[31]

Also in the spirit of crisis, Senator Harry F. Byrd abandoned his previous insistence that Congress act affirmatively on reorganization plans. He was willing, in 1945, to let a plan take effect after sixty days unless disapproved by a concurrent resolution. Byrd explained that the organizational structure of the Government had deteriorated to the point where constitutional misgivings had to give way to practical politics: "I am convinced, after 12 years of study on the subject of reorganization, that the only way to get a worth-while, honest-to-goodness reorganization is to abolish bureaus and agencies of the Government and reduce

[27] Ibid., p. 4603.

[28] Ibid., p. 5004.

[29] Ibid., p. 5005.

[30] Regarding the substitution of a *plan* for an Executive order, one study noted: "If, constitutionally, Congress could not disapprove reorganization proposals when embodied in executive orders, then perhaps it might properly reserve the power to disapprove *plans*. The issue of constitutionality versus unconstitutionality has in the past been determined by differences no more substantial than mere phraseology" (John D. Millett and Lindsay Rogers, "The Legislative Veto and the Reorganization Act of 1939," *Public Administration Review* 1 [Winter 1941]: 180).

[31] U.S., Congress, House, *Congressional Record*, 79th Cong., 1st sess., 1945, 91, pt. 7: 9447.

the number of personnel wherever possible, rather than merely to shift one bureau to another. I think the only way to accomplish that is to give the President the power to do it, after exempting the quasi-judicial agencies of the Government."[32]

In recent years, presidents have been placed in an uncomfortable position. They have opposed all legislative vetoes except the one in the reorganization act. Beginning in 1949, various high officials in the Justice Department developed arguments to justify this particular legislative veto while casting doubt on all others. In 1977, Attorney General Griffin Bell wrote to President Carter that the one-house veto attached to the reorganization authority is the only constitutionally valid legislative veto.[33] The checkered history of the reorganization statutes, and the evident difficulty of distinguishing those laws from others, has weakened any principled objection the president might have to the legislative veto. The position appears to be: it is acceptable when the president is advantaged, but unconstitutional when Congress is advantaged.

Time and mutual acceptance have not settled the constitutional issue involved in the reorganization acts. As recently as 1977, Congressman Jack Brooks introduced a bill calling for an affirmative vote by Congress, in the form of a joint resolution, to confirm a reorganization plan. Any other disapproval procedure, he said, would represent an unconstitutional delegation of power. When the House Government Operations Committee, chaired by Brooks, agreed to retain the one-house veto, he noted at the meeting of the full committee that the measure was "the best unconstitutional bill you could draw up."[34]

Political Rationale

While the statutory objective "economy and efficiency" has rarely been satisfied, and constitutional doubts remain, it is possible to argue that reorganization authority is worthwhile because it accomplishes important nonstatutory political objectives. The debate on specific reorganization plans is generally conducted on two levels: the formal, public debate in which symbols and values of orthodox administrative theory are invoked; and the "real politics" level where the fate of organizations, programs, and personalities are decided. It is to the latter level that Harold Seidman refers: "The knowledgeable members of Congress and the executive branch are generally quite aware what these issues are—and they seldom have anything to do with economy and effi-

[32] Ibid., p. 10571.

[33] Letter reprinted in *To Renew the Reorganization Authority*, hearings before the Senate Committee on Governmental Affairs, 95th Cong., 1st sess., 1977, pp. 11–12.

[34] U.S., Congress, House, Committee on Government Operations, *Extension of Reorganization Authority to the President: Report to Accompany H.R. 5045*, 95th Cong., 1st sess., 1977, H. Rept. 105, p. 43. Congressman Brooks did succeed in amending the bill to require that resolutions of disapproval be introduced in both chambers. This move was intended to virtually assure a floor vote on each reorganization plan. In practice, however, the Senate in a majority of instances did not take a floor vote on the reorganization plans submitted by President Carter.

ciency. But the real issues are openly discussed, if at all, by indirection and in language which only insiders can understand."[35]

Herbert Kaufman, another perceptive student of the governmental process, has pointed out that the consequences of reorganization do not lie in the realm of efficiency or cost of government but are measured in terms of influence, policy, and communicating the administration's priorities.[36] The political defense of the president's reorganization authority as a useful and necessary administrative process generally rests on three related premises: The reorganization plan method diminishes the role of "politics" in administrative decision making; the president and congressional leaders are able to enact necessary, yet controversial, reforms; and the reorganization plan process enhances the president's ability to be an effective manager of the executive branch.

Diminishing the Role of Politics

The American ambivalence towards "politics" is nowhere more evident than in the continuing debate over how the government ought to be organized. Supporters of the executive reorganization process are generally uncomfortable with, or hold in disdain, partisan politics. They tend to see public policy as the product of negotiations between groups asserting selfish interests, even though they too enter the political arena to accomplish personal policy objectives. Through much of this century, political reformers seeking the triumph of the public interest over the private interests have placed their faith in the institutionalized presidency.

Reform groups have not only been sympathetic to the presidency, but generally hostile towards Congress. They tend to see Congress as part of a subgovernment consisting of interest groups, agencies, and congressional committee leaders who work to keep policymaking within the confines of their alliance. For reformers, then, the reorganization plan method is attractive because it appears to permit the president to outmaneuver this subgovernment and propose what is "right."

Any attempt to remove politics from the reorganization process, however, is bound to fail. Politics, as Harold Lasswell opined, is the process that determines who gets what, when, and how. The reorganization act neither eliminates nor diminishes politics; it merely alters the rules by which the politics is conducted, restricts the number of players, and limits the time for congressional consideration.

Congress is frequently described as an institution rendered virtually helpless by the presence of "roadblocks" in the normal legislative process and by the dispersion of power and authority. One of the traditional justifications given

[35] Seidman, *Politics, Position, and Power*, p. 11.

[36] Herbert Kaufman, "Reflections on Administrative Reorganization," in *Setting National Priorities: The 1978 Budget*, ed. Joseph Pechman (Washington, D.C.: Brookings Institution, 1977), pp. 391–418.

for the executive reorganization process has been that it permits the president and the congressional leadership to overcome these hurdles. In 1961, for instance, the Kennedy administration submitted a bill to establish a Department of Urban Affairs and Housing. The Senate and House Government Operations Committees favorably reported the bill, but the House Rules Committee (a major roadblock at the time) declined to clear the measure for floor action. Faced with this opposition, the administration decided to short-circuit the legislative process and submit a reorganization plan to create the department.

The Senate Government Operations Committee held hearings on the plan, but a motion to discharge the committee of its jurisdiction was introduced prior to the expiration of the normal period for consideration. The extraordinary haste in this effort to take the plan from the committee, coupled with political reservations on the substance of the proposal, led the Senate to reject the motion to discharge by a vote of 58 to 42. On the day following the Senate action, the House disapproved the plan, 264 to 150.[37]

Rather than deemphasize politics, this episode illustrates how the reorganization plan method can escalate politics to high intensity. Details of departmental structure were relegated to the background. The primary issue became whether the president would be politically embarrassed by Congress. Congress, in this instance, chose to embarrass the president and defeat the plan. When Congress renewed the president's reorganization authority in 1964, it reacted to what it considered a presidential "end-run" by prohibiting the president from submitting reorganization plans that would establish an executive department.[38]

While the 1962 defeat of the housing reorganization plan constitutes a dramatic example of confrontation between the executive and legislative branches, on a smaller scale the same problems arise each time a reorganization plan is submitted. Congress must divert its limited time and staff resources to the implementation of the mandatory procedures outlined in the act. So must the executive branch. Truman discovered, as did later presidents, that reorganization proposals often "faced such strong opposition that expenditures of time, energy, and political resources ordinarily make them too costly to be undertaken on a large scale. The combined opposition from executive agencies, congressional committees, and pressure groups were almost impossible to overcome, especially in the case of plans that were most desirable to the executive."[39]

The original reorganization plan procedure was largely supported on the ground that, in denying Congress (or the president) the right to amend plans once submitted, it prevented interest groups and agency leaders from blocking desirable, yet controversial, legislation. The Reorganization Act of 1977 permits the president to transmit amendments to a plan after it has been forwarded to Congress, thereby reintroducing this suspect element of politics into the

[37] U.S., Congress, Senate, *Congressional Record*, 87th Cong., 2d sess., 1962, 108, pt. 2: 2527–44, and 2680.

[38] 78 Stat. 240 (1964).

[39] Pemberton, *Bureaucratic Politics*, p. 176.

reorganization process. Congress may now recommend amendments requested by interest groups, and the president may be obliged to submit them as a price for passage.

The amendment option itself is now one of the bargaining chips in the negotiations between Congress and the president. The amendment process reintroduces the possibility of interest-group and agency pressure upon Congress and dilutes the remaining justification for the reorganization plan authority. President Carter introduced ten reorganization plans, and in five instances he later submitted amendments. The 1977 provisions for presidential amendments to submitted reorganization plans blurs the distinction between the reorganization process and the regular legislative process.

Enacting Controversial Reforms

It is one of the ironies of the reorganization authority that it is used either for the most trivial of matters or for the most politically important and sensitive issues, such as establishing a major agency. In either instance, the review process followed by Congress is the same and is inappropriate.

It may be questioned, for example, whether President Kennedy in 1963 should have felt it necessary to use the reorganization process to transfer the Franklin D. Roosevelt Library from joint custodianship by the General Services Administration (GSA) and the Department of the Interior to the sole custodianship of GSA. The decision involved ten guards, one repairman, and two janitors, at a total cost of $87,000 a year.

More recently, in 1979, the president transmitted a plan to create a federal inspector for the Alaska natural gas pipeline project (Reorganization Plan No. 1 of 1979), a minor, noncontroversial proposal that could have been handled as expeditiously by statute. Such proposals suggest compulsory make-work. The White House and the Office of Management and Budget (OMB) staffs conclude that once reorganization authority is granted it must be used on a regular basis, even for picayune matters, for otherwise Congress may take it away. The thinking parallels the "use it or lose it" philosophy that agencies have toward federal funds.

When a major proposal is offered in the form of a reorganization plan, Congress is placed in a difficult position. In 1970 the House Government Operations Committee wanted to accommodate the president in his efforts to reconstitute the Bureau of the Budget into the Office of Management and Budget, but it objected to the use of the reorganization plan process to achieve this end. In recommending disapproval of the plan, the committee detailed several specific objections, but it lacked time to alert other members to these deficiencies.[40] The regular legislative process would have been preferable, allowing the House

[40] U.S., Congress, House, Committee on Government Operations, *Disapproving Reorganization Plan No. 2 of 1970: Report to Accompany H. Res. 960*, 91st Cong., 1st sess., 1970, H. Rept. 1066.

Government Operations Committee to retain the sound features of the plan together with other modifications important to Congress.

Occasionally the reorganization process creates more work for Congress rather than less. In 1973, for instance, three days before the president's reorganization authority was due to expire, President Nixon transmitted a reorganization plan to establish a Drug Enforcement Administration in the Department of Justice. The plan called for a number of transfers of agencies and authorities. Functions of the Bureau of Customs (Department of the Treasury) pertaining to drug investigations and intelligence were to be moved to the Justice Department. The Treasury Department would get some 900 Immigration and Naturalization Service (INS) inspectors.

The two unions representing INS and Customs Bureau employees opposed the plan. The House Government Operations Committee voted 23–17 against the plan. To stave off a floor defeat, OMB officials met with the labor leaders and reached a written agreement with them. Such action was unprecedented. OMB agreed to send congressional leaders a draft bill that would repeal a section of the plan that the unions found objectionable.[41] Congressman Jack Brooks argued that the agreement reached between the administration and the two labor unions constituted a threat to the integrity of the legislative process.

> I am appalled that the OMB would enter into a written agreement not to implement an act of this Congress. This is not the first time that OMB has refused to carry out a congressional directive, but it is the first time of which I am aware that they have entered into a written public agreement to follow that course. It is also the first time in my experience in over 20 years in Congress that a bill to repeal an act of Congress was pending prior to the enactment of the provision by Congress.[42]

The vote to disapprove the plan failed in the House. Since no resolution of disapproval had been introduced in the Senate, the plan became effective on 1 July 1973. One month before the effective date, however, Congressman Holifield, chairman of House Government Operations, introduced a bill to repeal the offending section. Because of delays on the Senate side, the bill was not enacted until 16 March 1974.[43]

This plan illustrates the institutional costs that may be incurred by Congress when the reorganization plan process is used. Although reorganization staffs may spend considerable time in researching an issue, the plans themselves are frequently drawn up in haste with inadequate preparation, drafting, and consultation with affected bodies. Agency heads are often given little time to comment on draft plans that will significantly impact their agencies.[44] Congress has

[41] U.S., Congress, House, *Congressional Record*, 93d Cong., 1st sess., 1973, 119, pt. 14: 17519–20.

[42] Ibid., p. 18466.

[43] 88 Stat. 50.

[44] William L. Cary, *Politics and the Regulatory Agencies* (New York: McGraw-Hill Book Company, 1967), p. 29.

been placed in a position where it had to accept a poorly conceived proposal or embarrass the president. In the instance under discussion, Congress had to pass a bill to "amend" the drug reorganization plan to ratify a written agreement between OMB and certain interest groups. How this year-long process constituted an improvement over the normal legislative process is difficult to ascertain.

In the three decades since passage of the Reorganization Act in 1949, there has been a gradual, yet persistent, erosion in the president's reorganization authority. This erosion reflects the ambivalence of Congress regarding its delegation of power to the president and the ways presidents in recent years have used this authority.

The act was noteworthy for the broad scope of authority delegated to the president. In this respect, Congress was heeding the recommendation of the first Hoover Commission that few limitations be placed on the president's authority to submit plans and that no agencies be exempted. "Once the limiting and exempting process is begun," Hoover warned, "it will end the possibility of achieving really substantial results."[45] In recent years, however, Congress has chosen to place limits on this authority and has exempted certain agencies from coverage.

In 1964, Congress denied the president authority to submit plans proposing new executive departments. When the law was renewed in 1971, there was a provision inserted that a plan must be limited "in effect" to dealing with no more than "one logically consistent subject matter." In 1977, the president was prohibited from proposing plans that established, abolished, or consolidated departments or independent regulatory agencies. Furthermore, he could not propose the elimination of any enforcement function or statutory program of an agency. No more than three reorganization plans could be under consideration at one time.

The erosion in presidential reorganization authority is also evident in the trend toward creating governmental units outside the purview of the reorganization act. These new exemptions cannot be located by reading the reorganization act; they are included in the enabling statutes of the units in question. Two recent examples include the Legal Services Corporation and the Synthetic Fuels Corporation.[46]

Enhancing Presidential Management

The reorganization plan process is considered by many to be a useful tool for the president to use against the bureaucratic fiefdoms. He can redistribute in-

[45] U.S. Commission on Organization of the Executive Branch of the Government, *The Hoover Commission Report* (New York: McGraw-Hill Book Company, 1949), p. xv.

[46] The Reorganization Act applies only to agencies of the federal government. The Legal Services Corporation is legally described as a "private nonmembership nonprofit corporation," not an agency of the federal government (88 Stat. 379–380, sections 1003[a] and 1005[e][1]). The Synthetic Fuels Corporation, another "nonagency" of the federal government, is further exempted from the reorga-

fluence in a policy field by restructuring organizations. Reorganization plans may be considered, in some instances, as presidentially imposed treaties upon bureaucratic combatants.

There is another side, however, to the reorganization plan process for the institutional presidency. If a president is going to ask that the reorganization authority be renewed, he must show that it is a delegation of authority that is needed and will be used. Historically, the pattern of reorganization plan use has been uneven and opportunistic.

In 1949 and 1950, immediately following the issuance of the first Hoover Commission report, the president submitted some thirty-five plans, of which twenty-six became effective. These plans were unusual because they "embodied one consistent and thoroughgoing effort to apply the Hoover Commission's prescription for strengthening the central management of departments and agencies by transferring to their heads all and sundry statutory powers previously lodged in their components and subordinates."[47] Aside from this one burst of systematic and philosophically cohesive reorganization activity, there has been little in the way of coherence among the proposals. Each plan appears to be justified on an ad hoc basis.

Occasionally, presidents have sought to preempt or settle certain political and administrative controversies by the use of reorganization plans. In 1970, President Nixon proposed the establishment of the Environmental Protection Agency (EPA) as an agency independent of any of the existing departments. The purpose was to symbolize to the public the commitment of his administration to the protection of the environment and also to preempt efforts by other departments and agencies to participate. Similarly, in 1970 the administration proposed the National Oceanic and Atmospheric Administration (NOAA), placing it in the Department of Commerce (rather than in the Department of the Interior) as a temporary location prior to the anticipated establishment of a new Department of Natural Resources.[48]

The benefits for the president, however, should be weighed against some of the costs. Concentration on process and procedures tends to obscure substantive issues and often results in pyrrhic victories for the president. Considerable resources in the OMB and the various departments and agencies are exhausted discussing and planning for reorganizations. Even the prospect of a reorganization, irrespective of whether it comes to fruition, causes much maneuvering and preparation within agencies.

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nization authority through its enabling act which states that the Reorganization Act of 1977 "shall not apply to authorize the transfer to the Corporation of any power, function, or authority" (94 Stat. 640, sec. 119[b][2]).

[47] Harvey C. Mansfield, "Federal Executive Reorganization: Thirty Years of Experience," *Public Administration Review* 29 (July-August 1969): 339.

[48] Office of Management and Budget, *Papers Relating to the President's Departmental Reorganization Program* (Washington, D.C.: Government Printing Office, 1971), pp. 171-72. See Richard Corrigan, "Conservationists Prepare to Fight Plan Giving Commerce Lead Oceanography Role," *National Journal*, 25 July 1970, pp. 1581-84.

There have been instances when presidents have caused themselves unnecessary political damage by using the reorganization plan option. In February 1979, President Carter announced he would forward a reorganization plan to establish a Department of Natural Resources that would absorb the Interior Department and include the Forest Service from the Agriculture Department and NOAA from the Commerce Department.[49] While the use of the reorganization plan process to establish this department was endorsed by Chairman Brooks of the House Government Operations Committee, it ran into stiff opposition from Senator Ribicoff, who chaired the Governmental Affairs Committee. Ribicoff's objection was based on his interpretation of the Reorganization Act's prohibition against using reorganization plans to create new departments. Administration officials argued that they were not proposing a "new" department. Rather, they were just moving some agencies around and changing some titles. Senator Ribicoff disagreed: "Section 905(a) of the Reorganization Act of 1977 states that no reorganization plan may provide for or 'have the effect of creating a new executive department.' It is my belief—and the belief of a number of other Senators—that this prohibition was written into law to cover just the kind of situation we are facing in this instance."[50]

Administration officials had been quite candid in their belief that tne proposal for a new Department of Natural Resources could not be passed using the regular legislative process. The only chance for success, in their view, lay in a reorganization plan.[51] When the White House recognized that the Senate leadership adamantly opposed the use of a reorganization plan to establish a department, it withdrew the proposal. President Carter, however, did pay a price. In response to his request for an extension of the reorganization authority, members of Congress gave him only a year extension and served notice that they would use the time to review the authority and its procedures. The administration also had to promise that it had no plans to propose the creation of a Department of Natural Resources "or anything resembling it."[52]

[49] Hedrick Smith, "White House to Ask New Resource Department," *New York Times*, 1 March 1979.

[50] U.S., Congress, Senate, *Congressional Record*, 96th Cong., 1st sess., 7 March 1979, 125: S2255 (daily edition).

[51] The political reality is that the presidential staffs often see the reorganization plan process as a means to achieve White House objectives not likely to be accepted if subjected to the regular legislative process. A White House aide in the Carter administration explained that with a reorganization plan "you don't need passionate supporters. All you need to do is avoid passionate enemies. That's the only way to get any of this through. We could never do it by legislation" (Rochelle L. Stanfield, "The Best Laid Reorganization Plans Sometimes Go Astray," *National Journal*, 20 January 1979, p. 86.

[52] U.S., Congress, Senate, Committee on Governmental Affairs, *To Extend the Reorganization Authority of the President*, 96th Cong., 2d sess., 1980, p. 6. Statement of Harrison Wellford, Executive Associate Director for Reorganization and Management, OMB.

Debasing the Process

We do not deny that a case can be marshalled for renewing the president's reorganization authority. The record shows that this authority has been used often and, in some instances, has achieved major results. Passage of reorganization authority can be a useful exercise in symbolic politics, sending a message to voters that both branches are committed to efficient government. Presidents may seek the authority to convince the bureaucracy that the White House is in charge, exerting control on the "subgovernments" in which agencies play a leading role. The reorganization process allows the president to skirt the political obstacles that exist in the regular legislative process. The argument will also be heard that it is unfair to deny future presidents a power that most presidents have had since the 1930s. The case for the plan method of reorganization has been succinctly argued by Harvey Mansfield.

> The particular utility of the plan method is not to displace previous methods of securing a reorganization, but to capitalize the advantages of its unique characteristics. The statute is not to be had for the asking. Each President must negotiate for it anew. What he gets, that he could not otherwise secure, is an opportunity from time to time to present the Congress, the country, and the entrenched interests with a reorganization package of his own devising, as a *fait accompli*, barring a veto; and if a protest is raised, an opportunity to appeal directly to the full membership of either house for support in a floor vote within a stipulated time on the package as he put it together, bypassing both the leadership and the legislative committee seniors if they are unsympathetic. This is an opportunity our constitutional system otherwise seldom affords.[53]

We believe these virtues, however, are more than offset by several serious shortcomings. First, to our minds there is something unseemly, and ultimately self-defeating, about lauding a method that seeks to circumvent the constitutional process. When a method is employed to reach an objective that might not have gained the backing of a majority in each House, the system of lawmaking is, to some degree, debased. "Stealthiness" appears to be a virtue that is rewarded, at least in the short run.

Second, the reorganization plan method is premised on an essentially negative view of Congress that does not comport with the facts. It assumes that members of Congress are irresponsible and will not support sensible legislative proposals submitted by the executive branch. The record suggests, however, that Congress can, and does, act with dispatch on organizational matters. Moreover, instead of cultivating an atmosphere of trust and mutual respect, the process breeds cynicism and suspicion. The plan method is grounded in a similarly hostile attitude toward the bureaucracy. Once legislators and agency officials are stereotyped as untrustworthy, the attitude is corrosive. It is difficult to look upon them favorably for other decisions.

Third, the delegation of the reorganization power to the president is un-

[53] Harvey C. Mansfield, "Federal Executive Reorganization: Thirty Years of Experience," p. 341.

necessary and potentially counterproductive. Little of value has been accomplished by reorganization plan that could not have been done through the regular legislative process. The mere existence of the authority places pressure on presidents to use the process lest they appear frivolous for having requested the authority in the first instance. Presidential staffs engage in reorganization for the sake of reorganization. The process becomes the goal.

Given this environment and the time and resource constraints present in the institutional presidency and in Congress, it is not surprising that many plans exhibit inadequate preparation and technical knowledge. On Capitol Hill, a debate on substance is necessarily subordinated to the exigency of appearance. Members have little time to uncover inconsistencies, contradictions, or other defects that may be hidden within a reorganization plan.

Furthermore, congressional ambivalence over the delegation of reorganization authority to the president has resulted in misunderstanding, confusion, and recrimination between the two branches. On the one hand, Congress gives the president authority to skirt the regular legislative process, yet when the president invokes the power, he risks being accused of violating the established system. After each presidential "misuse," Congress responds by adding restrictions and exemptions, gradually circumscribing the power; today the reorganization act is but a shadow of the 1949 statute. The original design has been so diluted that recourse ought now to be had to the regular legislative process—a conclusion especially compelling in view of the 1977 change that allows presidents to submit amendments to their plans. Having introduced one more element of the legislative process, it is wise to take the next step and let the regular procedure prevail.

This is not to suggest that it is always inappropriate for Congress to delegate to the president certain powers to reorganize the executive branch. When the two Hoover Commissions submitted their reports, there was some justification for permitting a "fast track" legislative process. The individual plans were part of a systematic approach to reorganization. Also, during periods of national emergencies, it may be advisable to delegate to the president substantial reorganization authority, subject to a congressional veto. During normal periods, however, both branches are ill-served by the reorganization plan method. If a proposal is noncontroversial, the regular legislative process will do. If controversial, there is all the more reason to insist on full congressional review and affirmative action by both houses. Only the normal legislative process can properly address the emerging organizational issues of the 1980s.

The CHAIRMAN. Excuse me just a minute. You described the *Chadha* case as a holding by the Supreme Court that Congress could not use an abbreviated process, they couldn't have a shortcut, as it were.

I thought of it in terms that the Court was holding that the Congress couldn't function except in the performance of its constitutional legislative duty; that every re-examination of every rule or every matter that may have been delegated by Congress to an administrative or to an independent agency, cannot be varied by the Congress unless they pass a new law.

And I just wonder whether that is denying to the Congress a function that it should be able to discharge. We call it sometimes oversight, sometimes we call it something else—review or the like.

But I just have a feeling that the Court denies Congress the ability to discharge its functions that it should have the right to perform.

Dr. FISHER. In some cases, the Court's decision might have helped Congress in this sense, that previously, when you delegated authority, you would let the President or the agency change legal matters, unless you stopped them; the whole burden was on you, through a legislative veto, to disapprove.

But if, after the Supreme Court decision, you decide in some areas not to delegate but to require the President to come up in the regular bill process, then you put the burden on him to get your support. I think the control is back in your hands, because if one House decides that is not an attractive proposal and decides not to support it, that is the end of the matter.

So under the regular——

The CHAIRMAN. Once we have delegated authority to an agency and it exercises that authority, the only way we can stop it is by a joint resolution submitted to the President.

Dr. FISHER. Under the old system you would delegate a great deal and hold in check a legislative veto. But now, after the Supreme Court case, you may decide to delegate less in some areas. You may want the President to submit reorganizations in bill form and put the whole burden and responsibility on him to attract your support.

You don't need a legislative veto in that case. You don't need a joint resolution of approval or disapproval, because nothing is going to happen unless you support it through the regular bill process.

So the regular bill process, without joint resolutions and expedited procedures, really gives you full control, it gives you full control through committees, your area of expertise; it gives you full control on the floor through any amendments you would like to add.

The CHAIRMAN. You mean in the first instance, when we are delegating?

Dr. FISHER. In this area of reorganization, say you decide not to delegate and tell the President any time he has a good idea to reorganize, send it up as a regular bill and we will consider it.

The CHAIRMAN. Doctor, I'm sorry, but you know the President of France is going to be downstairs at 3:30. You all are a particularly valuable group.

You go right ahead. Next is Dr. Bach.

Dr. BACH. Thank you, Mr. Chairman. Mr. Chairman, I have a prepared statement that is rather long and I would like to submit it for the record and merely summarize it.

The CHAIRMAN. Without objection, it will be received. Excuse me, did you want to submit your statement for the record, Dr. Fisher?

Dr. FISHER. Yes, Mr. Chairman.

The CHAIRMAN. The statement of Dr. Fisher, without objection, will be received.

STATEMENT OF DR. STANLEY BACH, CONGRESSIONAL RESEARCH SERVICE

Dr. BACH. Mr. Chairman, let me shift focus and comment on some of the implications of expedited procedures for the operations of the Congress itself. I would like to highlight the general proposition that expedited procedures, it seems to me, are basically at odds with some of the principles and practices that usually characterize the legislative process.

First, I suppose I should note that not all of the statutes that have provided for congressional approval or disapproval have included expedited procedures, including many of them that are still on the statute books and excerpted in the House manual.

Other legislative-veto statutes, of course, do contain expedited procedures, but not all expedited procedures are the same. And in my statement I discuss some of the variations in the packages of expedited procedures that Congress has enacted over the years.

It seems to me that if expedited procedures are to be effective in achieving their intended goal, they have to provide certain things.

For example, first, they have got to provide that the resolution cannot be blocked or delayed unduly in committee. Second, they have got to provide that the resolution, whether or not it is reported from committee, can reach the floor promptly for consideration. And, third, the procedures have to provide that a final floor vote within the time permitted cannot be prevented through delay.

Now, in practice this seems to require, first, setting a reporting deadline for the committee of jurisdiction; second, providing either for automatic discharge or for a special discharge procedure, if the committee fails to report; third, making the resolution privileged for floor action; and then, fourth, limiting the process of debate and amendment on the floor.

Mr. Chairman, in looking at these expedited procedures, first they restrict the discretion of House and Senate committees in deciding what measures they want to consider and when they want to consider them. The timing of committee action becomes determined largely by the timing of the executive branch initiative. And if the committee fails to act under the expedited procedures, then the resolution is either automatically discharged or a privileged motion to discharge is made in order.

The effect of this is to prevent congressional committees from performing one of the most valuable services they perform for the Congress. And that is the service they perform by doing nothing—by deciding not to act, as they screen and filter the thousands of measures that are introduced every Congress.

Expedited procedures also can limit the normal prerogatives of the majority party leadership in planning the floor agenda and in scheduling specific bills for floor action. The deadlines for congressional action, which necessitate expedited procedures in the first place, impose constraints on the floor schedule as well. The timing of floor consideration reflects the timing of the executive branch initiative, and then the pace of committee action. Moreover, if a resolution for which there are expedited procedures is not scheduled in the normal manner, the rulemaking statutes frequently provide that any Member—can offer a privileged motion to consider it.

Thus, the House and Senate can be presented with measures on the floor that a majority of Members may not wish to confront, and that, therefore, weren't scheduled for floor action by the majority party leadership.

In addition, let me note that expedited procedures frequently impose a time limit on floor debate and they usually prohibit all amendments, including committee amendments. Now, the time allotted for debate can be generous—2 hours in some cases and as many as 20 hours in others. But the maximum time is set in advance. Amendments are prohibited because the measures considered under expedited procedures are intended to be take-it-or-leave-it propositions, measures that simply approve or disapprove an executive branch initiative.

Instead of each chamber setting its ground rules for floor action through its usual and quite flexible procedures, especially the special rules reported by this committee and unanimous-consent agreements that are arranged in the Senate, rulemaking statutes with expedited procedures set these ground rules in advance and they set the same ground rules for all resolutions considered under the same act.

The debate limitations that frequently are included in expedited procedures may be particularly important and disturbing to the Senate. The House normally goes about its business under rather restrictive debate conditions. But, as you know very well yourself, Mr. Chairman, this isn't so in the Senate.

And whenever a debate limitation applies in the Senate, Senators lose the leverage that flows from the potential of a filibuster. If the debate limit is a very generous one, then this may not be a problem. But if the limit is stringent, then, it seems to me, it can change the ground rules on the Senate floor in a fundamentally important way.

As I recall, the 1981 reconciliation bill came to the Senate floor with a number of provisions that had no direct budgetary impact. But because these provisions were in a reconciliation bill and because that bill and all amendments to it were considered under the Budget Act with a debate limit of 20 hours, the Senate found itself presented with legislation that Senators opposed but could not filibuster even if they wanted to. So the debate limitations in expedited procedures may be a matter of special sensitivity in the Senate.

I will conclude, Mr. Chairman, by emphasizing that I am not arguing for or against expedited procedures. They can be a necessary means to achieve a goal: Namely, to ensure that the entire House or Senate can vote on a specified measure within a specified time.

Because this is a goal that Congress doesn't usually seek, the usual procedures of the House and Senate aren't sufficient to achieve it; and if the goal is valued highly enough, then expedited procedures become not merely appropriate, but essential.

But these procedures in and of themselves do have some implications and consequences for the way in which the House and Senate go about their own business that also deserve the committee's attention.

That concludes the summary of my statement, Mr. Chairman.

[Dr. Bach's prepared statement follows:]

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STATEMENT OF STANLEY BACH

CONGRESSIONAL RESEARCH SERVICE

ON EXPEDITED PROCEDURES

BEFORE THE HOUSE COMMITTEE ON RULES

March 22, 1984

Mr. Chairman and members of the Committee, my name is Stanley Bach; I am a Specialist in the Government Division of the Congressional Research Service. I am pleased to appear today at the Committee's request and to comment on some of the implications and consequences of expedited procedures for the legislative process in the House and in Congress generally. As a staff member of CRS, it would be inappropriate for me to offer judgments about the value or wisdom of such procedures; instead, I wish to highlight some issues that the Committee may consider in reaching its own judgments.

SUMMARY

My comments on expedited procedures may be summarized by three basic points. First, expedited procedures are intended to achieve a purpose that is not common to most other legislative procedures in Congress. Second, expedited procedures differ from the more usual procedures of the House and Senate in ways that affect the activities of congressional committees, the relationship between committees and their parent chambers, the prerogatives of the majority and the rights of the minority, the control over scheduling matters for floor consideration, and the ability of individual Members to shape public policy through debate and amendments. Third, therefore, expedited procedures may be evaluated by asking if their utility justifies setting aside usual procedures and the principles and relationships they embody.

THE NATURE OF EXPEDITED PROCEDURES

Sets of expedited procedures generally have been enacted into law, usually as part of legislative veto provisions, when (1) the law imposes a deadline for congressional action on a measure (typically a resolution of approval or

disapproval) in one or both chambers, and (2) Congress wishes to ensure that the full membership of the chamber(s) can have an opportunity to vote on the measure before the deadline is reached. Expedited procedures have been included in a variety of statutes as rule-making provisions, enacted pursuant to the constitutional authority of each chamber to "determine the rules of its proceedings." As such, they may be enforced, modified, waived, or ignored as Congress sees fit.

To ensure an opportunity for a floor vote, effective sets of expediting procedures must provide (1) that the resolution cannot be blocked or delayed unduly in committee, (2) that the resolution, whether or not reported from committee, can reach the floor promptly for consideration, and (3) that a final floor vote within the time permitted cannot be prevented through delay. Because such resolutions often are not amendable, either in committee or on the floor, there usually is less need to protect against possible delays in resolving substantive, as opposed to procedural, differences between the House and Senate.

Translating these general requirements into specific procedural arrangements, an effective set of expedited procedures would:

(1) set a time limit for the committee of jurisdiction to report;

(2) provide for automatic discharge or a privileged motion to discharge, with no debate or limited debate, if the committee fails to report;

(3) make the resolution privileged for floor consideration, either immediately or after a brief layover period, whether the resolution has been reported or the committee has been discharged;

(4) prohibit amendments, including committee amendments, and impose stringent time limits on debate during floor consideration of the resolution; and

(5) provide for prompt floor consideration and little or no debate on an identical companion resolution from the other chamber (if each chamber has acted initially on its own measure).

Not all sets of expedited procedures include all these provisions. However, eliminating any one of the provisions can be fatal by leaving open opportunities for delay or inaction. I propose to discuss some of the implications and consequences of the model set of procedures I have just outlined, and then to consider some of the variations that Congress has enacted.

EXPEDITED AND USUAL PROCEDURES

Some of the implications of effective expedited procedures for congressional operations emerge from a comparison of these procedures with more usual House and Senate procedures for acting on proposed legislation. In some respects, it is difficult to talk about "usual" procedures. There are variations among the procedures generally followed by House and Senate committees, the House

has as many as five basic packages of procedures for considering measures on the floor, special rules in the House include unique sets of procedural arrangements and prohibitions suited to individual measures, and the Senate frequently sets its rules aside in favor of simple or complex arrangements decided by unanimous consent. Nonetheless, there are a number of characteristics that typify the legislative process--more or less, more often than not. And in general, effective expedited procedures are at odds with these characteristics.

1. Committees generally control their agendas, schedules, and workloads.

Congress does not usually require its committees to act on certain measures or kinds of measures, nor do the House and Senate often impose deadlines for committee action. There are exceptions to this generalization, of course, just as there are exceptions to virtually every generalization about how Congress does its business. For example, sequential referrals frequently are accompanied by reporting deadlines. But the generalization remains sound.

The Appropriations and Budget Committees are exceptions in that they have responsibility for specific and limited sets of measures and they face time constraints imposed by congressional rules and the fiscal calendar. But the timetable of the Budget Act can be modified, waived, or ignored as Congress chooses. The same timetable requires authorizations and re-authorizations to be reported from committee by May 15th, but this deadline is waived regularly, and there is no procedural requirement (as opposed to practical necessity) that committees report these measures at all. Budget waiver resolutions in the Senate and resolutions of inquiry in the House also are exceptions, but the former tend to be routine and the latter are uncommon and without statutory force. In short, whether the measure at issue is a public bill or whether it is a simple resolution, such as a committee funding resolution or a special rule, the pressures on committees to act are generally grounded in political or governmental necessity, not in procedural requirements.

This condition does much to permit House and Senate committees to set their own agendas, establish their own priorities, and control their own workloads. Committees make these decisions within fairly broad and generally accepted constraints: congressional rules should be followed whenever possible; government activities should not be halted for lack of necessary legislative action; and key presidential proposals and intense public concerns should receive a hearing. Still, these constraints leave committees with considerable latitude for action and inaction. And it is by inaction that committees make one of their most

important contributions to the legislative process, as they separate the relatively few measures that, in their judgment, should receive floor action from the many more that should not.

What of expedited procedures? In comparison with the conditions that normally prevail in either chamber, these sets of procedures generally deprive committees of the control they usually enjoy over their agendas and schedules. Effective expedited procedures generally set a time limit for committee action, and provide for automatic discharge or a privileged motion to discharge if the committee fails to act within the deadline. Thus, committees are generally confronted with the choice of acting within an imposed deadline or losing jurisdiction over the measure. Furthermore, the timing of committee action is largely determined by when the executive branch acts or when a measure is introduced; the committee does not control when the clock begins to run. The effect of these procedures on committee workload also can be significant—depending, of course, on how frequently they can be and are invoked.

2. The House and Senate generally consider only measures that have been approved by their committees.

The control that committees normally enjoy over their own activities is critical because committee inaction often is conclusive. Again as a general rule, a bill is moribund unless it receives favorable committee action. In this context, however, a significant difference between the House and Senate should be noted.

Although the two chambers give their committees much the same discretion, the House is more likely to abide by committee inaction or the timing of committee action. If a House committee fails to act on a bill, or fails to act quickly enough to satisfy its proponents, they have relatively little recourse. Discharge is so difficult as to be a last resort, and Rule XXI has been amended to the disadvantage of proposed limitation amendments. Moreover, this Committee evidently has been reluctant to propose extracting bills from the control of other committees, or to propose waiving the germaneness rule so that the text of one bill can be offered as a floor amendment to another measure.

By contrast, the rules of the Senate result in less deference to committee agenda and scheduling decisions. If a Senate committee fails to report a measure, the text of that bill or resolution can be offered as a non-germane floor amendment to most other measures (although the fact that the committee of jurisdiction has not considered the amendment can be a persuasive argument against it). Alternatively, the text of a bill that remains in committee may

be re-introduced as a new measure and placed directly on the Senate's calendar of legislative business with precisely the same procedural standing it would have had if it had been referred to committee and then reported (although a motion to call up the bill may well be opposed by some or all of the committee's members). In short, while committee inaction in the Senate is a significant impediment to legislative action, it is not as difficult an obstacle to surmount or circumvent as it is in the House.

Notwithstanding these differences between the House and Senate, the usual practice and expectation in both chambers is that the measures considered on the floor are measures that have been selected or developed, and then studied and approved, by the committee or committees of jurisdiction. Effective expediting procedures, on the other hand, alter the normal implications and consequences of committee inaction. Instead of meaning the death of the bill or resolution, inaction means that the committee may lose much of its control over a measure that can reach the floor anyway. The prospect of automatic discharge or a privileged motion to discharge is a strong incentive for the committee to act, even if its action takes the form of an adverse report.

Underlying the more usual procedures of the House (and, to a lesser extent, those of the Senate) is the fact that more measures are introduced than can possibly be considered on the floor, and the presumption that some considerable deference is due to the judgments of the standing committees as they screen the measures referred to them. Effective expediting procedures are at odds with this presumption, in that they permit certain measures to reach the floor because of the general class to which they belong, not because of committee judgments about their individual merits.

3. A voting majority generally can determine whether a measure will be considered on the floor.

If the lack of committee action normally can determine which bills will not reach the House or Senate floor, the committees normally cannot compel floor consideration of the measures they have reported favorably. As a general rule, voting majorities of the House and Senate retain ultimate control of their floor agendas.

In the House, a majority can prevent a bill or resolution from being considered by means such as defeating a special rule for considering the measure, or, in theory at least, by defeating the motion to resolve into Committee of the Whole (in the case of a privileged appropriations measure, for example) or by raising the question of consideration and voting against considering the

measure (under the Calendar Wednesday rule, for example). Motions to suspend the rules may be considered an exception, but passing a bill by this means requires a two-thirds vote. For more controversial measures, the House has delegated to this Committee the responsibility for recommending an order of business through the special rules that are reported. But it remains for the entire House, by majority vote, to accept or reject each such recommendation.

The situation in the Senate is complicated by the absence of devices to terminate debate by majority vote. Consequently, the votes of sixty Senators may be required to invoke cloture on motions to consider, though most measures reach the Senate floor by unanimous consent. Still, even if a simple voting majority in the Senate cannot always call up the measures on which it wishes to act, a simple majority can prevent consideration of measures--but not amendments--on which it prefers not to act. Given the rights of Senators to debate (and thereby delay action) and a natural desire of the majority party leadership to use limited floor time efficiently and productively, the intense opposition of one Senator or a small minority of Senators may be sufficient to postpone floor consideration of a bill temporarily or permanently.

In this respect, the difference between expedited and more usual procedures lies not in the measures that the House and Senate must consider, but in the votes that members can be made to cast.

Expedited procedures generally do not provide for automatic or mandatory floor consideration of the measures to which they apply. Instead, they generally make in order a privileged motion to consider, on which there can be limited debate or no debate at all. Either chamber still can vote not to consider the measure. But a vote for or against consideration has clear and obvious policy implications; a bill or resolution that is not considered cannot be passed (unless as an amendment to another measure). So a decision by roll call vote not to consider a measure does not protect Representatives or Senators against the need to take a public position on the issue the measure addresses.

The difference between these and more common procedures lies in the fact that the House or Senate usually is not even presented with a measure, or a motion to consider it, unless there is a reasonable presumption that a majority is prepared to pass it. Under expedited procedures, there is a greater likelihood that members will be presented with votes, if not with measures, that a majority may prefer not to confront. The reason for this difference lies in the implications of expedited procedures for majority party control over floor scheduling.

4. Setting the floor agenda and the daily schedule generally is a prerogative of the majority party.

By and large, the majority party leadership of the House and Senate enjoy at least a negative control over the floor agenda. Although any Senator may move to consider any measure on the legislative calendar, such motions (or the equivalent unanimous consent requests) are made only by the Majority Leader or another Senator acting at his behest or with his concurrence. It is by this means that the Majority Leader can exercise some control over the daily schedule and the more long-term agenda. If other Senators did not defer to the Majority Leader in this regard, the conduct of business on the Senate floor would become far less predictable, to the detriment of all Senators and the expedient transaction of essential or important business.

In the House, this Committee is not inclined to report a special rule when the majority party leadership actively opposes consideration of the measure at issue. Although a variety of matters are privileged, it is the responsibility of the committee leaders, primarily or exclusively, to arrange for their consideration—a process that involves cooperative discussions with the party leadership. In the case of motions to suspend the rules, the discretionary power of the Speaker is explicit. And generally, the number of privileged matters eligible for floor action at any one time permits the Speaker to exercise considerable control over the daily schedule through his power of recognition.

The agenda control of the majority leadership is more effective as a negative than as an affirmative power; as a general matter, these leaders in either chamber are better able to prevent consideration of measures they oppose than to secure consideration of measures they support. And there are limits to their negative power—for example, limits imposed in the House by the discharge and Calendar Wednesday procedures and by the responsibilities and powers of this Committee, and limits imposed in the Senate by the right of Senators to propose non-germane amendments. Nonetheless, leadership control over the schedule and agenda is potent, and there usually is little incentive for the majority party leaders to ask their chamber to take up a measure that a voting majority is not prepared to consider and pass.

Expedited procedures tend to undermine majority party leadership control over the floor schedule and agenda, and they bypass this Committee's responsibilities for the order of business in the House. These procedures generally make the measures to which they apply privileged business, even if they have not been reported by the committee of jurisdiction (unlike most other privileged measures in the House). Precisely because expedited procedures are

designed to ensure an opportunity for floor action within a limited time period, there is a strong presumption that an expedited measure should be scheduled for consideration by the leadership. And if it is not, it may be called up by any member of either party, whether or not at the direction of the committee of jurisdiction. Moreover, the timing of floor action is constrained by the date of the executive action and by the deadline imposed by statute.

5. The House and Senate generally can set conditions for floor debate and amendment that are appropriate for each measure that is considered.

The standing rules of the two chambers specify the procedures for debate and amendment that are to govern consideration of measures on the floor. However, each chamber has one or more devices by which these procedures can be modified. In the Senate, cloture may be invoked if necessary; more often, the general rules of the Senate are set aside by unanimous consent in favor of a negotiated agreement concerning one amendment or the entire process of considering a measure. In the House, the special rules reported by this Committee supplement and supplant the general rules of the House by specifying the length and control of general debate, by restricting or expanding the range of amendments in order, and by expediting final action in the House after the Committee of the Whole rises and reports. The procedures under suspension of the rules also are available as an alternative to consideration in Committee of the Whole or in the House under the one-hour rule.

By such means, the House and Senate can, and often do, adjust their floor procedures to suit the characteristics of the specific measures before them. Expedited procedures generally do not permit this kind of flexibility. More often than not, these procedures limit debate and prohibit all amendments. Such restrictions may be necessary, given the deadlines for congressional action and the purpose of most measures considered under expediting procedures—to approve or disapprove specific actions or regulations proposed by the executive branch. However, the same period for debate may not be appropriate for all measures considered under the expediting provisions of the same statute. And these restrictions usually permit Congress only to approve or disapprove, but not modify, the proposed executive decision (except through a new statute that is not subject to the expedited procedures).

When expedited procedures apply to measures other than resolutions of approval or disapproval, their constraints on floor consideration can be even more important. The procedures of the Budget Act governing Senate floor action on reconciliation measures impose time limitations on debate and a germaneness requirement on amendments that otherwise would not apply. This has been the

cause of some consternation among Senators when reconciliation bills have included changes in law that were not required to comply with reconciliation instructions. Because those proposed changes were included in a bill considered under expedited procedures, the proposals were not subject to the extended debate that would have been possible under more conventional parliamentary circumstances.

It bears emphasizing that there are exceptions to each of the five generalizations I have just discussed. Yet these generalizations do identify typical characteristics of the legislative process. In significant ways, effective sets of expedited procedures are inconsistent with these characteristics. They impose unusual requirements on standing committees—both as to what measures the committees shall consider and when those measures shall be considered. They take from the standing committees one of their most important powers—the power to do nothing. Expedited procedures create an additional and major class of privileged measures—measures dealing with a wide array of subjects, and measures that can vary considerably in their individual importance. The consideration of each of these measures can be brought to a vote on the House and Senate floor, even over the opposition of the committee of jurisdiction, and consideration of the measure may be proposed by any member of either party if it is not scheduled through the normal practices and prerogatives of the majority party leadership. Finally, measures considered under expedited procedures generally are subject to limited debate and no amendments, and these restrictions are imposed by the rule-making statute to all the measures that may arise under that statute.

VARIATIONS IN EXPEDITED PROCEDURES

Not all statutes providing for resolutions of approval or disapproval include expedited provisions, and the sets of expedited provisions that do appear in such statutes are not all the same. The Manual of House rules (House Document No. 97-271) includes a two-hundred page compilation of statutory provisions for congressional disapproval devices that are still in force (although the standing of most of them is obviously in serious question as a result of the Chadha decision). More than half of the statutes excerpted in the Manual provide for resolutions which require action by the full House or Senate or both, but which are not privileged for floor consideration in the House. These statutes describe simple, concurrent, or joint resolutions on which Congress may act within a specified time period to affect some executive branch decision or action, but they generally include no special procedures for committee or chamber action on such resolutions.

At issue in the Chadha case, for example, was §244(c)(2) of the Immigration and Nationality Act (8 U.S.C. 1254(c)(2)), which states that if

> during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.

The Act says nothing about how such a resolution is to be considered by any committee or by either chamber.

The resolution of disapproval affecting Chadha, H. Res. 926 of the 94th Congress, was considered on the House floor on December 16, 1975, when Representative Eilberg asked unanimous consent that the Judiciary Committee be discharged from further consideration of the resolution and asked for its immediate consideration (121 Congressional Record 40800). Under a reservation of objection, Representative Wylie commented that:

> This resolution has not been available to the Members of the House for review because it was not printed. The Private Calendar objectors met this morning, and we decided that there are extenuating circumstances and will make this resolution an exception so that it can be considered by the Members of this body.
>
> The Private Calendar objectors think this resolution does deserve immediate consideration. We would like the Record to show, however, that we do not regard this "expediting" procedure as a precedent so far as the minority Members of the Private Calendar objectors are concerned.

The "expediting" procedure to which Representative Wylie referred was based not in statute but in unanimous consent—an approach that is always available in either chamber. Had there been an objection to Representative Eilberg's request, H. Res. 926 could have come to the House floor only under one of the sets of procedures contemplated in the standing rules, such as suspension of the rules.

Statutes with congressional approval or disapproval provisions similar to those of §244(c)(2) deal with such matters as defense contracts (50 U.S.C. 1431), Federal Rules of Evidence (28 U.S.C. 2076), naval petroleum reserves (10 U.S.C. 7422(c)), export controls on agricultural commodities (50 U.S.C. App. 2406(g)(3)), and hazardous substances regulations (15 U.S.C. 1276). These statutes (and others with comparable provisions) do not include any expedited procedures to promote timely consideration of and action on the resolutions for which they provide.

A number of other statutes do include certain special procedures, but these procedures do not meet all the criteria of the model set of expedited procedures I discussed earlier. Several examples, drawn from the House Manual,

illustrate some of the variations in expedited procedures that Congress has enacted.

First, under §109 of Public Law 96-187 (2 U.S.C. 438(d)), the Federal Elections Commission is to transmit to Congress a proposed rule or regulation, and Congress has thirty days within which either chamber may adopt a resolution of disapproval. But a motion to consider such a resolution on the House floor is privileged only if and when the resolution is reported from committee. Section 109 does not include a special discharge procedure if the House committee of jurisdiction fails to report, although it does provide for a highly privileged and non-debatable discharge motion in the Senate (without stating that a Senate committee may consider a resolution of disapproval for a certain number of days before the motion to discharge is in order on the Senate floor).

Second, under §104(b) of Public Law 93-526 (44 U.S.C. 2107 note), the Presidential Recordings and Materials Preservation Act, Congress was empowered to adopt a resolution disapproving proposed regulations governing public access to President Nixon's White House tapes. The statute provided that, if the committee of either chamber to which such a resolution was referred failed to report within sixty calendar days, it would then be in order to move to discharge the committee from further consideration of the resolution. Section 104(b)(5) further provided that:

> Such motion may be made only by a person favoring the resolution, and such motion shall be privileged. An amendment to such motion is not in order, and it is not in order to move to reconsider the vote by which such motion is agreed to or disagreed to.

Note, however, that there is no restriction on debating the motion to discharge. Presumably, such a motion would be considered in the House under the one-hour rule, with the previous question moved during the first hour of debate. In the Senate, on the other hand, the absence of any debate restrictions would subject a resolution considered under these procedures to the possibility of extended debate.

Third, under §202(e) of Public Law 94-579 (43 U.S.C. 1712), the Federal Land Policy and Management Act of 1976, certain management decisions and actions are to be reported to the House and Senate. Congress then has ninety days to adopt a concurrent resolution of "nonapproval." There is a thirty-day deadline imposed for committee action, after which a privileged motion to discharge may be made and debated for not more than one hour. A motion to consider the resolution itself is highly privileged and not subject to debate or amendment; a motion to reconsider is even precluded. But the statute imposes no restrictions on the rights of Representatives or Senators to either debate or amend the resolution. Although §202(e) makes it likely that a resolution of nonapproval

will reach the floor in the House and Senate, it does not assure that either chamber will reach a vote to dispose of it.

Such variations may represent drafting anomalies, but they are more likely to reflect deliberate decisions. For instance, the motion to consider a concurrent resolution of disapproval under §12(b) of Public Law 96-464 (15 U.S.C. 1463a), the Coastal Zone Management Improvement Act of 1980, is in order if and when such a resolution is reported from committee. Debate in the House on the resolution is limited to ten hours but the statute is silent about debate in the Senate, where lengthy debate is more likely and, therefore, debate restrictions are more important.

By the same token, different procedures apply in the House and Senate to concurrent resolutions of disapproval under the Arms Export Control Act (Public Law 94-329, as amended by Public Law 97-113; 22 U.S.C. 2776). In the House, a motion to consider a resolution of disapproval is highly privileged if and when the resolution is reported from committee. The Act does not specify the procedures under which the resolution then is to be considered on the House floor. On the other hand, most resolutions of disapproval under the Act are to be considered in the Senate in accordance with the provisions of §601(b) of the International Security Assistance and Arms Export Control Act of 1976, which provides for a privileged motion to discharge in case of committee inaction, a privileged motion to consider the resolution, and time limitations on debating the resolution and any debatable motion or appeal that arises.

Thus, there are differences among sets of expedited procedures, and even differences in the same statute between the expedited procedures that apply in the House and those that apply in the Senate. Whatever the nature and extent of these differences, the absence in any set of such procedures of one or more of the elements I outlined at the beginning of this statement jeopardizes the utility of the procedures by leaving open some significant opportunity for inaction or delay. Some of these opportunities may be less practical than others; it may not be necessary, for example, to limit Senate floor debate on a resolution if motions to discharge and consider the resolution are in order as much as sixty days before the deadline for congressional action. Still, the variations among sets of expedited procedures indicate that the specific terms of each set must be examined before their implications can be evaluated.

CONCLUSION

Expedited procedures have been enacted in response to the fact that more usual procedures in the House and Senate generally are not designed to ensure

that certain measures move from introduction to conclusive floor action within relatively short periods of time. Whether or when the House or Senate votes on a measure usually depends on (1) agenda decisions made by the committee of jurisdiction, (2) the schedule set by the committee in light of competing demands for its attention, (3) action by this Committee in reporting a special rule for consideration by the House (unless the measure is called up under suspension of the rules), and the prospects for limiting debate by unanimous consent in the Senate, (4) floor scheduling decisions usually made by the majority party leadership in cooperation with the appropriate committee leaders, and (5) the interest of members in debating and amending the measure.

Expediting procedures can reduce or avoid the uncertainties that normally result. These procedures can protect against the usual consequences of committee inaction, enable any member to force a floor vote on considering a measure, and assure prompt disposition of the measure if it is considered on the floor. To the extent that such procedures limit or preclude debate that otherwise would be in order, they probably have greater consequences for the Senate than the House, given the historic importance to the Senate and the strategic importance to Senators of the right to debate at length.

Expediting procedures have been enacted presumably because Congress has placed more value on making certain timely decisions on the floor than on adhering to its normal procedures. This is a judgment to be made by this Committee and Congress as a whole in evaluating the wisdom and impact of expedited procedure provisions, individually and cumulatively.

The CHAIRMAN. Well, thank you very much, Dr. Bach. We appreciate your excellent statement.

Our next witness will be Dr. Davidson.

Dr. DAVIDSON. Mr. Chairman, I, too, have a prepared statement.

The CHAIRMAN. Without objection, it will be received.

STATEMENT OF DR. ROGER H. DAVIDSON, CONGRESSIONAL RESEARCH SERVICE

Dr. DAVIDSON. I simply want to summarize it. I will start with two observations that Dr. Bach mentioned.

First of all, not all legislative-veto laws have expedited or fast-track procedures. Over the last three Congresses, only about 37 percent of the legislative-veto provisions actually included expedited procedures. They do include some of the most important pieces of legislation, but by no means all. Second, these expedited or fast-track procedures vary a great deal from law to law.

What I would like to do is talk very briefly about the workload impact, both on the committees and on the management of the floor, particularly in the House. To what extent are these fast-track procedures in fact used, and to what extent do they constitute a burden on the workload of the committees and the floor?

Unfortunately, we do not know very much about the committee workloads in the House or in the Senate, or exactly how they are affected by legislative-veto provisions. Potentially, of course, the impact is very great, because there is a large number of rules—some 60,000 pages of the Federal Register last year were produced by Federal agencies, 33 times as much material in the Federal Register as pages of laws enacted by the Congress. Not all of these regulations are subject to legislative veto, but of course all of them are potentially fodder for oversight and for legislative action.

It appears that committees of the House are spending increasing amounts of time reviewing these rules and regulations that come in from the executive branch. One House chairman, recently speaking before the Accounts Subcommittee, referred to, "The increasing portion of staff time devoted to detailed analysis and study of departmental regulations to determine that the administration of our laws conforms with the intent of Congress."

We also know that formal communications to the committees have increased tremendously over the years. For two bills that are referred to a committee of the House, almost one Executive message is referred to a committee of the House. Again, not all of these are legislative-veto messages or messages subject to legislative veto, but potentially it is a very great burden of workload.

And I would say that none of the normal workload indicators that we have about committees—numbers of bills referred, numbers of meetings, numbers of reports, things like that—really speak to this kind of workload on the part of our committees. It is the part of the iceberg of the work of the House that is below the surface.

Let me turn briefly to the floor management and the impact of fast-track procedures on the floor. We took all of the measures that came to the House floor since 1975, under pieces of legislation having expedited-procedures provisions. Not all of these came to

the floor under fast-track procedures—that is, they weren't always invoked. In fact, very rarely were these procedures really invoked. But in all of these cases, the legislation had these procedures embedded in them, and of course that affected the timetable under which the legislation was considered on the floor. And we tried to look at these for 1975 through last year.

We have a few major findings.

First of all, these expedited procedures required relatively little or accounted for relatively little activity on the House floor; these measures are modest in number; they require a very few yea and nay votes; and, until recently, have taken little time.

In the last Congress, 10 such measures were brought to the House floor, and 4 rollcall votes were taken. That is about 1.7 percent of all the bills and resolutions reported.

We estimate, though we can't say for sure, that about 11 hours of floor time were consumed by such measures during the 97th Congress.

Second, the number of measures considered under expedited procedures varies greatly over time. Basically, it follows the basic patterns of workload on the floor: A broad increase through the 1960's and 1970's, and then a tailing off of the numbers since about 1978 or 1979.

The subjects of legislative-veto provisions that are considered on the floor vary a great deal. Executive reorganization comes to the floor sometimes, budget deferrals, occasionally the District of Columbia Council, certain other issues—a relatively limited number of issues is involved. And, indeed, almost 60 percent of all the measures considered on the House floor under these fast-track procedures are in fact budget deferral measures.

Finally, while most of the measures require very little time on the House floor, a few embody major issues, and these are taking increasing amounts of floor time, particularly in the last Congress or so. In this Congress, for example, the House has already done a great deal in terms of measures brought undersuch procedures.

So at least potentially though the effect is modest thus far, potentially there is a very great impact on the floor time.

Finally, let me say, very few Members have invoked these procedures formally on the floor, and fewer Members still have expressed opinions about their advantages and disadvantages.

We found two cases in the Senate where committees have been discharged under these procedures, and in both cases it was noncontroversial. The committees themselves had agreed because of the time limits.

There is only one case that I know of where a congressional committee has been discharged against its will, and that was the District of Columbia Committee in 1981 in the House with regard to the D.C. sexual assault bill.

So, in conclusion, though these measures have had a modest impact thus far, the potential is considerable.

[Dr. Davidson's prepared statement follows:]

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

STATEMENT OF

ROGER H. DAVIDSON

OF THE CONGRESSIONAL RESEARCH SERVICE

BEFORE THE COMMITTEE ON RULES

UNITED STATES HOUSE OF REPRESENTATIVES

March 22, 1984

Mr. Chairman and Members of the Committee: I am Roger H. Davidson, Senior Specialist in American National Government and Public Administration with the Congressional Research Service, U. S. Library of Congress. It is an honor to appear today at the Committee's request to discuss some of the implications of congressional approval and veto legislation--and especially its associated "expedited procedures"--for the House of Representatives. While it is not my purpose to evaluate the merits of legislative approval and veto mechanisms, much less the alternatives advanced in the wake of the Supreme Court's pronouncement, I am pleased to share with you some information concerning the congressional workload impact of "expedited procedures" mechanisms.

As many students of the legislative process have pointed out, congressional approval and veto provisions are a varied phenomenon. Beginning in 1932, Congress has authorized a large number of such mechanisms--nearly 300 separate provisions embedded in nearly 200 statutes. The bulk of these provisions were adopted in the 1970-1980 decade, which was characterized by (a) an upsurge in legislative activity, and (b) enhanced congressional sensitivity to its prerogatives to review and oversee the Executive branch. My colleague Clark Norton of the Congressional Research Service has identified more than a dozen separate forms of this legislation, including (in rough order of frequency): disapproval by either house; approval by committees (or subcommittees) of

both Houses; disapproval by both houses; approval by both houses; disapproval by committees of either or both houses; and other procedures.

"FAST-TRACK" PROCEDURES

Some, though by no means all, of these "legislative vetoes" include some form of so-called "expedited procedures"—that is, "fast-track" mechanisms to assure that a measure of approval or disapproval can be considered and voted upon within a reasonable period of time. Such provisions may call for one or more of the following: limits on the time for committee consideration; methods for getting the resolution out of committee and onto the House or Senate floor; methods for calling the resolution up as privileged business; limits on the time for debate; and limits on amendments to the approval/disapproval measure.

Although the procedural aspects of the legislative veto have received scant attention in the wake of the Chadha decision, they are in fact a significant element in the picture. They represent a decision by the two Houses, consistent with their Constitutional power to frame their own rules of procedure, to establish ways of precipitating action on questions of approval or disapproval of Executive actions. Although now deemed unconstitutional in most of its forms, legislative approval and veto processes were designed to adapt the separation of powers to facilitate complex, detailed, and responsive decisions. As its part of the bargain, Congress relieved itself of the burden of making, at least in the first instance, decisions or rules embodying great complexity or requiring immediate response. Congress also gained the chance to review the Executive action, on the rebound so to speak, and the right to delay or negate the action. The Executive, for its part, gained the right to take actions that Congress might otherwise be unwilling to delegate. To facilitate timely legislative review, Congress sometimes agreed to modify its procedures, including the prerogatives of its committees and Members, to achieve that result. Expedited procedures could thus be part of a working agreement, or "bargain," between the executive and legislative branches of government.

Like the legislative approval and veto provisions themselves, expedited or fast-track procedures are not a single set of requirements, but rather a mixed bag. In the first place, by no means all legislative veto provisions embrace expedited procedures. In the last three Congresses (95th through 97th), for example, only 37 percent of the 78 legislative veto provisions enacted into law included expedited procedures as part of the mechanism. These, however, include

many of the key legislative veto statutes enacted during those years--for example, the amended Reorganization Act of 1977 (P.L. 95-17), the Trade Agreements Act of 1979 (P.L. 96-39), the Emergency Energy Conservation Act of 1977 (P.L. 96-102), the Federal Trade Commission Improvements Act of 1980 (P.L. 97-377), and the International Security and Development Cooperation Act of 1981 (P.L. 97-113). When considering expedited procedures, therefore, we speak not of the entire body of legislative approval and veto statutes, but rather a subset that amounts to something less than half the total.

In the second place, expedited procedures themselves vary from statute to statute, usually falling into one of several patterns. At the committee stage, the provisions differ as to the time specified for committee action--that is, the number of days within which a committee must report out or may be discharged from a pending measure of approval or disapproval. A 1981 CRS study of 59 separate provisions embodied in 35 statutes found that the committee deliberation span could be as short as five days and as long as 60 days or more. Most provisions allow from 11 to 30 days for committee consideration. The method of ending committee deliberation, moreover, varies among the statutes. A large majority simply provide that a motion to discharge the committee from considering the measure is in order after a given time had passed. Some provide for automatic discharge after the time had elapsed, and a few require a report from the committee.

Once the committee's deliberation has been completed, various methods are set forth to compel floor consideration of the approval or disapproval measure. Quite obviously, the form of the measure (whether a bill or a simple, joint, or concurrent resolution) and the overall time allowed for Congressional action (for example, 30 days, 60 days, 90 days, or indefinite) affects the latitude of action and the strategies for opponents or proponents. Methods for calling up the measure, time limits for debate, and limitations on floor amendments are also important constraints. Finally, many of these statutes feature "escape clauses" permitting one or both chambers to vote to alter the procedures.

To illustrate how these expedited procedures have been woven into the fabric of the congressional review process, consider the War Powers Resolution of 1973 (P.L. 93-148). Whenever armed forces are sent into hostilities abroad, the President is required to submit a report. If a report is transmitted when Congress is adjourned, the Speaker of the House and President pro tempore of the Senate can request the President to call Congress into special session to take appropriate action. The heart of the War Powers Resolution is Section 5(b),

requiring the President to halt the use of U.S. forces after 60 days unless Congress (1) declares war or authorizes the action; (2) extends the period by law; or (3) is physically unable to meet. The 60 days can be extended to 90 days if the President certified "unavoidable military necessity." The President must remove the forces at any time if Congress directs by concurrent resolution (Section 5(c)).

Congressional consideration of a joint resolution or bill authorizing the use of armed forces is governed by Section 6 of the War Powers Resolution. The expedited procedures include:

> (1) Referral to the House Foreign Affairs or Senate Foreign Relations Committee with the committee required to report a measure not later than 24 calendar days before the 60-day period expires (unless the chamber votes otherwise).
>
> (2) Making the reported measure the pending business of the relevant chamber and requiring a vote within three calendar days (unless that House decides otherwise by vote). In the Senate, debate is equally divided between proponents and opponents.
>
> (3) After passage by one House, referral of the measure to the relevant committee of the other House and reporting out not later than 14 calendar days before the expiration of the 60-day period. Again, the reported measure becomes the pending business of that House and must be voted on within three calendar days (unless, again, determined otherwise by vote).
>
> (4) Requiring conferees to file a report not later than four calendar days before the 60-day period expires. If they cannot agree within 48 hours, the conferees report back in disagreement; their report is to be acted on by both Houses not later than expiration of the 60-day period.

Although at several points one or both chambers may vary the procedure by vote, the entire mechanism was governed by the 60-day (or 90-day) timetable for Congressional action. On the action involved, the clock is running at every stage; and if delays are encountered in the early stages, the two chambers find themselves under very strict limits indeed. (A similar priority arrangement governs a concurrent resolution to withdraw forces under Section 5(c)). Not all congressional review tasks are as momentous as those involving war powers, and not all fast-track procedures as rigorous as these. But the departures from normal legislative practice are quite striking.

Following such procedures has affected the practices and workloads of the two Houses and their committees. Committees to which measures are referred must have in place procedures for reviewing and researching the issue at hand. If committee action is required or expected, the committee must presumably meet, take action, and report. The schedule of floor deliberations must accommodate the approval or disapproval measure, often under a strict deadline.

COMMITTEE WORKLOADS

Committees are conceded to be the heart of the legislative process on Capitol Hill, but their actual internal organization and workload characteristics vary widely. To analyze the committees' role in reviewing Executive decisions, the normal indicators of activity and workload--for example, number of bills referred, hearings, reports, and so forth--are not very helpful. However, several fragments of information suggest that reviewing Executive actions is a substantial and probably growing burden for committee Members and staffs.

The Federal government's production of rules and regulations--while having slowed perceptibly in the past few years--is still quite impressive. The Federal Register ran to some 57,703 pages during 1983--about four times higher than at the end of World War II. In terms of sheer bulk, Federal regulations far outstrip the public laws passed by Congress. In the 96th Congress (1979-80), 33 times as many pages of regulations were promulgated as pages of public laws enacted (164,000 compared to less than 5,000). Not all of these regulations, of course, were subject to legislative approval or veto, though all were at least potentially subject to congressional oversight and even alteration by statute. There is every reason to think that committees are devoting increasing energy to review--systematic or otherwise--of Executive rule making. In a recent report to the Accounts Subcommittee, one House chairman referred to the "increasing portion of staff time devoted to detailed analysis and study of departmental regulations to determine that the administration of our laws conforms with the intent of Congress."

Executive agencies send large quantities of formal communications to Capitol Hill. In the 97th Congress, for example, the average committee of the House received nearly one message from the President or an Executive agency for every two bills it received by referral.

Such communications range widely in importance and impact on committee workload. Some are routine and require no legislative action. Others are reports or recommendations requested by Congress on major questions. They may merit detailed review by the committee staff, or even hearings or legislative action on the part of the committee itself. Some of these communications were forwarded in compliance with legislative approval and veto provisions. In a few cases, these actions trigger committee hearings, reports, and floor action vetoing or confirming the Executive's action. As we will see, this latter class of cases has been relatively small; but it is the tip of a sizable iceberg in terms of committee responsibilities for monitoring such provisions. Presumably in all or most cases

of such actions, committee staff or Members examine and review the action to determine if legislative action was warranted. Little is known about the cumulative impact of these provisions on the workload of the committees, which differ widely in their internal methods for handling them. However, this is a sizable category of committee business that lies outside our traditional counts of legislative "measures."

A more direct impact upon committee workloads occurs when approval or disapproval resolutions are introduced and referred to the appropriate committee. According to Clark Norton of CRS, in the 16 years between 1960 and 1975 a total of 351 approval or disapproval resolutions (267 House and 84 Senate) were introduced and 63 passed. Every year, on average, about 18 such measures were introduced and 2 passed. In the six years from 1975 through 1980, however, the figures soared to 645 measures introduced (422 House and 223 Senate) and 79 passed. That was an average pace of 107 measures introduced and 13 passed.

The potential burden falls especially on committees of the House, where nearly two thirds of all such measures have been introduced. Although the volume has subsided since the mid-1970s, these measures remain a workload consideration for the committees involved. And because budget deferral resolutions form the largest category, this burden is especially heavy on the Budget and Appropriations committees. Other committees particularly affected are Government Operations (Executive reorganization), Energy and Commerce (Energy Department matters), and Foreign Affairs (war powers, arms sales, and nuclear nonproliferation).

Unfortunately, indicators of committee activity and workload level are incomplete. Numbers of measures introduced, or even the number of measures taken up on the floor, convey only a partial picture of committee responsibilities under legislative veto and approval provisions. It is impossible, moreover, to separate these duties from the committees' broader mandate to oversee departments, agencies, and programs under their jurisdiction--including the implementation of laws and issuance of regulations. Committee practices and reporting procedures vary widely, as revealed by the committees' calendars, activity reports, and financial statements. Established, standardized procedures for classifying and recording committee activities would convey a more complete view of the oversight tasks undertaken by committees.

EXPEDITED PROCEDURES ON THE FLOOR

Scheduling and management of floor time is a crucial aspect of managing Congress as an organization. In the House, the problem of time is compounded

by the large number of Members and committees that must be accommodated. Most indicators of floor activity--especially length of sessions (hours as well as days), numbers of measures taken up or passed, numbers of quorum calls, and numbers of recorded votes--show a fairly clear and consistent pattern over the past generation. Floor activity in both chambers rose steadily from World War II through the late 1970s, accelerating especially in the the 1970s. Since about 1978, activity levels have been on the downturn, though they still are far above pre-1960 figures. The long-term growth in floor activity undoubtedly mirrors demands placed upon the House by the agenda of public issues and the level of inter-branch conflict. Procedural factors also affect activity levels. Recorded votes on the House floor, for example, soared after the Legislative Reorganization Act of 1970 allowed "recorded teller votes" on amendments in Committee of the Whole. Trends in bill introduction were affected by House cosponsorship rules: the number of measures introduced has dropped substantially since 1978, when the House changed its rules to permit unlimited cosponsorship.

Use of expedited procedures on the House floor reflects these overall trends. That is, the number of approval or veto measures considered on the House floor grew somewhat over the 1960-1975 period, reaching a peak in the mid-1970s. This is understandable, since at least half of all expedited-procedure provisions date from the 1970s. Since about 1977, the number of measures considered on the floor under such procedures has fluctuated--but at levels well below those of the mid-1970s. At the same time, these measures are consuming increasing amounts of floor time--at least as measured by pages in the Congressional Record.

My research assistant, Mary Etta Cook, and I have attempted to identify all those measures that have been considered since 1975 by the House and Senate under expedited procedures. This period embraces all of our experience under the Congressional Budget and Impoundment Control Act of 1974, as well as numerous other statutes enacted in the 1970s or before. Our search began with legislative veto or oversight questions listed in the files of CRS's SCORPIO system as having been reported by a committee or deliberated on the floor. Then the cases were limited to those involving laws approval or disapproval measures with fast-track features. The results are presented in two tables appended to my testimony. In Table 1 are presented the numbers of resolutions, numbers and types of floor votes, and numbers of pages consumed in the Congressional Record, for both chambers from the 94th Congress through the first session of the 98th Congress. Needless to say, some measures were considered by both Houses, and some by one House only. The total numbers of measures considered on the floor during those years are arrayed in Table

2. House and Senate figures are combined, though in many instances both dealt with the same measure. The figures are classed by type of issue or statute, and by Congress.

Several conclusions emerge from these figures. First, the level of floor activity under fast-track procedures is rather modest in comparison with total legislative activity. Second, the number of measures considered varies widely with the rise and fall of given issues. Third, the issues are confined to a relatively small number of categories. Finally, even though most such measures require relatively little time, a small number of major issues requires increasing amounts of time. Let me consider each of the points briefly.

1. Fast-track procedures account for relatively little floor activity. Measures considered under fast-track procedures are modest in numbers, require few yea-and-nay votes, and until recently have taken little floor time. In the 97th Congress (1981-82), 10 such measures were brought to the House floor and 4 roll-call votes were taken. This represents about 1.7 percent of all the bills and resolutions reported during that Congress. Four roll-call votes were taken--less than one half of one percent of all roll calls for that Congress. While it is impossible to say exactly how much time the deliberations consumed, the Congressional Record space consumed by these measures amounted to just under one percent of the total for the 97th Congress. Reasoning from the available figures, I would estimate that during the 97th Congress the House used about 11 hours of floor time considering fast-track measures.

2. The number of measures considered under expedited procedures varies greatly over time. Budget deferral issues tend to dominate, but other issues come to the fore from time to time. In the 94th Congress (1975-76), for example, 23 of the 24 resolutions coming before the House dealt with budget deferrals; most were disposed of quickly and only one record vote was taken. In 1983, 10 of the 13 measures before the House were budget deferral resolutions. Yet in the 95th Congress (1977-78) no budget deferrals at all came before the House, and there was only one in the 96th Congress (1979-80). As Senator Pete V. Domenici (R-N.M.) has already noted before this Committee, it has now become customary to act on deferrals through provisions in regular appropriations measures, rather than through resolutions of disapproval. Thus, over a three-year period (fiscal years 1981 through 1983), only two percent of the Administration's proposed deferrals that were disapproved were handled through the Impoundment Act's mechanism for disapproval. Executive reorganization plans figured prominently in the 95th and 96th Congresses; but reorganization authority expired in April 1981

and was not renewed. The 96th Congress confronted energy policy regulations and nuclear nonproliferation questions—issues that barely surfaced in other Congresses.

3. The measures cover a relatively small number of issue categories. Budget deferral resolutions are the leading type of fast-track measures, although other classes of issues appear. In the nine-year period covered by our statistics, budget deferral resolutions accounted for 57 percent of all these measures. Other frequent issues were executive reorganization and energy policy regulations. These three types of issues together accounted for three quarters of the fast-track measures considered by the House. Other recurring measures included District of Columbia home rule and arms export controls. Other issues--for example, Alaska natural gas transportation and the MX missile basing mode--appeared in a single Congress.

4. While most measures require little time, a few embody major issues; and these are taking increased amounts of floor time. In the House of Representatives, issues that involved lengthy floor debate have included: the MX missile basing mode (1983); the sale of AWACS planes to Saudi Arabia (1981); disapproval of the Federal Trade Commission's used car rules (1982); the sale of nuclear materials to India (1978; 1980); disapproval of the District of Columbia City Council's sexual conduct ordinance (1981); and the Alaska Natural gas transportation waiver (1981). These issues have clustered in recent years, producing an upswing in floor time devoted to legislative veto questions. In the first session of the 98th Congress alone, the House has considered MX missile basing and war powers in Lebanon and Grenada, in addition to a dozen budget deferral questions. Hence, there is some reason to think that, although small in sheer numbers, such measures are demanding more and more floor time.

COMMENTS ON EXPEDITED PROCEDURES

In light of Congress's extensive experience with expedited procedures since the mid-1970s, it is surprising that few Members have expressed opinions about their advantages or disadvantages. Laws embodying such features continued to be enacted up to the time of the Supreme Court's 1983 ruling, and even thereafter; indeed, the Chadha ruling in no way challenged expedited procedures. Debates under these statutes have occurred on the House and Senate floor under a variety of circumstances. Yet there has been little comment and no systematic examination of the phenomenon.

On the rare occasions in which these measures came to the floor without committee consideration, it has--with one exception--been made clear that it was

not regarded as a precedent for future action. In July 1975, for example, the Senate disapproved a deferral of budget authority for Youth Conservation Corps summer programs. Time was very limited, due to a combination of factors: the funds had been appropriated late, the President had not formally announced the deferral, and the Comptroller General therefore had to certify that a deferral had taken place. In order to release the funds in time for the summer programs, the Senate acted on July 10 to disapprove the deferral. Senate Robert C. Byrd (D-W.Va.), then chairman of the relevant Appropriations subcommittee, noted that

> . . . taking up this resolution without committee referral is not to be considered as setting a precedent. It is only because of the critical time factor that I have agreed to this procedure in this instance. (Congressional Record, 94th Congress, 1st session, July 10, 1975, p. 22224)

The chief proponent of the disapproval resolution, Senator James Abourezk (D-S.D.), outlined the situation and agreed that "it is a special case and ought not to be considered a precedent or a standard practice." (Ibid., p. 22226) Similarly, at the close of the 1981 session three Senate committees (Budget, Appropriations, Judiciary) were discharged from considering a deferral resolution involving certain Justice Department juvenile crime programs. It was clear, however, that the three involved committees had agreed to an exceptional procedure, and that the discharge was arranged only because of pressing time limits at the session's end. The disapproval resolution, which had bipartisan support, passed on a voice vote. (Congressional Record, 97th Congress, 1st session, December 15, 1981, pp. S15240-41.)

Only once has a congressional committee been discharged under fast-track procedures without its consent. This occurred on October 1, 1981, when the House discharged the Committee on the District of Columbia from further consideration of the District Council's Sexual Assault Reform Act of 1981. In accord with the the D.C. Home Rule Act of 1973, Congress can disapprove acts of the City Council. In balancing the spirit of home rule with Federal responsibilities, the House Committee has developed three criteria for reviewing City Council acts: Does the act violate the Home Rule Act? Does it violate the Constitution? Does the Act raise a Federal issue or obstruct the Federal interest? The Committee found that the sexual assault act violated none of these criteria, and by a bipartisan 8-3 margin declined to report the resolution of disapproval. However, the 1973 Act provides expedited procedures, including discharge of the committee. On the floor, Committee Members and other opponents of the resolution stressed procedural questions, especially the desirability of leaving such matters up to the D.C. City Council. A subsidiary question involved the Committee's prerogatives. The

Committee's chairman and ranking minority member explained in some detail the Committee's handling of the issue. Delegate Walter Fauntroy (D-D.C.) declared that "we are dealing with a question first of the integrity of our committee process." He continued:

> This committee has acted both expeditiously and judiciously on House Resolution 208. In short, the motion of discharge would denigrate and dismiss the proper and careful considerations that this committee has given to the subject matter. . . . We have discharged our responsibilities fully and have reached a well considered conclusion, 8-to-3, a bipartisan basis . . . (Congressional Record, 97th Congress, 1st session, October 1, 1981, p. H6743)

In the end, however, the sensational subject-matter of the Council's action overwhelmed these procedural questions. By a 279-126 margin the Committee was discharged, and subsequently the disapproval resolution was passed, 281-119.

The strongest statement thus far on the implications of expedited procedures came from the Senate at about the same time. The Federal Assistance Improvement Act of 1981 (S. 807), as reported by the Governmental Affairs Committee, would have authorized the President to reorganize and consolidate Federal grant programs by submitting plans that Congress would approve by joint resolution. Concerned about the impact of expedited procedures upon the Senate Rules, the Rules and Administration Committee requested and was granted referral of the measure limited to its procedural aspects. The Committee held a day of hearings on the measure, recommended deleting the expedited procedures, and reported S. 807 without recommendation. The bill was not acted upon.

The procedural requirements of S. 807 were rigid but not unlike certain other fast-track arrangements. Among the bill's features were: referral to only one committee in each House; automatic discharge after 60 days; in the absence of a committee report, taking up the President's plan on the floor by "privileged, non-debatable, non-amendable, and non-postponable motions"; prohibition of other business while the President's plan was being considered; and prohibition of amendments to the President's plan, either in committee or on the floor.

Such provisions, the Committee found, not only gave the President too broad a grant of power, but limited congressional consideration.

> This is indeed a fast track, and to this Committee, these fast track techniques severely restrict the flexibility of the Congress and serve especially to dramatically alter the deliberative nature of Senate floor and committee proceedings. (US Senate, Committee on Rules and Administration, Federal Assistance Improvement Act of 1981, S. Rept. 97-267, 97th Congress, 1st session, p. 3)

The Committee rejected the analogy of Presidential reorganization plans, which "serve basically to rearrange boxes in organization charts." In contrast, they noted, S. 807 permitted extensive shifts in administration, funding, management, and eligibility requirements of Federal grant programs. In its hearing, the

Committee heard Senators of both parties denounce the measure's procedural features.

While addressing itself to S. 807, the Rules and Administration Committee cast a critical eye on the whole notion of expedited procedures. First, it was asserted (Ibid.) that "this Committee opposes changing the Standing Rules of the Senate except by direct amendment"--a principle that, if followed, would strike at a number of similar enacted or proposed provisions. Second, pointing to the proliferation of expedited procedures, the Committee promised to review in depth "the nature and consequences of these complex and confusing deviations from the ordinary course of Congressional deliberation." (Ibid.) Although it has not yet produced such a study, the Committee's reaction to the overall notion of fast-track mechanisms suggests potential countermoves against them.

Fast-track procedures became a common feature of legislative approval and veto statutes out of a desire to accommodate the two policy branches of government and assure timely committee and floor decisions. Yet, it is fair to say, little thought seems to have been given to their implications or actual impact upon legislative procedures and workloads. Assessing that impact is necessarily part of any overall evaluation of the legislative veto itself. I hope this discussion will cast some light upon the matter and will help the Committee in its review of the question.

Table 1

FLOOR CONSIDERATION OF RESOLUTIONS
UNDER EXPEDITED PROCEDURES, 1975-83

House of Representatives

Congress	Number of Resolutions	Votes		No. of pages in Record
		Yea-Nay	Voice	
94th (1975-76)	24	1	23	21
95th (1977-78)	4	3	1	28
96th (1979-80)	14	7	11	125
97th (1981-82)	10	4	9	170
98th (1983)*	11	6	7	101
Totals	63	21	51	445

Senate

Congress	Number of Resolutions	Votes		No. of pages in Record
		Yea-Nay	Voice	
94th (1975-76)	19	1	17	15
95th (1977-78)	3	1	3	91
96th (1979-80)	19	4	18	112
97th (1981-82)	8	7	2	176
98th (1983)*	4	2	2	250
Totals	53	15	42	644

* 98th Congress - first session only.

Table 2

ISSUES CONSIDERED IN CONGRESS UNDER EXPEDITED PROCEDURES, 1975-1983

Category of Issue	Total Resolutions	94th Congress (1975-1976)	95th Congress (1977-1978)	96th Congress (1979-1980)	97th Congress (1981-1982)	98th Congress (1983)*
Impoundment Control Act	67	42	—	4	9	12
Executive reorganization	12	—	4	8	—	—
Energy policy regulations	10	—	1	9	—	—
Nuclear nonproliferation	8	—	1	7	—	—
Federal employee salaries	5	—	—	—	5	—
DC home rule	3	—	—	2	1	—
War Powers Act	2	—	—	—	—	2
Trade Act of 1974	1	—	—	1	—	—
Arms Export Control Act	2	—	1	—	1	—
Presidential recordings/ materials preservation	1	1	—	—	—	—
Federal Election Commission	1	—	—	1	—	—
Alaska natural gas transport	1	—	—	—	1	—
Natural Gas Policy Act	1	—	—	1	—	—
Federal Trade Commission	1	—	—	—	1	—
MX missile basing mode	1	—	—	—	—	1
Totals	116	43	7	33	18	15

* 98th Congress - first session only.

The CHAIRMAN. Thank you. Dr. Kravitz?

Dr. KRAVITZ. I do not have a written statement, but I can write one up and submit it for the record, if you wish me to do so.

The CHAIRMAN. Well, would you tell me, sort of in a nutshell, Doctor, what your view is?

Dr. KRAVITZ. Mr. Chairman, let me respond to that. And I can respond to it, whereas my colleagues cannot. They are members of the Congressional Research Service and the Library of Congress. It's in the nature of their work that they are not permitted to give opinions of the kind that you are asking for.

Until 1980, when I worked for the Congressional Research Service, I was under the same prohibitions. I no longer am under those constraints—I have retired—and now that I am a private citizen I can give you my personal opinions, and I am delighted to do so. [Laughter.]

But you must understand that they are under constraints over which they have no control.

The CHAIRMAN. What if I were to ask you: taking the hypothesis that Congress wishes to reserve some power which it appears to have been deprived of by the *Chadha* decision, how would you state what we should do to retain such power?

Dr. KRAVITZ. Let me give you a very brief answer in just a couple of minutes.

My own personal view is one of opposition to expedited procedures if Congress can get along without them—and I think Congress can, in most cases, get along without them. You have already heard some of the arguments, or at least some of the factors which would enter into that. It disrupts the committee process. I think it is no coincidence that the Congress of the United States, the most powerful legislature in the world, also has the most powerful committee system in the world.

Anything that disrupts the strength of that system, it seems to me, erodes the power of Congress—and I am very reluctant to see anything like that done. Expedited procedures do tend to do so.

You have heard about the impact of expedited procedures on the control by the leadership of the floor agenda; you have heard that it gives the executive branch what I consider to be excessive influence on that agenda; you have heard that the House of Representatives, and you know yourself, the House of Representatives' rules and procedures are such that in fact expedited procedures are a redundancy. If the House wants to do something quickly, it can do something quickly under its current rules and practices.

The problem is not in the House; the problem is in the Senate. My own view is, let the Senate take care of its own problems, the House is well established.

The key, it seems to me, is the deadline problem. When you have a structure that establishes a deadline, expedited procedures get dragged in by the tail. I think there are ways in which Congress can still maintain itself and its prerogatives under the recent Su-

preme Court decision, but without expedited procedures if it takes a more sensible view—or what I consider to be a more sensible view—of the deadline situation.

Now, as Mr. Levitas pointed out, if the device that Congress adopts is one in which approval is required by Congress for the executive branch to do something, that is, approval by law, then expedited procedures are subsidiary.

The CHAIRMAN. Doctor, I am going to have to go. Would it be too much of a burden for you to write out a statement and submit it?

Dr. KRAVITZ. No, it will not, and I will do so.

[Dr. Kravitz' statement, as received, follows:]

STATEMENT OF DR. WALTER KRAVITZ ON EXPEDITED PROCEDURES IN THE HOUSE OF REPRESENTATIVES

Mr. Chairman and Members of the Committee:

I am honored by your invitation to testify on the question of the impact of expedited procedures on House operations.

My collegues on this panel have very ably and thoughtfully analyzed the technical details of expedited procedures, the issues they raise in the context of executive-legislative relations, and their impact on congressional workload.

My statement is a good deal less objective than theirs. As members of the Congressional Research Service, they are not permitted to offer personal opinions on questions of policy. I am no longer under those constraints, having retired from the Service in 1980.

As a private citizen, therefore, I suggest to you that, in my judgment, expedited procedures do not usually serve the interests of the House or of the public it represents, nor should they be permitted except under the most crucial circumstances. My reasons are the following:

First, expedited procedures tend to erode the effectiveness and influence of the committee system. In many cases, these procedures permit summary or automatic discharge of committees. Furthermore, the legislative veto approach often limits the scope of committee recommendations to approval or disapproval, prohibiting committee amendments. These constraints pervert the functions and purposes of committee consideration.

The congressional committee system is not a perfect instrument; on the contrary, it has many serious flaws and faults. But I think it is no coincidence that Congress, the most powerful national legislature in the world, has the most influential committee system in the world. And expedited procedures strike precisely at that system's most valuable features: its ability to study a subject in great depth without unduly pressing deadlines and its ability to refine and modify proposals in ways that make them more acceptable politically and more flexible as policies.

Second, expedited procedures tend to erode leadership and majority control of the floor agenda of the House and the functions of the Committee on Rules. Members occasionally complain, and sometimes with good cause, about the way in which the leadership handles the chamber's agenda. But both political parties have traditionally agreed that the House cannot function in a responsible and orderly manner unless the leadership has broad authority to control and manage that agenda.

The larger the number of measures granted privileged status for floor consideration in the House, the greater the dilution of the leadership's control over the floor agenda. Members of this Committee may recall that the House amended Rule XI, clause 4(a), in 1974 so as to reduce the number and types of privileged measures. This action reversed a long-term increase in such measures, and wisely so. Unfortunately, Congress has undermined that 1974 reform by continuing to confer privilege on motions to consider legislative veto resolutions.

Promiscuous distribution of privileged status provides too many opportunities to disrupt the orderly procession of measures to the floor. Such status ought to be reserved for matters of critical importance.

Furthermore, in some instances these expedited procedures permit any Member to offer the privileged motion, rather than reserving it for the committee of jurisdiction or one of its members. That is an extraordinary grant of authority in the modern House. I can think of no similar grant to individuals other than on questions of privilege and discharge motions.

Third, expedited procedures tend to erode both the deliberative process and the deliberate pace of the process. That pace has many values. It encourages careful and thorough study of issues and proposals and of their ramifications and nuances. It constrains the House and its Members from hasty and ill-considered action. It protects the House from the stampede effect of what may turn out to be an ephemeral wave of public opinion. It gives proponents and opponents time to develop their arguments and present them to the legislature and to the public. It gives Members time to canvass and discuss the matter with constituents. It gives the legislative process time to forge coalitions that better serve the public interest.

Congress is not a fast-food counter, nor is it a factory production line for spewing out legislation. Deadlines that force precipitate congressional action, or penalize Congress for not taking such action, ought to be avoided whenever possible.

Fourth, expedited procedures tend to expand executive branch influence over the congressional agenda. To some degree, that kind of influence is both inevitable and useful to Congress and the Nation. But Congress must limit that influence solely to the inevitable and the necessary if it hopes to maintain the integrity of its representative functions.

Finally, expedited procedures are generally redundant in the House of Representatives. The normal rules and practices of the House already permit expeditious action, if a majority of the House so desires. This Committee is familiar with those devices; indeed, this Committee controls many of them.

The problem of expeditious action in Congress is a Senate problem, not a House problem. Let the Senate attend to its own affairs.

Since the Committee knows why these expedited procedures were developed, I will not waste your time by rehashing the details. But clearly the key procedural factor is the deadline that most legislative veto statutes impose on congressional action. Typically, one or both Houses must agree to a veto resolution by a date certain if Congress wants to prevent an Executive action subject to such a veto. In other words, expedited procedures become necessary when Congress imposes a deadline on itself.

This fact, it seems to me, suggests that the House can best alleviate the situation by exploring ways in which Congress can control Executive decisions without subjecting itself to such deadlines.

If I understand the implications of the *Chadha* decision correctly, legislative vetos as we have known them are now unconstitutional. In effect, the Court told Congress that it may halt or modify a statute-based Executive action only by enactment of another statute.

Congress already does so quite frequently through the normal legislative process by prohibitions in authorization and appropriation bills. *Chadha* may persuade Congress to adopt that approach even more frequently in the future, but this will not resolve the problem in all cases.

Two major alternatives have been suggested:

Require an agency to propose an action it wishes to take, but permit its implementation only if Congress enacts a law to that effect.

Require an agency to propose an action it wishes to take, but permit its implementation only if Congress, by law, does not prohibit or modify it.

The first approach closely resembles the method currently used in dealing with Presidential rescission requests, under the Impoundment Control Act of 1974.

The second approach poses at least one major problem: if the President favors the agency's proposal and vetoes the disapproval bill or joint resolution, Congress could enforce its will only by the extraordinarily difficult means of override votes in both Houses.

What about the need for expedited procedures?

A major merit of the first approach is that no such need exists. The agency could not carry out its proposal unless Congress approved it by passing a law. In essence, the circumstances would not differ from those surrounding any other executive branch request for legislation.

The second approach—permitting an agency to act unless a law is enacted prohibiting that action—probably requires some kind of deadline. But if the time in which Congress may act is sufficiently lengthy, expedited procedures of the kind now associated with legislative veto resolutions may not be necessary. If the deadline is set at six or eight months, for example, instead of the 20, 30, 40, 60, or 90 days required in many current legislative veto laws, normal House procedures usually would suffice.

In the case of proposed agency regulations, for example, development of such regulations often takes many months, and sometimes years. Another six or eight months delay would probably do no great harm.

Congress might even consider requiring agencies to submit their proposals no later than the end of February in each year, those proposals to become effective only if no disapproval law has been enacted by the last day of the year.

Finally, there may be some policy subjects that must be dealt with quickly and threfore require short deadlines. Expedited procedures are probably unavoidable in such cases, but surely these can be kept to a minimum.

In summary, Mr. Chairman, I hope this Committee will use its influence to minimize the application of expedited procedures in the House in whatever mechanisms Congress devises to retain reasonable control over executive branch actions.

The CHAIRMAN. Because I have further questions, I want to confer with you all some more about this thing, because we have a responsibility of serious moment—and I wish I had much more time to go into these things with you.

Dr. KRAVITZ. I appreciate that, we all appreciate your situation.

The CHAIRMAN. We are going to try to follow it up.

The committee is adjourned subject to the call of the Chair. Thank you.

[The committee adjourned at 3:24 p.m.]

LEGISLATIVE VETO AFTER CHADHA

THURSDAY, MAY 10, 1984

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RULES,
Washington, D.C.

The committee met, pursuant to call, at 2:15 p.m. in room H-313, the Capitol, Hon. Claude Pepper (chairman) presiding.

Present: Representatives Pepper and Lott.

The CHAIRMAN. The committee will come to order, please.

I am sorry to be a little late. I had some problems downstairs and some people that I was a little late getting away. I am sorry. Let me make a little statement here.

OPENING STATEMENT OF HON. CLAUDE PEPPER, CHAIRMAN OF THE COMMITTEE ON RULES

The CHAIRMAN. Today the Rules Committee continues its hearings on the impact of the Supreme Court decision in the case *Immigration and Naturalization Service* v. *Chadha,* which found the legislative veto unconstitutional.

In previous hearings the committee examined the effect of the Supreme Court's decision on various policy areas, on the authorization/appropriation/budget process, and on the judicial process. The committee also reviewed the impact of expedited procedures on House operations.

Today we will devote special attention to seven issues.

We have returned bills to committees, which provided for expedited procedures for the handling of those bills on the floor because it is a function of this committee, the Rules Committee, to prescribe the rules governing the consideration of measures on the floor and not the function of the several legislative committees.

The committees have been very cooperative when we have called the matter to their attention.

Today we will focus on the effects of the Supreme Court ruling on the administrative process. They have been good enough to remove the bills.

One, the effect of joint resolutions on delaying agency rulemaking; two, the choice between approval and disapproval resolutions; three, the effect of informal committee review on agency drafts; four, Executive Order No. 12291; five, the distinction between rulemaking and other executive actions; six, the distinction between rulemaking by executive departments and by independent agencies; and seven, prospects for clearer statutory guidance or less delegation.

To assist us in our examination, we are privileged to have with us Hon. Theodore B. Olsen, Assistant Attorney General from the Department of Justice; Hon. George W. Douglas, Commissioner of the Federal Trade Commission, presenting the remarks of James Miller, Chairman of the FTC; Mr. Christopher C. DeMuth, Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget.

In addition, we are delighted to have with us three distinguished panels of expert witnesses and scholars on the subject of the legislative veto. On our first panel, we will hear from Dr. Cass Sunstein from the University of Chicago and Dr. Peter Strauss from Columbia University.

Our second panel will be represented by Dr. Barbara Hinkson Craig from Wesleyan University; Dr. Robert S. Gilmour from the University of Connecticut; and Dr. Chester Newland from George Mason University.

Panel No. 3 will consist of Ms. Mary Jane Norville from the National Federation of Independent Business and Mr. Richard Leighton speaking for the U.S. Chamber of Commerce.

We have our agenda and at the end of this meeting we will put in the record a summary of legislation that has been pending or that has been in the courts since the decision of the *Chadha* case.

Now, then we will call our first witnesses, having to do with the subject that I have discussed. The first witness is Hon. Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, Department of Justice; Hon. George W. Douglas, Commissioner, Federal Trade Commission; and Mr. Christopher C. DeMuth, Administrator for Information and Regulatory Affairs, Office of Management and Budget.

Mr. DeMuth is not here—he will be along, I understand, a little bit later.

Well, Mr. Olson, we are very much pleased to hear you and we welcome your statement.

STATEMENT OF HON. THEODORE B. OLSON, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Mr. OLSON. Thank you, Mr. Chairman.

The CHAIRMAN. Would you like to make any statement?

Mr. LOTT. No, sir.

The CHAIRMAN. Go right ahead.

Mr. OLSON. Thank you, Mr. Chairman, and members of the committee for affording me the opportunity to appear before you today on behalf of the administration to discuss the impact of the Supreme Court's decision in *INS* v. *Chadha,* 103 S. Ct. 2764 (1983), on the administrative process, particularly in light of the several across-the-board "regulatory reform" proposals that have been introduced in Congress or discussed since the *Chadha* decision was handed down on June 23, 1983.

To begin, I would like to note that in many ways the impact of the *Chadha* case has been considerably less draconian than was predicted by many commentators both prior to and after the Court's decision.

Chadha has not resulted in a dramatic shift of power away from Congress and toward the President, nor has Congress acted precipitously to eliminate or circumscribe delegations of authority to the executive branch. Rather, both Congress and the executive branch have for the most part worked together in a reasoned and deliberate fashion to assess the long-range effect of the *Chadha* decision, and to determine whether changes should be made to accommodate the legitimate concerns of the three branches that share power in our form of Government.

The hearings being held by this committee are a prime example of this effort, and I am pleased to be able to participate in this thoughtful and responsible process.

More than anything else, *Chadha* provides a unique opportunity for a badly needed reexamination of the allocation of governmental power and accountability in this country.

Before *Chadha,* that debate was, to a large degree, obscured by constitutional considerations. With that debate behind us, I believe our two branches can focus on what those underlying concerns are, and whether there are steps that should be taken to improve the efficiency and public accountability of the Federal Government, consistent with the "single, finely wrought and exhaustively considered, procedure for making laws that is embodied in the Constitution."

Much of the current discussion of possible legislative steps to be taken post-*Chadha* has focused on oversight and control over the rulemaking authority of Federal agencies.

While there is no constitutional basis for distinguishing between rulemaking by Federal agencies and other actions by those agencies taken pursuant to delegated authority, rulemaking is perceived as a form of lawmaking more often than most other methods by which the executive implements laws.

This perception is particularly prevalent if the standards in a statute governing the exercise of rulemaking authority are broad and open-ended. The task the agency must perform is to fill the interstices left by Congress when it passed the statutory scheme—a task that in many cases requires the agency to make its best guess as to what Congress intended to be done.

Such a system understandably will sometimes provoke considerable controversy over whether the agency has reached the correct conclusions regarding legislative intent.

Perhaps even more importantly, the concern with regulatory reform stems from a sense that the Federal agencies may be "out of control" exercising considerable authority over the lives of individuals and the conduct of business, without being accountable for how such authority is exercised.

This is a concern that this administration shares, particularly with respect to the accountability of the independent regulatory agencies and commissions—the "fourth branch" of Government that exists largely outside the day-to-day control of either the President or Congress.

I would like to begin, therefore, by addressing some issues related to the President's control over "independent" regulatory agencies within the executive branch. I will then discuss briefly some of

the concerns raised by various proposals for enhancing congressional control over those agencies generally.

An issue that the Court's decision in *Chadha* and its summary affirmances in the FTC "used car rule" and FERC cases has highlighted is the need for oversight and control over the regulatory authority exercised by the "independent" agencies. As stated by former Deputy Attorney General Schmults, "The legislative veto decisions mark an appropriate point in our history for serious reexamination of the wisdom of the creation of this fourth branch of the Government."

Central to the Court's analysis in *Chadha* is the well-founded proposition that the Constitution recognizes only three branches of Government—legislative, executive, and judicial—and that the respective spheres of power of those three branches are identifiable and distinct.

As the Court recognized in *Chadha,* the fundamental thrust of the tripartite scheme designed by the Framers was to ensure that each branch fulfilled the functions for which it is best suited, and that each branch is accountable for performance of those functions.

And, the Supreme Court reminded us that the division of powers among the three branches was to assure:

> As nearly as possible that each Branch of Government would confine itself to its original responsibility. The hydraulic pressure inherent within each of the separate branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

It is difficult to reconcile this constitutional scheme with the reality of regulation by the mixed assortment of commissions, agencies, government or quasi-government corporations, authorities, institutions, and boards generally referred to as independent regulatory agencies.

Historically, the premise underlying creation of such independent agencies has been that some forms of regulation—primarily adjudication and investigation—should be entrusted to nonpartisan experts whose decisions are free from political supervision by the President.

Whatever its original validity, however, that premise now seems questionable. Today, executive branch agencies that cannot be characterized as independent engage in rulemaking in a functionally indistinguishable fashion from the so-called independents, and many of the responsibilities and functions of the independent agencies overlap considerably with responsibilities and functions placed by Congress in other executive branch agencies.

By and large, those independent agencies are not cohesive, centrally managed, or, most important from a constitutional standpoint, accountable in any effective way to the Congress or the President, those organs of Government to whom the Founders gave exclusive power to make and to execute the laws.

In the wake of *Chadha,* it is appropriate to reexamine whether responsibility for administrative and regulatory execution and enforcement of our laws should be vested in governmental entities that are not accountable to our elected President.

Alexander Hamilton explained in The Federalist No. 70 why he opposed diffusing the Executive power in the hands of largely unac-

countable individuals, in words that are equally applicable to our system of unaccountable commissions and agencies.

> The plurality of the Executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power, first, the restraints of public opinion, which lose their efficacy as well on account of the division of the censure attendant on bad measures among a number, as on account of the uncertainty on whom it ought to fall; and secondly, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office, or to their actual punishment in cases which admit of it.

We believe that some of the energy being expended in seeking alternatives to legislative vetoes should be channeled into efforts to return lawmaking and lawexecuting authority to the political branches of the Government, as intended so clearly by the Framers of the Constitution.

As a beneficial byproduct, this process might well expose governmental authority that is not only lodged improperly in various politically unaccountable agencies, but is not even the proper business of the Federal Government. The primary objective, however, should be to reaffirm that in our system governmental power must be allocated in a manner that allows for direct political accountability in the spheres of lawmaking and lawexecuting.

Several of the regulatory reform bills or proposals that have been advanced in the wake of *Chadha* would enhance, to a greater or lesser extent, the accountability of the independent agencies to the executive branch, at least with respect to the rulemaking functions of those agencies.

Both S. 1080 and H.R. 3939, for example, would include independent agencies and commissions within the definition of agency for the purposes of those bills. [See pps. 43 and 121.] Since those bills would give the President the authority to estabilsh procedures for agency compliance with the detailed provisions requiring a regulatory analysis for every major rule, the authority to monitor, review, and ensure agency implementation of such procedures, and the authority to designate major rules, the President would have a measure of control over rulemaking by the independent agencies.

The Administrative Conference of the United States, which has given much thought to this issue, has discussed the alternative of creating a super-agency within the executive branch that would be responsible for review of the rules of all agencies, and that would provide a single agency as a focus for oversight of agency rulemaking.

I would note that, to a certain extent, this super-agency concept already exists in the Office of Management and Budget under Executive Order 12291, although that Executive order does not require compliance by independent agencies and commissions.

I do not mean to suggest that the administration endorses any of the particular proposals that would provide for increased executive branch control over the rulemaking of these so-called independent agencies. Nonetheless, I believe the time has come to give very serious consideration to the problems of unaccountability of the independent agencies, which, after all, execute the law and, therefore, functionally belong as a part of the executive branch.

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I would also like to make some general observations about the question of enhancing congressional review of Federal agencies' rulemaking in the aftermath of *Chadha*. Christopher DeMuth, the Administrator for Information and Regulatory Affairs of the Office of Management and Budget, will discuss this subject in more detail.

My observations here are general, and I will not attempt to address each and every facet of the pending regulatory reform proposals.

First, I would like to highlight what I believe to be the fundamental problem that is not addressed by any of the various proposals to give Congress an opportunity to review agency rules through a joint resolution of approval or disapproval mechanism.

While for the most part these mechanisms would satisfy minimal constitutional requirements for legislation, they fail to ameliorate the basic difficulty confronting agencies that are delegated rulemaking authority—that the statutory criteria under which such authority is granted are in all too many cases not well defined, are too broad, and provide only limited guidance to the agencies in the exercise of their discretion.

I can only echo the words of former Assistant Attorney General Rose, who observed in a statement transmitted last fall to the Subcommittee on Administrative Practice and Procedures of the Senate Judiciary Committee, on the Bumpers Amendment in S. 1080, which raises many of the same concerns that the congressional review provisions of that bill and H.R. 3939 raise:

> * * * that the roots of agency activism more often lie in the vaguely-defined objectives and standards found in many regulatory statutes. Of course, general delegations of power to administrative agencies are inevitable, given the sophistication and complexity of the technical areas covered by many regulatory statutes and the institutional constraints upon the time and resources of Congress.
>
> However, * * * Congress has frequently asked the agencies to make the basic, vitally important policy choices that, at least in theory, are more properly for the legislature to make. To the extent that agencies have misread the direction that Congress intended them to take, we believe that Congress—and not the courts—should be responsible for articulating regulatory policies.

To the extent that statutes give the agencies clear, precise guidance as to how, and to what ends, discretion should be exercised, all our jobs would be easier. The executive branch would have a clearer view of its responsibility to execute the laws, and therefore would be better able to keep administrative agencies politically accountable; Congress would not be faced with agency rulemaking that distorts or exceeds what Congress intended in the statute; and the courts would be better able to determine whether particular agency action lies within the scope intended by Congress when it delegated the authority in question.

Most importantly, this process would be more fully in accord with the law-making and law-executing processes envisioned by the Framers of the Constitution, processes that were intended to be political and subject to democratic controls.

By contrast, some of the congressional review proposals that have been advanced, particularly those that would require congressional approval by joint resolution of agency rules, would not be wholly compatible with the Framers' view of how the Government should work.

I do not believe that the Framers envisioned a legislative process in which no issues of national importance—and, therefore, worthy of congressional attention—could ever be resolved with a reasonable degree of certainty because Congress would reserve to itself an opportunity and a power to redebate its prior decisions on a continuing basis through a veto power over implementing regulations.

Rather, what the Framers envisioned was that Congress would make laws with reasonable specificity, reflecting policy judgments and decisions that then would guide the Executive in execution of those laws.

Of course, making the political choices that must be made in order to give clear, precise policy guidance to administrative agencies is not easy. In the past, the legislative veto mechanism has often been rationalized as an attractive substitute for making those difficult choices, by giving Congress leverage to pull back particular agency decisions and take another look, free of executive branch input or veto.

Yet, I think it is relatively clear that the legislative veto mechanism, in addition to its constitutional infirmities, simply has not been effective in checking agency abuses and has, in fact, subliminally encouraged the passage of vague and overly broad delegations of authority.

Although there has not been any relevant experience with regulatory veto mechanisms, such as those in H.R. 3939 and S. 1080, we believe that such mechanisms would be similarly counterproductive and would mask, rather than relieve, the fundamental problem of clearly articulating public policies in law.

In addition, we have serious concerns about the workability of the various congressional review mechanisms that have been proposed. Most of these proposals impose rigid timetables upon Congress and its committees to introduce, debate, report upon, and enact literally thousands of resolutions every year.

The cumulative burden of such paperwork could overwhelm committee staffs, and the possibilities for stalemate and delay would be virtually endless. Even assuming that Congress could always overcome these obstacles and meet its self-imposed deadlines, I have serious questions about the quality of the decisions that would result from such a process.

Would only 2 hours of debate, for example, give Congress adequate opportunity to explore and evaluate the merits of a complex major rule promulgated after years of agency proceedings pursuant to a statute, such as the Clear Air Act, that itself had been the product of years of congressional deliberation, not to mention the procedural deliberative process prescribed by the Administrative Procedure Act?

The Framers understood that, to the extent Congress as a body were to become seriously involved in the process of reviewing the substance of every detailed, complex, and elaborate rule, it would likely become hopelessly mired in details.

Thomas Jefferson wrote nearly 200 years ago that:

> Nothing is so embarrassing nor so mischievous, in a great assembly, as the details of execution. The smallest trifle of that kind occupies as long as the most important act of legislation, and takes place of everything else. Let any man recollect, or look over, the files of Congress; he will observe the most important propositions hanging

over, from week to week, and month to month, till the occasions have past them, and the thing never done. I have ever viewed the executive details as the greatest cause of evil to us, because they in fact place us as if we had no Federal head, by diverting the attention of that head from great to small subjects.

Although the actual impact may differ with the various proposals that have been advanced, it also seems evident that there is considerable potential for injecting massive delay, uncertainty, and paperwork into the administrative process without any substantial countervailing benefit, and for creation of difficult problems of interpretation in judicial review of agency rulemaking decisions.

Finally, I think we have to ask whether the various proposed congressional review procedures offer any discernible improvement over the process currently available for reviewing agency rulemaking.

I do not think they do. Under Executive Order 12291, the President, through the Office of Management and Budget, maintains considerable oversight over the process of rulemaking by the nonindependent executive branch agencies, both to ensure that the agencies scrutinize carefully the legal and factual basis for major rules in order that those rules maximize social benefits and minimize costs to the extent permitted by law, and to ensure a consistent, well-reasoned administration-wide approach to policies for which the executive branch is responsible.

Once the agency has done the regulatory impact analysis required by Executive Order 12291 for a major rule and published the rule in the Federal Register, Congress has time to inform itself about, and legislatively to block, offensive rules, as it has done in the past in exceptional cases on an ad hoc basis.

Perhaps more important, there is a constant, informal and ongoing dialogue between every Federal agency and Congress. That dialog serves both to inform Congress of the agency's plans and interpretations of its statutory authority, and to give the agencies information about congressional concerns and views.

This process is supplemented by the considerable political influence that Congress can bring to bear on the agencies, through the authorization and appropriations process and through legislative hearings and inquiries.

The process generally works quite well, although I am sure there are many cases in which the executive branch could improve the lines of informal communication with the various committees of Congress, and I would hope that we are trying to do so, particularly in the wake of the *Chadha* decision.

In sum, let me say that there should be no doubt regarding this administration's concern about excessive and abusive agency actions, and about our interest in taking a hard look at the need for reform. One area in which both branches can, I believe, successfully focus their attention, is the need to gain control over the so-called independent agencies, and to make those agencies directly accountable for the choices they make in executing and enforcing the law.

We look forward to working with you to achieve that end. With respect to the question of enhanced congressional review of rulemaking, however, we would caution against any quick fixes. There is no more reason to believe that the proposed regulatory vetoes

would solve any problems or make the Government work better, than to believe that legislative vetoes would be a panacea for overly broad delegations of rulemaking authority.

That is where we should focus our efforts—on making the hard policy choices required by disciplined law making. The regulatory veto proposals would only divert that essential effort, and would inevitably complicate, delay, and frustrate operation of the law-making and law-executing process as the Framers envisioned it.

Thank you.

[Mr. Olson's prepared statement follows:]

Department of Justice

STATEMENT

OF

THEODORE B. OLSON
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

BEFORE

THE

COMMITTEE ON RULES
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

THE EFFECT OF INS V. CHADHA ON THE
ADMINISTRATIVE PROCESS

ON

MAY 10, 1984

Mr. Chairman and Members of the Committee:

Thank you for affording me the opportunity to appear before you today on behalf of the Administration to discuss the impact of the Supreme Court's decision in INS v. Chadha, 103 S. Ct. 2764 (1983), on the administrative process, particularly in light of the several across-the-board "regulatory reform" proposals that have been introduced in Congress or discussed since the Chadha decision was handed down on June 23, 1983.

To begin, I would like to note that in many ways the impact of the Chadha case has been considerably less draconian

than was predicted by many commentators both prior to and after the Court's decision. Chadha has not resulted in a dramatic shift of power away from Congress and toward the President; nor has Congress acted precipitously to eliminate or circumscribe delegations of authority to the Executive Branch. Rather, both Congress and the Executive Branch have for the most part worked together in a reasoned and deliberate fashion to assess the long-range effect of the Chadha decision, and to determine whether changes should be made to accommodate the legitimate concerns of the three Branches that share power in our form of government. The hearings being held by this Committee are a prime example of this effort, and I am pleased to be able to participate in this thoughtful and responsible process.

More than anything else, Chadha provides a unique opportunity for a badly needed reexamination of the allocation of governmental power and accountability in this country. Now that the Supreme Court has definitively disposed of the constitutional "cloud" created by use of the legislative veto device as a means of retaining Legislative Branch control over Executive discretion, we can address jointly many of the difficult concerns that encouraged resort to the legislative veto device. Before Chadha, that debate was, to a large degree, obscured by constitutional considerations. With that debate behind us, I believe our two Branches can focus on what those underlying concerns are, and whether there are steps that should be taken to improve the efficiency and public accountability of the federal government, consistent with the "single, finely wrought and exhaustively considered, procedure for making laws that is embodied in the Constitution." INS v. Chadha, 103 S. Ct. at 2784.

Much of the current discussion of possible legislative steps to be taken post-Chadha has focused on oversight and control over the rulemaking authority of federal agencies that engage in substantial administrative and regulatory activities. The subject of regulatory reform is, of course, not new, and the Department of Justice has commented in the

past on a number of such proposals. 1/ I can fully appreciate, however, why regulatory reform has a new impetus in the wake of Chadha. While there is no constitutional basis for distinguishing between rulemaking by federal agencies and other actions by those agencies taken pursuant to delegated authority, rulemaking is perceived as a form of "lawmaking" more often than most other methods by which the Executive implements laws. This perception is particularly prevalent if the standards in a statute governing the exercise of rulemaking authority are broad and open-ended. The task the agency must perform is to fill the interstices left by Congress when it passed the statutory scheme -- a task that in many cases requires the agency to make its best guess as to what Congress intended to be done. Such a system understandably will sometimes provoke considerable controversy over whether the agency has reached the correct conclusions regarding legislative intent.

Perhaps even more importantly, the concern with regulatory reform stems from a sense that the federal agencies may be "out of control," exercising considerable authority over the lives of individuals and the conduct of business, without being accountable for how such authority is exercised. 2/ This is a concern that this Administration shares, particularly with respect to the accountability of the independent regulatory agencies and commissions -- the "fourth branch" of Government that exists largely outside the day-to-day control of either the President or Congress. I would like to begin, therefore, by addressing some issues related to the President's control over "independent" regulatory agencies within the Executive Branch. I will then discuss briefly some of the

1/ See Statement of Jonathan C. Rose, Assistant Attorney General, Office of Legal Policy, Before the Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, United States Senate, Concerning S. 1080, the Regulatory Reform Act (Sep. 21, 1983); Statement of Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, Before the Committee on Rules, Subcommittee on Rules, United States House of Representatives, Concerning the Legislative Veto and Congressional Review of Agency Rules (Oct. 7, 1981).

2/ See Sierra Club v. Costle, 657 F.2d 298, 405-06 (D.C. Cir. 1981).

concerns raised by various proposals for enhancing congressional control over those agencies.

Presidential Control over Independent Regulatory Agencies

An issue that the Court's decision in Chadha and its summary affirmances in the FTC "used car rule" and FERC cases 3/ has highlighted is the need for oversight and control over the regulatory authority exercised by the so-called "independent" agencies and commissions. As stated by former Deputy Attorney General Schmults before a subcommittee of the House Committee on the Judiciary on July 18, 1983, "[T]he legislative veto decisions mark an appropriate point in our history for serious reexamination of the wisdom of the creation of this 'fourth branch of the Government . . . .'" 4/

Central to the Court's analysis in Chadha is the well-founded proposition that the Constitution recognizes only three Branches of Government -- Legislative, Executive, and Judicial -- and that the respective spheres of power of those three Branches are identifiable and distinct:

> Although not 'hermetically' sealed from one another, the powers delegated to the three Branches are functionally identifiable. When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it. When the Executive acts, it presumptively acts in an executive or administrative capacity as defined in Art. II. And when . . . Congress purports to act, it is presumptively acting within its assigned sphere.

103 S. Ct. at 2784 (citations omitted). As the Court recognized in Chadha, the fundamental thrust of the tripartite scheme

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3/ Process Gas Consumers Corp. v. Consumers Energy Council of America, 103 S. Ct. 3556 (1983).

4/ Statement of Edward C. Schmults, Deputy Attorney General, Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary Concerning Legislative Veto, at 5 (July 19, 1983), quoting Process Gas Consumers Group v. Consumers Energy Council of America, 103 S. Ct. at 3558 (White, J., dissenting).

designed by the Framers was to ensure that each Branch fulfilled the functions for which it is best suited, and that each Branch is accountable for performance of those functions. And, the Supreme Court reminded us that the division of powers among the three Branches was to assure

> as nearly as possible, that each Branch of government would confine itself to its original responsibility. The hydraulic pressure inherent within each of the separate branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

Id.

It is difficult to reconcile this constitutional scheme with the reality of regulation by the mixed assortment of commissions, agencies, government or quasi-government corporations, authorities, institutions, and boards generally referred to as "independent" regulatory agencies. Historically, the premise underlying creation of such "independent" agencies has been that some forms of regulation (primarily adjudication and investigation) should be entrusted to nonpartisan "experts" whose decisions are free from "political" supervision by the President. See H. Bruff, "Presidential Power and Administrative Rulemaking," 88 Yale L.J. 451, 480 (1979). Whatever its original validity, however, that premise now seems questionable. Today, Executive Branch agencies that cannot be characterized as "independent" engage in rulemaking in a functionally indistinguishable fashion from the so-called "independents," and many of the responsibilities and functions of the independent agencies overlap considerably with responsibilities and functions placed by Congress in other Executive Branch agencies. In fact, in the recent past Congress has seen fit to transfer to Executive Branch agencies some functions performed by these "independent" agencies. For example, in 1978 Congress transferred a number of functions exercised by the Civil Aeronautics Board with respect to interstate and overseas air transportation to the Department of Transportation and the

Department of Justice. Pub. L. No. 95-504, § 40(a), 92 Stat. 1744, 49 U.S.C. § 1551.

By and large, those independent agencies are not cohesive, centrally managed, or, most important from a constitutional standpoint, accountable in any effective way to the Congress or the President, those organs of Government to whom the Founders gave exclusive power to make and to execute the laws. In the wake of Chadha, it is appropriate to reexamine whether responsibility for administrative and regulatory execution and enforcement of our laws should be vested in governmental entities that are not accountable to our elected President. Alexander Hamilton explained in The Federalist No. 70 why he opposed diffusing the executive power in the hands of largely unaccountable individuals, in words that are equally applicable to our system of unaccountable commissions and agencies:

> The plurality of the Executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power, first, the restraints of public opinion, which lose their efficacy as well on account of the division of the censure attendant on bad measures among a number, as on account of the uncertainty on whom it ought to fall; and secondly, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office, or to their actual punishment in cases which admit of it.

We believe that some of the energy being expended in seeking alternatives to legislative vetoes should be channeled into efforts to return lawmaking and lawexecuting authority to the political branches of the Government, as intended so clearly by the Framers of the Constitution. As a beneficial byproduct, this process might well expose governmental authority that is not only lodged improperly in various politically unaccountable

agencies, but is not even the proper business of the federal government. The primary objective, however, should be to reaffirm that, in our system, governmental power must be allocated in a manner that allows for direct political accountability in the spheres of lawmaking and lawexecuting.

Several of the regulatory reform bills or proposals that have been advanced in the wake of Chadha would enhance, to a greater or lesser extent, the accountability of the independent agencies to the Executive Branch, at least with respect to the rulemaking functions of those agencies. Both S. 1080 and H.R. 3939, for example, would include independent agencies and commissions within the definition of "agency" for the purposes of those bills. Since those bills would give the President the authority to establish procedures for agency compliance with the detailed provisions requiring a regulatory analysis for every "major rule," the authority to monitor, review, and ensure agency implementation of such procedures, and the authority to designate "major rules," the President would have a measure of control over rulemaking by the independent agencies. The Administrative Conference of the United States, which has given much thought to this issue, has discussed the alternative of creating a "super-agency" within the Executive Branch that would be responsible for review of the rules of all agencies, and that would provide a single agency as a focus for oversight of agency rulemaking. I would note that, to a certain extent, this "super-agency" concept already exists in the Office of Management and Budget, under Executive Order 12291, although that Executive Order does not require compliance by independent agencies and commissions.

I do not mean to suggest that the Administration endorses any of the particular proposals that would provide for increased Executive Branch control over the rulemaking of these so-called independent agencies. Nonetheless, I believe the time has come to give very serious consideration to the problems of unaccountability of the independent agencies, which, after all, execute the law and therefore functionally belong as a part of the Executive Branch, and to come up with reasonable, and reasoned, solutions.

Congressional Review of Rulemaking

I would also like to make some general observations about the question of enhancing congressional review of federal agencies' rulemaking in the aftermath of Chadha. Christopher DeMuth, the Administrator for Information and Regulatory Affairs of the Office of Management and Budget, has recently succinctly identified the relevant question: "Should the President and Congress agree, through legislation, to procedures that would approximate the defunct legislative vetoes over some or all agency rules, while avoiding their constitutional pitfalls?" 5/ The Administration has serious concerns about the viability of some of the provisions of H.R. 3939 and S. 1080. My observations here are general, and I will not attempt to address each and every facet of the pending regulatory reform proposals.

First, I would like to highlight what I believe to be the fundamental problem that is not addressed by any of the various proposals to give Congress a "second shot" at reviewing agency rules through a joint resolution of approval or disapproval mechanism. While for the most part these mechanisms would satisfy minimal constitutional requirements for legislation, 6/

5/ Statement of Christopher DeMuth, Administrator for Information and Regulatory Affairs, Office of Management and Budget, Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, on Legislative Veto (Feb. 8, 1984).

6/ H.R. 3939 and S. 1080 (as amended by Chairman Grassley's amendment no. 2655) would both require congressional approval by joint resolution of "major rules" and would authorize congressional disapproval by joint resolution of "nonmajor" rules. The Department of Justice has consistently taken the position that action by joint resolution satisfies the bicameralism and presentment requirements of the Constitution, because joint resolutions are passed by both Houses and presented to the President for signature or veto. However, both bills currently provide that one House may speed up the effective date of a rule, by acting or failing to act on joint resolutions of approval or disapproval prior to expiration of the prescribed waiting period. In Chadha, the Supreme Court held that such action, taken by one House with "the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch," would be "essentially legislative in purpose and effect," INS v. Chadha, 103 S. Ct. at 2784, and would therefore "require action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President." Id. at 2787. Because these provisions of S. 1080 and H.R. 3939 conform to neither procedure for legislative action, they are unconstitutional.

they fail to ameliorate the basic difficulty confronting agencies that are delegated rulemaking authority, viz., that the statutory criteria under which such authority is granted are in all too many cases not well-defined, are too broad, and provide only limited guidance to the agencies in the exercise of their discretion. I can only echo the words of former Assistant Attorney General Rose, in a statement transmitted last fall to the Subcommittee on Administrative Practice and Procedures of the Senate Judiciary Committee, on the "Bumpers Amendment" in S. 1080, which raises many of the same concerns that the congressional review provisions of that bill and H.R. 3939 raise:

> While we agree that some agencies have acted beyond the limits of their authority, we believe that the roots of agency activism more often lie in the vaguely-defined objectives and standards found in many regulatory statutes. Of course, general delegations of power to administrative agencies are inevitable, given the sophistication and complexity of the technical areas covered by many regulatory statutes and the institutional constraints upon the time and resources of Congress. However, as the full Senate Judiciary Committee acknowledged in its report last Congress on S. 1080 . . . , Congress has frequently asked the agencies to make the basic, vitally important policy choices that, at least in theory, are more properly for the legislature to make. To the extent that agencies have misread the direction that Congress intended them to take, we believe that Congress -- and not the courts -- should be responsible for articulating regulatory policies. 7/

7/ Statement of Jonathan C. Rose, Assistant Attorney General, Office of Legal Policy, Before the Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, United States Senate, Concerning S. 1080, The Regulatory Reform Act (Sep. 21, 1983) (footnote omitted).

To the extent that statutes give the agencies clear, precise guidance as to how, and to what ends, discretion should be exercised, all our jobs would be easier. The Executive Branch would have a clearer view of its responsibility to execute the laws, and therefore would be better able to keep administrative agencies politically accountable; Congress would not be faced with agency rulemaking that distorts or exceeds what Congress intended in the statute; and the courts would be better able to determine whether particular agency action lies within the scope intended by Congress when it delegated the authority in question. Most important, this process would be more fully in accord with the lawmaking and lawexecuting processes envisioned by the Framers of the Constitution, processes that were intended to be political and subject to democratic controls.

By contrast, some of the congressional review proposals that have been advanced, particularly those that would require congressional approval by joint resolution of agency rules, would not be wholly compatible with the Framers' view of how the Government should work. I do not believe that the Framers envisioned a legislative process in which no issues of national importance (and therefore worthy of congressional attention) could ever be resolved with a reasonable degree of certainty because Congress would reserve to itself an opportunity and a power to redebate its prior decisions on a continuing basis through a veto power over implementing regulations. Rather, what the Framers envisioned was that Congress would make laws with reasonable specificity, reflecting policy judgments and decisions that then would guide the Executive in execution of those laws.

Of course, making the political choices that must be made in order to give clear, precise policy guidance to administrative agencies is not easy. In the past, the legislative veto mechanism has often been rationalized as an attractive substitute for making those difficult choices, by giving Congress leverage to pull back particular agency decisions and take another look, free of Executive Branch

input or veto. Yet, I think it is relatively clear that the legislative veto mechanism, in addition to its constitutional infirmities, simply has not been effective in checking agency abuses and has in fact subliminally encouraged the passage of vague and overly-broad delegations of authority. Although there has not been any relevant experience with "regulatory veto" mechanisms, such as those in H.R. 3939 and S. 1080, we believe that such mechanisms would be similarly counterproductive and would mask, rather than relieve, the fundamental problem of clearly articulating public policies in law.

In addition, we have serious concerns about the workability of the various congressional review mechanisms that have been proposed. Most of these proposals impose rigid timetables upon Congress and its committees to introduce, debate, report upon, and enact literally thousands of resolutions every year. The cumulative burden of such paperwork could overwhelm committee staffs, and the possibilities for stalemate and delay would be virtually endless. Even assuming that Congress could always overcome these obstacles and meet its self-imposed deadlines, I have serious questions about the quality of the decisions that would result from such a process. Would only two hours of debate, for example, give Congress adequate opportunity to explore and evaluate the merits of a complex major rule promulgated after years of agency proceedings pursuant to a statute, such as the Clear Air Act, that itself had been the product of years of congressional deliberation, not to mention the procedural deliberative process prescribed by the Administrative Procedure Act?

The Framers understood that, to the extent Congress as a body were to become seriously involved in the process of reviewing the substance of every detailed, complex, and elaborate rule, it would likely become hopelessly mired in details. Thomas Jefferson wrote nearly two hundred years ago that:

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> of that kind occupies as long as the most important act of legislation, and takes place of everything else. Let any man recollect, or look over, the files of Congress; he will observe the most important propositions hanging over, from week to week, and month to month, till the occasions have past them, and the thing never done. I have ever viewed the executive details as the greatest cause of evil to us, because they in fact place us as if we had no federal head, by diverting the attention of that head from great to small subjects . . . ." 8/

Although the actual impact may differ with the various proposals that have been advanced, it also seems evident that there is considerable potential for injecting massive delay, uncertainty, and paperwork into the administrative process without any substantial countervailing benefit, and for creation of difficult problems of interpretation in judicial review of agency rulemaking decisions.

Finally, I think we have to ask whether the various proposed congressional review procedures offer any discernible improvement over the process currently available for reviewing agency rulemaking. I do not think they do. Under Executive Order 12291, the President, through the Office of Management and Budget, maintains considerable oversight over the process of rulemaking by the nonindependent Executive Branch agencies, both to ensure that the agencies scrutinize carefully the legal and factual basis for major rules in order that those rules maximize social benefits and minimize costs to the extent permitted by law, and to ensure a consistent, well-reasoned Administration-wide approach to policies for which the Executive Branch is responsible. Once the agency has done the regulatory impact analysis required by Executive Order 12291 for a major rule and published the rule in the

8/ 6 T. Jefferson, The Writings of Thomas Jefferson 228 (A. Bergh, ed. 1903) (letter to E. Carrington, Aug. 4, 1787).

Federal Register, Congress has time to inform itself about, and legislatively to block, offensive rules, as it has done in the past in exceptional cases on an ad hoc basis.

Perhaps more important, there is a constant, informal and ongoing dialogue between every federal agency and Congress. That dialogue serves both to inform Congress of the agency's plans and interpretations of its statutory authority, and to give the agencies information about congressional concerns and views. This process is supplemented by the considerable political influence that Congress can bring to bear on the agencies, through the authorization and appropriations process and through legislative hearings and inquiries. The process generally works quite well, although I am sure there are many cases in which the Executive Branch could improve the lines of informal communication with the various committees of Congress, and I would hope that we are trying to do so, particularly in the wake of the Chadha decision.

In sum, let me say that there should be no doubt regarding this Administration's concern about excessive and abusive agency actions, and about our interest in taking a hard look at the need for reform. One area in which both Branches can, I believe, successfully focus their attention, is the need to gain control over the so-called independent agencies, and to make those agencies directly accountable for the choices they make in executing and enforcing the law. We look forward to working with you to achieve that end. With respect to the question of enhanced congressional review of rulemaking, however, we would caution against any quick fixes. There is no more reason to believe that the proposed regulatory vetoes would solve any problems or make the Government work better, than to believe that legislative vetoes would be a panacea for overly broad delegations of rulemaking authority. That is where we should focus our efforts -- on making the hard policy choices required by disciplined law-making. The regulatory veto proposals would only divert that essential effort, and would inevitably complicate, delay, and frustrate operation of the lawmaking and lawexecuting process as the Framers envisioned it.

The CHAIRMAN. Thank you. Do you believe that the Congress has the authority to exercise supervisory and oversight jurisdiction over independent agencies or executive agencies or either?

Mr. OLSON. If I understand the question correctly, Mr. Chairman, I do believe that Congress does have the power to exercise oversight and supervision through various different procedures that take place.

The CHAIRMAN. How do you believe then that the Congress may exercise such supervision or oversight jurisdiction?

Mr. OLSON. In the many ways in which Congress does do so now: though the oversight processes where hearings are conducted to examine the manner in which the laws are executed; through the appropriations process; through the authorization process that takes place; and in a variety of other ways, including the possibility of mechanisms such as "report-and-wait" provisions, where rules are submitted to the Congress for opportunity to review.

The CHAIRMAN. Where——

Mr. OLSON. "Report-and-wait" provisions pursuant to which the agency might submit to Congress a proposed regulation and allow it to rest there for a while before it becomes effective, and in a variety of other ways that Congress does exercise that authority.

The CHAIRMAN. Do you consider that the legal effect of the *Chadha* decision is to hold that the only way Congress can function is to function in its legislative authority in the enactment of legislation by passage of an identical bill by both houses and submitting the legislation enacted to the President?

Mr. OLSON. When the Congress performs the law-making function, the Supreme Court *Chadha* decision did, in fact, say that, Mr. Chairman. The legislative function, however, seems to me to be broader than simply the enactment of laws. It does include an oversight function and it does include investigative responsibilities.

The CHAIRMAN. I thought the Supreme Court came near to holding that the only thing the Congress could do was to act in its constitutional law enacting capacity.

Mr. OLSON. When it makes legislation——

The CHAIRMAN. It didn't seem to recognize that we had any other capacity or power.

Mr. OLSON. I do not believe that the Supreme Court in the *Chadha* decision meant to say that, or that the Chief Justice's opinion for the Court meant to articulate that.

I think that the Court was saying, as I understand the opinion of the Chief Justice, that when Congress takes actions which would have the effect of legislation, changing the rights of individuals, including officials of the executive branch, that process must be exercised in only one way and that is through the presentment clause as articulated in article I.

The CHAIRMAN. Do you think oversight or supervisory jurisdiction could have that effect?

Mr. OLSON. Not as a legal matter. In terms of exercising supervision, it may. I do not think that the oversight function in itself would have the effect of lawmaking, but it would have the effect of communicating the interest of Congress, and of keeping the executive branch agencies and independent agencies responsible.

The CHAIRMAN. What would be the objective of Congress exercising oversight jurisdiction? What could Congress do through the exercise of such jurisdiction?

Mr. OLSON. In the first place, it serves the very useful function of reminding the people over whom the oversight function is executed that they do have responsibility to the statute. It forces them to go back to their books to make sure that they are complying with the original intent of the legislation.

The CHAIRMAN. Does it take away, if they had to go back and reexamine the rule, might they not take away some right you may say had been vested in somebody?

Mr. OLSON. Not if they go back and reexamine it, Mr. Chairman. They may go back and reexamine a rule or prospective decision and decide what they were doing was not consistent.

The CHAIRMAN. You don't think the aim of oversight or supervisory jurisdiction is to get the agencies to reexamine what they do, do you, without any possibility of correcting or changing what they have done?

Mr. OLSON. I do believe that that whole process is part of a continuum—to use the vernacular, to "keep the agencies honest," faithful to the legislative intent as articulated in the statute and in the legislative history in some cases. They may decide to go back through the process of reexecuting the law or changing the rules, based upon their judgment that they may have erred in the first place. That is not inconsistent with the *Chadha* decision either as to the extent of the function of Congress or of the executive branch.

The CHAIRMAN. Maybe it is inappropriate. I made the analogy here that it seems to me the decision of the court in respect to the power of Congress is to say that all a woman can do is to have a baby.

They have that function, of course, by nature, creation, but that is about all they can do. It looks like to me the court very narrowly limited the authority of Congress to act except in the exercise of its constitutional provision to enact legislation, but supervision and these other things are not necessarily the enactment of legislation.

Mr. OLSON. Well, I do not know how for we can go with that metaphor, but the legislation can take a variety of forms. It can decide where that child is to be educated and how large that child will grow and how much money that child will have to perform various functions.

The legislative process is the most powerful process set out in the Constitution, and all the Supreme Court said, I submit, in the *Chadha* decision is that that legislative authority, which is the greatest power vested in the Constitution, must be exercised in a certain way.

The CHAIRMAN. May I call your attention to a portion of a memo submitted to this committee by the Congressional Research Service of the Library of Congress. I am reading—the impact of *Chadha* on the ability of Congress to oversee and control executive agencies' actions is not confined to the decisions of the courts.

In a recent opinion of the Department of Justice Office of Legal Counsel, to the Office of Management and Budget, OLC expressed the view that the authority heretofore exercised by the Joint Com-

mittee on Printing, under title 44, United States Code, over the Federal printing establishment was invalid under *Chadha* and that executive departments and agencies are free to contract for their printing needs as they find convenient.

Then they add "The impact of this opinion, if put into effect by OMB and the agencies, would be to confine JCP's authority to the printing needs of the Congress or closely related matters."

Do you agree with that action taken by the Office of Legal Counsel?

Mr. OLSON. I believe I must. I believe my name is on the bottom of that opinion. I am not sure I necessarily agree with the Congressional Research Service characterization, however.

We were addressing in that opinion a proposed set of revised rules and regulations put out by the Joint Committee on Printing which, as I recall my analysis of it, went considerably beyond what the historical function had been and in fact articulated in the statement of purpose for the regulations that they were intended to be policymaking and to involve the Joint Committee on Printing in the process of executing specific decisions involving the purchase of equipment in the executive branch and so forth.

So I would submit that the analysis that we set out in that opinion is consistent with *Chadha* and, in fact, is required by the *Chadha* decision, but that taken as a whole it is a reasonable conclusion and should not impair the powers of Congress to properly exercise the legislative function. There are going to be some limits that result from that *Chadha* decision and in that particular area I think that we reached the correct conclusion.

The CHAIRMAN. Do you think it is appropriate for Congress to exercise under any circumstance any further legislative veto with a view to giving the Supreme Court an opportunity to determine the issue of the legislative veto, perhaps under different circumstances from those existing in the *Chadha* case.

Mr. OLSON. I do not think that it would be appropriate for Congress intentionally to pass a statute which was inconsistent or set up a mechanism which was inconsistent with the *Chadha* decision as read by Congress.

There are various cases in the courts now that may lead the Supreme Court to the opportunity to revisit the *Chadha* decision in connection with decisions that have been made before. In fact, there was one reported in the paper today involving the Home Rule provisions of the District of Columbia Code.

The CHAIRMAN. Was the "severability" provision in the statute involved in the *Chadha* case?

Mr. OLSON. Yes.

The CHAIRMAN. Do you consider that was a critical part of the Supreme Court's decision, that fact?

Mr. OLSON. It was a critical part of the Supreme Court's decision, particularly with respect to the issues that are going to come up over and over again about severability. Severability may be one of the more important parts of the dialog that continues to go on because, as you noted, the Supreme Court decision potentially affects——

The CHAIRMAN. You wouldn't think it appropriate for Congress if it saw fit, thought it should exercise legislative veto, and decided to do it without a severability provision in the bill, to do so?

Mr. OLSON. Well, I would not purport to make that judgment. It seems to me it might be presumptuous for the executive branch to express a view as to what the Congress should do with in the passage of legislation when Congress believes that that particular mechanism or that particular law has already been declared unconstitutional by the Supreme Court. That is the dilemma it would present to me if I were a Member of Congress.

If I believed that the Supreme Court decision was clear and unequivocal on that subject, I would be concerned about——

The CHAIRMAN. The Supreme Court and all other judicial decisions depend upon the facts of the case, don't they?

Mr. OLSON. Yes, they do.

The CHAIRMAN. And different facts may lead the courts to differing decisions.

Mr. OLSON. That is true within certain limits. The principles that are articulated by the Supreme Court in the *Chadha* decision, as you noted, were reasonably broad.

They were also, it seems to me, reasonably predictable in terms of the outcome of the case. As I said, I think there are other methods by which issues related to this subject may get to the Supreme Court, in which these issues will be debated, but I would not presume to tell you that you should or should not vote for a particular statute because it had a mechanism of that nature.

I believe the Supreme Court will come to the same conclusion if the issue is presented again.

The CHAIRMAN. Was OMB set up by Congress?

Mr. OLSON. I might allow Mr. DeMuth to answer that question. I wouldn't be surprised if Congress placed a role, particularly, through various reorganization statutes and changes in legislation.

The CHAIRMAN. I wonder if you thought it might be appropriate for Congress to examine OMB.

Mr. OLSON. I am not sure that I understand your question. Mr. DeMuth can address this. Congress does examine into OMB and its functions quite frequently.

Mr. LOTT. I have been very interested in your line of questioning and you asked a lot of questions that perhaps I would have asked. I was especially interested in the last question about OMB. That is an interesting question that maybe Congress will have to look at in the future to get the Justice Department, executive branch to come more around to our view on this whole question of *Chadha* and the legislative veto.

I was curious about a lot of things you were saying about the fourth arm of Government. I have always felt the fourth arm of Government was the bureaucracy which, as a matter of fact, doesn't respond necessarily to Congress. It writes regulations, it writes laws contrary to our intent, and that are not totally in line with our intent, or writing regulations that expand the law that we passed. And it appears to me whether it is a Democratic or Republican administration, the President has very little control over these people, usually backed up by the Office of Legal Counsel in that particular department, and I just have to wonder if this ad-

ministration has any better control of the Justice Department, State Department, Transportation Department.

Before we start taking looks at independent agencies, I think we ought to look at the bigger ones first because I don't think we have got control over them. How do you respond to that?

Mr. OLSON. We believe very strongly that that question should be looked at and that the President should have the power to exercise more control over the people who work for him in the executive departments.

Mr. LOTT. I don't think he does, and how are we going to do that? In fact, I have had personal experiences where we have had a department say, "No, our regulations say this or that and it can't be done." We have gone to the White House and the White House would say, "You are right, they are wrong," and would try to tell the department that is what they ought to be doing, and they say our interpretation of the regulations are different. They don't give a damn what the White House says, or OMB in many instances. I am referring to whether it is a Democrat or Republican administration.

Mr. OLSON. I agree with you, Mr. Lott. That is not the way it is supposed to work. The President is the one who is given responsibility by the Constitution faithfully to execute the laws. People in the executive branch work for the President. Sometimes a structure gets established where it does take some time to make the move, and anything that could be done to enhance the President's ability, either by himself or by those whom he selects, to make that process more effective or more efficient would be better for our Government.

You are absolutely correct that these agencies tend to take on a life of their own, and it is extraordinarily difficult for such matters to be brought back under control.

Mr. LOTT. That is one reason why I have come around to the point that I am for the legislative veto. And if the courts say this is not constitutional, then I am going to be looking for a way to find some approach that will be constitutional.

As long as I am in Congress, whether it is Republican or Democrat administration I am not going to give up on that: First, because I think that many times our laws are misinterpreted and mistreated by the regulations that the bureaucrats write; and second, because I am going to wonder if any President can control the regulations and the bureaucracy.

If the executive branch can't do it, since we write these laws that they are promulgating regulations on, we have some responsibility to try to see that they are carried out and enforced the way we passed the law, especially in those agencies that are not the normal independent agencies, as you refer to them.

This is a view that was supported by the President before his election.

Mr. OLSON. I understand that, and I could not agree more with everything that you have said. I think that it is very important for us to examine ways in which it can be more possible for the President to do what the Constitution vests in him alone. The Constitution does not specify any other authority to exercise that power in the executive branch, although it acknowledges that there will be

other officials, but the Constitution makes those people responsible to the President.

In many instances it is the legislation itself who makes it difficult for the President to control the process.

Mr. LOTT. I understand that.

Mr. OLSON. In some respects the process under 12291 that Mr. DeMuth is responsible for is an effort to take a step in the direction of greater control over his subordinates. But that, as Mr. DeMuth will tell you, has not been easy for him to do.

Mr. LOTT. What bothers me is that I think the only instrument in this city that is really trying to work at making the bureaucracy responsive to the law and the executive is the Office of Management and Budget, which may itself be unconstitutional itself.

Mr. OLSON. I don't think that the Office of Management and Budget is unconstitutional. I think that that is the instrument pursuant to which the President should and does exercise some management authority over the executive branch. The people at OMB are responsible for carrying out the President's authority as much as possible.

To the extent that it is difficult for the President to move the ship of state in various different areas, we ought to think about more ways in which Congress can make the agencies more responsive not only to Congress but to the President. We ought to spend some time on helping the President become more effective—whichever party he belongs to—a more effective leader.

Mr. LOTT. I guess what I would really hope for instead of telling us what is not constitutional or what shouldn't be done, I wish you would have more of an approach of how we can comply with *Chadha* and approve the way independent agencies operate, and help the President through OMB or whatever to get some better control of his own branch of Government.

Mr. OLSON. I agree with you, and that point is well taken.

Mr. LOTT. That is all, Mr. Chairman.

The CHAIRMAN. Thank you very much. Mr. Olson, thank you very much for your excellent statement.

The CHAIRMAN. Our next witness is the Honorable George W. Douglas, Commissioner of the Federal Trade Commission. We will be pleased to hear you.

STATEMENT OF HON. GEORGE W. DOUGLAS, COMMISSIONER, FEDERAL TRADE COMMISSION

Mr. DOUGLAS. Thank you. Mr. Chairman and members of the committee, it is a pleasure for me to be here today. Your invitation was addressed to Chairman Miller who unfortunately is unable to be here today. I have with me, however, Chairman Miller's prepared statement, which I shall submit for the record, and which I wish to sponsor. [See p. 742.]

Mr. DOUGLAS. I will first very briefly highlight the points raised by Chairman Miller, and I would be happy to discuss any issues with you further.

In our view, a legislative veto is an important part of the much broader issue of regulatory reform. As you know, Mr. Chairman, in our letter of invitation, today's hearing poses its legislative veto

question within the context of refining the manner and degree to which Congress and the executive branch delegate authority to regulatory agencies, and it is this larger issue which I would like to emphasize in my remarks today.

We should continually strive to see that only needed cost-effective government regulations are imposed upon the public. There are several approaches by which requisite accountability can be imposed on the delegated legislation promulgated by independent agencies such as the FTC. In addition to the application of the constitutional variant of legislative veto, other approaches include independent court reviews of agency decisions, increased public participation, regulatory agenda in budgets, improved coordination and management of regulatory process, and modification in the agency's organic authorizing statutes. Let me advance two points in this regard.

First, an overall approach to regulatory reform might well incorporate some of the best elements of all of these ideas, and thus transcend the issue of legislative veto.

Second, I suggest consideration be given to both short-run and long-run strategies for dealing with problems of inefficient and ineffective regulation. In my judgment, the most important priority in the long run is for Congress to address the organic statutes. For example, in the case of the FTC, we can promulgate rules to prevent "unfair or deceptive acts or practices." What these terms "unfair and deceptive" mean is not altogether clear.

Congress so far has provided little guidance. The courts have said in large measure the terms mean whatever the majority of the FTC commissioners say they mean. Not surprisingly, because the FTC can exercise this broad discretion on an industrywide basis, the agency has been characterized by some as the second most important legislative body in America.

In the short run, while Congress addresses the organic statutes, there should be safeguards to restrain possible agency excesses. Such safeguard legislation is far more important for so-called independent agencies than it is for those which were formerly a part of the executive branch of Government.

The reason is that the President's supervision, primarily through a review process established by Executive Order 12291, provides important safeguards with respect to executive branch agencies in rulemaking.

Even though independent agencies are subject to congressional oversight, and limited presidential authority, I do not believe that this constitutes a sufficient safeguard with respect to the FTC at this time.

I recomend, therefore, a short-term strategy with respect to the FTC and other independent agencies consisting of two major elements.

The CHAIRMAN. Did you say there was some limitation of the authority of the President over the FTC?

Mr. DOUGLAS. Yes, sir. The President nominates the members of the commission who then serve for a fixed term, and they do not serve at the pleasure of the President. They can only be removed by impeachment, so that the President has very little review and direct control over the behavior of the agency.

I recommend a short-term strategy with respect to the FTC and other independent agencies, consisting of two major elements. First, a revised and constitutional legislative review mechanism, and second, more precise standards for rulemaking.

The CHAIRMAN. A revised what?

Mr. DOUGLAS. A constitutional legislative veto, essentially.

The CHAIRMAN. Some sort of a new constitutional provision, or a new kind of veto?

Mr. DOUGLAS. Yes. We believe that Congress could reenact a legislative veto mechanism similar to that which the FTC Act had previously, by simply adding into the joint resolution process the presentment to the President to sign the legislative veto.

The CHAIRMAN. Of course they can do anything that is within their constitutional authority by joint resolution presented to the President.

Mr. DOUGLAS. That is correct, sir.

The CHAIRMAN. There is nothing new, you know, in that.

Mr. DOUGLAS. We understand. But what I am suggesting is that I think the Congress needs this ability to review the legislative acts of the Federal Trade Commission in this constitutional fashion.

The CHAIRMAN. You see what it comes down to, if you observe the literal present interpretation of the Supreme Court decision, it comes down to that Congress can't do the slightest thing to alter or change anything that an agency, independent or executive, does, except passing a full law, passing a full law, the same kind of law by which the agency or the branch was set up. Every time they act they have to enact a full law, and they can't delegate. Now you delegate a lot of authority, don't you, to the people in the course of your work?

Mr. DOUGLAS. No. In our case, Mr. Chairman, the entire commission acts on every official act that the commission makes, including official communications.

The CHAIRMAN. We delegate authority to you.

Mr. DOUGLAS. That is correct.

The CHAIRMAN. You act on the authority of Congress?

Mr. DOUGLAS. That is correct.

The CHAIRMAN. Just like the Interstate Commerce Commission. They fix rates, let's say. Congress could fix rates, and a little bit ago we did fix the telephone rate here in interstate commerce by legislation, by statute. Congress could fix every rate of every public carrier and everything else in the United States subject to the U.S. jurisdiction, by exercising our authority, but we delegate it to the Interstate Commerce Commission, the Federal Trade Commission, and the like.

Now, the Court says we can't delegate to one House of the Congress or even two Houses of the Congress without it being presented to the President, the function to examine what we have delegated, and see if we want to adhere to that delegation.

Mr. DOUGLAS. Yes, that may be technically correct, Mr. Chairman, but the FTC is under congressional oversight, and I have attended a number of congressional oversight hearings, and I can assure you that our current policies do get very careful review.

The CHAIRMAN. Excuse me. They can't change anything you have done, under the *Chadha* case, unless they pass another law.

Mr. DOUGLAS. That is technically correct. If you have a modification of your authorization or a rider on an appropriation or what have you, that is technically correct. However, the point that I was trying to make is that the Congress has delegated legislative authority to the Federal Trade Commission in an unprecedented broad and vague manner, whereas the delegated authority that goes to the FCC or to the Federal Energy Regulatory Commission is fairly specific.

The CHAIRMAN. In the Bible the language says "The Lord giveth and the Lord taketh away." Congress can do that, you know.

Mr. DOUGLAS. You are quite correct, sir, and that is exactly what we are expressing today. In our judgment, in the current hiatus as we understand it, there is no effective review by the Congress or the legislative rules that the commission has the authority to pass.

Legislative veto, however, deals only with agency action after it has been taken. Doesn't it also make sense to try to prevent ill-advised rulemaking before hundreds of thousands of tax dollars are spent, before millions of dollars in legal fees have been run up, costs that are eventually passed on to consumers, and before your time is spent considering a proposed rule which happens to be flawed?

Therefore, I believe Congress should more carefully specify the standards the commission or other agencies must meet in order to initiate rulemaking or promulgate a rule.

Our reauthorization bill currently pending in the Senate, S. 1714, does take an important step in addressing these problems by requiring this conduct to be "prevalent" in an industry before the commission can promulgate a rule banning such conduct, but I would also welcome congressional guidance on the standard of evidence required for the promulgation of final rules. We believe that if agencies adhere to better standards of evidence, there will be a lesser need for extensive oversight review. We have endeavored to do just that at the FTC.

Requiring the commission to base its determination that regulatory action is needed upon the most reliable evidence obtainable would eliminate the seat-of-the-pants rulemaking that has justifiably troubled Congress.

Mr. Chairman, I appreciate being invited here today to share my thoughts on these important and timely matters, and I congratulate the committee for its continuing work in this area, and hope you will call upon me if I ever may be of assistance. Thank you.

The CHAIRMAN. Thank you very much, Mr. Douglas. We appreciate your coming and giving us your excellent statement.

[The statement of Mr. James C. Miller follows:]

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

PREPARED STATEMENT

OF

JAMES C. MILLER III, CHAIRMAN

FEDERAL TRADE COMMISSION

BEFORE THE

COMMITTEE ON RULES

UNITED STATES HOUSE OF REPRESENTATIVES

MAY 10, 1984

Mr. Chairman, and Members of the Committee: It is a pleasure to appear before you today to discuss the impact of the Supreme Court's decision in Chadha, which declared existing forms of the legislative veto unconstitutional. As you are aware, since the late 1970's, legislative veto has been a crucial factor in the debate surrounding the FTC's authority to promulgate trade regulation rules.

Of course, legislative veto is part of the much broader issue of regulatory reform. As you note, Mr. Chairman, in your letter of invitation, today's hearing poses the legislative veto question within the context of refining the manner and degree to which Congress and the Executive Branch delegate authority to regulatory agencies. And it is this larger issue which I would like to emphasize in my remarks this morning.

As former Executive Director of the Presidential Task Force on Regulatory Relief, and now as Chairman of the FTC, one of my highest priorities has been to improve the effectiveness of regulations and to lower their costs. What has struck me in that pursuit is the great variety of approaches that have been proposed. In addition to the application of a constitutional variant of legislative veto, other approaches include: "independent" court review of agency decisions; increased public participation; regulatory agendas and budgets; improved coordination and management of the regulatory process; and modifications in the agencies' organic, authorizing statutes. Let me advance two points in this regard.

First, an overall approach to regulatory reform might well incorporate some of the best elements of all these ideas and thus transcend the issue of legislative veto.

Second, I suggest consideration be given to both short-run and long-run strategies for dealing with problems of inefficient and ineffective regulation. In my judgment, the most important priority for the long run is for Congress to address the organic statutes.

For example, in the case of the FTC, we can promulgate rules to prevent "unfair or deceptive acts or practices." What these terms "unfair" and "deceptive" mean is not altogether clear. Congress so far has provided little guidance. The courts have

said, in large measure, the terms mean whatever a majority of FTC commissioners say they mean. Not surprisingly, because the FTC can exercise this broad discretion on an industry-wide basis, the agency has been characterized by some as "the second most powerful legislative body in America."

In the short run -- while Congress addresses the organic statutes -- there should be safeguards to restrain possible agency excesses. Such safeguard legislation is far more important for so-called independent agencies than it is for those which are formally a part of the executive branch of government. The reason is that the President's supervision -- primarily through a review process established by Executive Order 12291 -- provides important safeguards with respect to executive-branch agencies. Even though "independent agencies" are subject to Congressional oversight and limited Presidential authority, I do not believe this constitutes a sufficient safegard with respect to the FTC at this time.

I recommend a short-term strategy with respect to the FTC consisting of two major elements -- first, a revised (constitutional) legislative review mechanism, and second, more precise standards for rulemaking.

As you know, legislative vetoes, affecting some two hundred laws, have covered a broad variety of issues. My comments on legislative veto go only to use of the device for purposes of providing legislative oversight of regulatory agencies. I express no view on their use in other areas, such as budget impoundment and foreign policy.

I urge Congress to consider a modified veto mechanism that might be called simply, "regulatory veto".

As you know, the typical legislative veto consists of three parts. First, there is the "laying on the table" requirement. That is, any regulation an agency promulgates does not become effective for, say, 90 days, so Congress has time to review the agency's action.

Second, there are expedited procedures which could be used to discharge a veto resolution from a Committee to the floor of the House and Senate for an up-or-down vote on the regulation. This is absolutely essential, to prevent a bare majority of one of the relevant congressional committees, or even a reluctant chairman, from bottling up any veto initiative.

Finally, there are provisions that raise bicameral and "presentment clause" problems. In some cases the veto resolution requires action by only one house (or one house in the absence of offsetting action by the other house). But until the Chadha decision the essence of legislative veto was final, determinative action by Congress, without President approval or veto override. However, these are the grounds on which the Supreme Court found the FTC's legislative veto unconstitutional.

Thus, the only changes necessary to make the typical legislative veto constitutional are to provide for concurrent action by both chambers and to include the President in the loop. In short, retain the delay provision and the expedited procedures, but turn the veto resulution into an ordinary law by making it a joint resolution of disapproval.

I believe this approach, if adopted for the FTC and other independent agencies, would give Congress breathing room to address the basic delegations of rulemaking authority in each agency's statute with more precision. In comparison with the old legislative veto mechanism, it would afford Congress only slightly diminished supervisory control over agency excesses. At the same time, it would allow the legitimate work of the regulatory agencies to move forward.

Legislative veto, however, deals only with agency action after it has been taken. Doesn't it also make sense to try to prevent ill-advised rulemaking before hundreds of thousands of

tax dollars are spent, before millions of dollars in legal fees have been run up -- costs that are eventually passed on to consumers -- and before your time is spent considering a proposed rule which happens to be flawed? Therefore, I believe Congress should more carefully specify the standards the Commission must meet in order to initiate a rulemaking or promulgate a rule.

Our reauthorization bill currently pending in the Senate, S. 1714, takes an important step in addressing these problems by requiring misconduct to be "prevalent" in an industry before the Commission can take initial action. But I would also welcome Congressional guidance on the standard of evidence required for the promulgation of final rules. I urge the Committee to consider the approach unanimously approved by the Commission in its recently promulgated Trade Regulation Rule on Credit Practices. The initial step in that rulemaking proceeding was for the Commission to find substantial evidence that an act or practice was legally unfair or deceptive. In addition, before promulgating a rule rather than bringing individual cases, I believe the public interest requires the Commission to answer, as we did in the credit rule, the following questions in the affirmative:

1. Is the act or practice prevalent?

2. Does a significant harm to consumers exist?

3. Will the proposed rule reduce that harm?

4. Will the benefits of the proposed rule exceed its costs?

In analyzing each of these questions, three types of evidence are frequently introduced: quantitative studies, expert testimony, and anecdotes. Although the Commission should have the flexibility to marshall evidence for a rulemaking record that combines the best mix of these three, we have a responsibility to see that the best evidence reasonably available is included. I believe the best evidence will most often be methodologically sound quantitative studies and expert testimony. Anecdotal evidence alone is rarely, if ever, sufficient to provide the "substantial evidence" required in a rulemaking record.

In conjunction with these requirements, I also propose that the Statement of Basis and Purpose that must accompany Commission rules be made judicially reviewable and that the Commission be required to include within it an affirmative showing of the prevalence of the unfair or deceptive acts or practices and the necessity for any remedies it has proposed. Judicial review of these findings, as well as requiring the Commission to base its determination that regulatory action is needed upon the most reliable evidence obtainable, would eliminate the seat-of-the-pants rulemaking that has justifiably troubled Congress.

Mr. Chairman, I appreciate being invited here today to share my thoughts on these important and timely matters. I congratulate the Committee on its continuing work in this area and hope you will call upon me if ever I may be assistance.

Now, I would now be happy to address any questions you or your colleagues might have.

The CHAIRMAN. Our next witness is Mr. Christopher C. DeMuth, Administrator for Information and Regulatory Affairs, Office of Management and Budget.

STATEMENT OF CHRISTOPHER C. DeMUTH, ADMINISTRATOR FOR INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET

Mr. DEMUTH. Chairman Pepper, thank you very much for inviting me here today. I have submitted a detailed statement for you and your colleagues, and propose now just to summarize it briefly.

The CHAIRMAN. Without objection, it will be received.

Mr. DEMUTH. Thank you. At the present time the administration has no position on any of the post-*Chadha* regulatory veto bills, such as those proposed by Congressman Lott, Senator Grassley, and some others. These bills raise a profoundly difficult question. In the aftermath of *Chadha,* should the Congress and the President agree to enact legislation that would accomplish approximately the same results as the pre-*Chadha* legislative vetoes of agency rulemaking actions? There are many, many uncertainties involved, and it is taking us as much time to review these issues as you.

The CHAIRMAN. Since you raised the question about your attitude toward various proposals that have been made since the *Chadha* decision, has the executive agency taken a position on all the things, like the War Powers Act and other veto proposals that are still in existence?

Mr. DEMUTH. It is dependent on the specific case. For example, with regard to rescissions and deferrals of spending, we have been working fairly closely with Members of Congress and have worked out a good accommodation. But outside of the regulatory area, we have not taken a formal position on any legislative proposal.

The CHAIRMAN. In other words, you have gone so far, rather waiting for the matter to be determined in the courts, various matters like the War Powers Act, which have not yet been specifically tested in the courts?

Mr. DEMUTH. Yes, sir. In the spending area, I think it is very unlikely that anything will move into the courts. The two branches have been working fairly closely, and, I think, satisfactorily with rescissions and deferrals that have come up since *Chadha.*

Ms. BOLLING. Mort, how many cases are there pending before the courts?

Mr. ROSENBERG. There have been about 20 or so decisions that have been rendered, at least 20 decisions.

The CHAIRMAN. I am advised that there are at least 20 cases in the courts now involving the *Chadha* decision. That is what I have been talking about, letting cases go back into the mill, and let the court look at it from all angles. They might begin to refine a little bit, saying, well, we didn't intend this. I would certainly hope they don't intend to invalidate the War Powers Act. That would be I think a matter of terrible impact upon the Congress and the country.

We have been living under that now for a number of years, and the Presidents have been going along with it and Congress has believed that they had that authority, and we are hopeful that it has

perhaps been helpful maybe in keeping us out of involvement in hostilities that otherwise we might have been involved in. I just wanted to know the extent. The Executive doesn't consider that it has taken a position on all of the cases that might be affected.

Mr. DEMUTH. I think the cases in the courts are being litigated. I was only referring to various legislative proposals concerning regulatory and other vetoes. I really could not speak to the status of litigation concerning severability and other issues.

The CHAIRMAN. Go right ahead.

Mr. DEMUTH. I do want to summarize, if I may, the three principal points that I have tried to raise in my written testimony. These are not arguments or positions favoring one version of regulatory veto or another. Rather, as we look at the whole question of reformulating the way Congress and the Executive oversee the regulatory bureaucracies after the *Chadha* decision, these are what we consider to be the three most important issues.

The first principle I want to emphasize is that the various regulatory veto proposals certainly address an extremely serious problem.

As the Government has grown, as so many new laws have been passed in the past several decades, Congress—and this is purely an institutional problem—has simply lacked the time to fashion all of the thousands of discrete policy decisions and compromises that need to be made when the Federal Government takes responsibility for medical care, for environmental protection, for all the things that the Government now does.

As a result, Congress has increasingly had to grant larger and larger shares of lawmaking authority to the executive branch. The executive branch has, since the forties, exercised this lawmaking authority through the administrative technique that we call informal rulemaking. This technique is quite different from that used in the early days of more formal rulemaking, when what the agencies did was primarily case-by-case adjudication, modelled on a judicial proceeding.

Now, through informal rulemaking, the agencies just propose a general policy for the Nation.

They take comments from the public, and then render a decision. If the rule is upheld by the courts, it is the law of the land. And agencies now do this thousands of times a year. Informal rulemaking has solved the problem of high-volume decisionmaking in the large modern State that we have, but it has certainly done so at great cost. Case after case study has documented that regulatory decisions are prone to manipulation by narrow, well-organized groups, whose interests in the outcome of the decision is frequently quite different from, and sometimes directly opposed to that of the general public.

Moreover, regulatory bureaucracies, particularly in the 1950's and 1960's, became insulated from accountability to either of the two political branches of the Government. And, as a result of the economic importance of their regulatory decisions, the decisions always end up being litigated, no matter which way the agency comes out. This has resulted in a large migration of authority for making Federal policy to the judicial branch.

Both political branches have been attempting with increasing vigor in recent years to reestablish the political accountability of the regulatory bureaucracies. The last three Presidents have issued Executive orders requiring the agencies to assess the economic impacts of their rulemaking decisions, and have required these rulemakings to be reviewed by officials in the Executive Office of the President before being issued. And Congress passed an increasing number of legislative vetoes before the *Chadha* decision.

But Congress has done a good deal more to establish regulatory oversight. In my view, the legislative vetoes have been one of the least important mechanisms of congressional oversight of the executive branch. Indeed, it is remarkable with so many legislative veto statutes on the books, how long it took for a controversy to rise to the Supreme Court. The reason is that the less formal mechanisms of congressional oversight have been much more important.

In extreme cases, Congress would use the legislative veto or even a direct legislative override. But from my point of view within the executive branch, informal oversight, contacts between Members of Congress and the executive branch officials, and riders to appropriation bills, threatened or realized, have been a far more important form of oversight.

I work at OMB. You ask if there is much oversight of our activities. There is indeed a great deal. I am responsible for administering one law, for overseeing agency implementation of others. Your colleague, Chairman Brooks and his colleagues on the Committee on Government Operations keep very, very close watch over what we do. We are also visited frequently by people from the General Accounting Office.

We come up and we have informal meetings with members of our oversight committees as well as frequent hearings. We try to keep them in touch with what we are doing, and try to satisfy them that we are executing the laws about which they are concerned with great detail and care. They don't always agree with what we do, but we certainly know when they disagree.

The CHAIRMAN. Excuse me. That is on an informal person-to-person basis?

Mr. DEMUTH. Yes, sir.

The CHAIRMAN. Just friendly cooperation. But suppose you didn't do what the Government Operations Committee wanted you to do; what could they do?

Mr. DEMUTH. They have on more than one occasion held hearings. They have called me up to testify on one decision and another.

The CHAIRMAN. That doesn't change anything; that is just a hearing.

Mr. DEMUTH. Well, a hearing could ultimately lead to legislative change. I think it is inherent in the system of government that the Founders established. A Member of Congress may say, "Well, I don't really see the existing law the same way that that fellow did." I will then do things a little bit differently. I know that if Members of Congress feel very strongly, there is a threat—a very live threat—that has sometimes been exercised, that a new law will be passed.

The CHAIRMAN. Henceforth, we won't use the legislative veto because the Supreme Court said not to use it. Henceforth, all Congress has got to do is just communicate in an informal way or write them a letter or call them up and have a hearing. We don't like this rule 27. We don't like what you do. We want you to change it, and you go change it. That is the way Congress exercises their oversight and supervision?

Mr. DEMUTH. That is not quite what I am trying to say. I believe there are strong arguments to be made in favor of the various regulatory veto mechanisms that have been proposed. I can see some very positive effects flowing from Congress becoming more involved in some regulatory decisions.

I am saying simply that if you look back at the actual exercise of legislative vetoes by Congress in the regulatory area, as opposed to many other areas, you see that it was not exercised very much. I think when Congress was very strongly opposed to something regulatory the executive branch did, it just undid it by law—the saccharin ban, the seatbelt/ignition interlock requirement. But more often executive branch officials knew on a week-to-week basis the views of the chairmen and members of their authorizing and appropriations committees, kept in touch with them and accommodated their concerns.

This doesn't mean that there weren't a lot of disagreements, occasionally bitter disagreements, and some disagreements where no law was passed to change what the executive branch did. It is just that when we focus on a constitutional form of the legislative veto, we have to ask how much difference it is going to make in the scheme of things under the Constitution, given the size and scope of the Government today. This is particularly true, because when we look back, it wasn't exercised very much. Nonetheless, more direct congressional involvement in regulatory decisionmaking could be very healthy.

The CHAIRMAN. I can make one observation on it. Here we are now, approaching the end of a second session of a Congress, and we have got a very tight legislative schedule. Yet the *Chadha* decision would require that if we are going to change any rules, if we are going to recall any delegation of authority, the only way we can do it, unless this informal method works is to pass a law. That means hearings, and that means consideration of a bill in both Houses, and then of course submission of it to the President, and the conference report on it between the two Houses and all that.

Congress hasn't got time to handle the many matters that are being transacted by the Government of the United States, through independent agencies and the executive branch. Congress just doesn't have time.

I am just saying in response to what you have said, we have got such a big Government with so much to do, Congress really doesn't have time to exercise the full legislative process in respect to every matter that it may want to supervise or oversee.

You go ahead.

Mr. DEMUTH. I think that the *Chadha* decision was correct, but I understand your concerns. I would say only that the Constitution did not purport to set up an efficient government. It attempted to set up a balanced representative government, and it wanted any

law, any policy change, to be adopted with great solemnity. If we have departed from the conception of the Founders, it is probably more from having set up rulemaking bureaucracies that in effect make laws, the average one of which in 1984 is of much more moment socially and economically than many of the things that were done by lawmaking 100 years ago.

I agree with you that having to follow full legislative procedures to change what a rulemaking agency has done raises many difficulties. But I do think, as I said, that many of the informal means of congressional oversight have been more important.

But there is one essential insight, I believe, which the proponents of the post-*Chadha* regulatory vetoes have. For all of the informal means of oversight and influence that Congress has, As far as political accountability is concerned, there is no substitute for an on-the-record vote.

We have a situation today, which is probably not very healthy for either the executive or the legislative branch, in which the laws come down solidly in favor of clean air or solidly against cancer. But they have very, very vague statutory standards. The statutes contain essentially noncontroversial, very abstract generalities. The really important, tough policy decisions are made way down the line in the agencies.

It probably would be desirable if Congress occasionally stood up and was counted—not on whether one was for or against clean air, but what specifically should be the pollution standard for one of the major sources of pollution in the United States. The regulatory veto proponents want to have more of these very large decisions, which now only occasionally come through Congress, receive more through congressional attention. They have that essential insight. The question is whether it would be practicable to do it.

The second basic principle I want to emphasize is that *Chadha* affects the answer as to whether such on-the-record votes would be practicable. There were many varieties of legislative veto before the Supreme Court decisions. Many different Members of the House and the Senate supported them for a multitude of reasons. Following *Chadha,* as I explain in my written testimony, there are essentially only two mechanisms left. The first is the statutory disapproval approach, such as that proposed by Senators Levin and Boren. It is not much different from the status quo, except for its expediting procedures to see that regulatory decisions go to the floor.

The Levin/Boren-type would be like a super-majority two-House legislative veto. Assuming that in most—but not all—cases the President would support the decisions of at least his Cabinet agencies, and would veto a resolution of disapproval, it would take two-thirds of two Houses to override. That is a very high hurdle to cross, of course, even for something that is fairly controversial and unpopular.

The second mechanism is the version proposed by your colleague, Congressman Lott, and others such as Senator Grassley.. It says that at least major regulations could not go into effect until Congress voted affirmatively through a joint resolution. This would, of course, be a very considerable change from the status quo. Because a majority of either House could stop the rule from going into effect, it is close to a one-House legislative veto, pre-*Chadha.*

But it accomplishes that at the administrative cost of having Congress review all of these rules. My office at OMB reviews 40 or 50 major rules a year under the President's Executive Order 12291, and we review about 1,500 nonmajor rules. For Congress to review the rules of the independent agencies—probably a dozen or so major rules in a year, maybe 100 or so nonmajor ones—plus those we now review would be a very substantial increase in legislative workload. In addition under the Lott-Grassley affirmative vote proposal, one thing to be considered carefully by Congress is that the President's role in the legislative process would increase and inescapably so. Once the executive branch proposed a rule, it would, according to both of these proposals, become privileged to some degree. The effect would be that the President would gain some control over the calendar of the Congress, and in legislating, of course, timing is everything. This would certainly be something that Congress would have to consider very carefully.

I would now like to make my third, and final point. I say in the concluding section of my written testimony that the details of each regulatory veto proposal are important. The procedures that the House of Representatives or the Senate might wish to adopt are primarily your business, and something I wouldn't think to advise you on. But, for example one can see that at this point in the current session of Congress, it could be very difficult for any agency to adopt a major rule. It could be that the timing has to be adjusted. We in the executive branch would be concerned about such details as timing, impact on the efficiency of the executive branch agencies, and so forth.

However, there is one detail affecting both the legislative and executive branches, which I think is more than a detail, and which requires a great deal of thought. The current proposals are crafted to continue judicial review of regulations—after they survive a proposal to disapprove them, or even after they are affirmed by a majority of both Houses of the Congress and signed by the President. Now, I know you can write a statute to do that. But, I think that it is worth considerable reflection whether it would be appropriate to do that.

I think that a district court judge would have some pause about unilaterally throwing out a regulatory policy after two Houses of Congress and the President had gone on record saying it was good policy. Even if a district court judge did feel comfortable in doing that, I wonder if it would be constitutionally appropriate. And, when you consider that part of the cost of regulation to the economy in the past 20 years has been the cost of endless delays and uncertainties resulting from protracted litigation of every detail of a rulemaking, we might consider the advisability at least of stating that when a rule had been adopted affirmatively by legislation, then that is the end of it.

A regulation, affirmatively adopted by legislation should have the formal status of law. It should not be subject to judicial review except on constitutional grounds. Unfortunately, when you take that step, you then face the question of what happens if an agency later wants to make a minor revision to that major rule. Does that have to come back to Congress? There are many details which will have to be resolved as this debate continues.

Thank you, sir.
[Mr. DeMuth's prepared statement follows:]

STATEMENT OF CHRISTOPHER DeMUTH
ADMINISTRATOR FOR INFORMATION AND REGULATORY AFFAIRS
OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE COMMITTEE ON RULES
U.S. HOUSE OF REPRESENTATIVES
ON
LEGISLATIVE VETO

May 10, 1984

Chairman Pepper and members of the Committee:

I appreciate the opportunity to appear before you this afternoon to discuss the impact of the Supreme Court's decision in INS v. Chadha on the regulatory process. Before the Court's decisions last term in Chadha and related cases, the Administration had opposed on constitutional grounds many legislative veto provisions and proposals (many of them affecting Executive branch decisions other than rulemaking). At the same time, substantial majorities of both Houses of the previous Congress were on record as favoring some version of legislative veto over agency rules.

Now that the Court has definitively resolved the constitutional issue, we are faced with the more direct and difficult policy issue: Should the President and Congress agree, through legislation, to procedures that would approximate the defunct legislative vetoes over some or all agency rules, while avoiding their constitutional pitfalls? Recent "regulatory veto" proposals 1/ offered by Members of both Houses and both political parties urge an affirmative response--while differing significantly on what those procedures should be.

The Administration has not yet adopted a position on any of these proposals. Our hesitation regarding the various across-the-board regulatory veto proposals is not, however, due to lack of interest. We believe these proposals are of profound

1/ I refer to these proposals as "regulatory veto" to distinguish them from proposals concerning Congressional involvement in non-regulatory matters such as spending deferrals and the President's military and foreign policy authorities.

importance, and therefore worthy of the most careful deliberation.

We are following the Congressional debates with close and keen interest, and hope to have a more definite position concerning universal regulatory veto requirements in the near future. But I do not want to leave the impression that we will ultimately conclude by supporting some provision. It may well be that, given existing forms of oversight and the complexities of adding new, constitutional procedures for Congressional review of individual rules, a universal regulatory veto requirement is not the best solution.

This afternoon, I would like to offer three general considerations which are guiding our own thinking on this issue, in the hope that they will be useful to you as well.

* * * * *

First, it is important to recognize that the regulatory veto proposals address a serious and fundamental problem. This is the increasing use of administrative "rulemaking" to establish substantive law--a trend that has seriously weakened the authority and accountability of the two political branches for major national policies, and has led to an increasing migration of policy control to the Federal courts.

The growth of the pre-Chadha legislative veto (at least as it applied to domestic regulating) was roughly coincident with the rise of the large administrative state. Over the past half-century, Congress has extended the Federal government's reach into one new territory after another that were previously the domain of the states, private markets, or common law--highways, education, medical care, the design of automobiles and other products, pollution abatement, and so forth. With Congress injecting the Federal government more and more deeply into private markets and local governance, the Legislative branch

has increasingly lacked the resources--chiefly time and information--to enact into law all of the discrete judgments and compromises necessary to guide these interventions. As a result, Congress has increasingly hedged--enacting vague or even contradictory statutory standards that have effectively transformed Executive officials (and, derivatively, judges) into de facto lawmakers.

Cabinet agencies and the so-called independent regulatory agencies alike have responded to this challenge with a series of administrative innovations that has demonstrated their relative versatility in writing detailed and complex laws--and, as a result, has induced Congress to grant agencies yet broader legislative authority, further increasing regulatory growth. The most important administrative innovation has been "informal rulemaking," a technique that subtly combines the efficiencies of hierarchical, executive decisionmaking with the key legitimating features of judicial and legislative decisionmaking--due process and public sanction. The agency issues a "notice of proposed rulemaking," receives and evaluates written comments from the public, and then issues a "final rule" that becomes (with the courts' permission) the law of the land.

The success of informal rulemaking, however, has been problematic at best. While it has provided a means for high-volume decisionmaking in the large modern state, it has done so at a very high cost in policy coherence and political accountability. While the regulatory bureaucracies have never exactly been "out of control," the locus of that control, and its relationship to any publicly articulated conception of the national interest, have been increasingly difficult to discern. The result has been intense competition among the Legislative, Executive, and Judicial branches for control of the rulemaking machinery: the pre-Chadha legislative veto--in which Congress responded in kind to the development of "informal rulemaking" by attempting to import the efficiencies of executive decisionmaking back into the Legislative branch--is only one part of this larger drama.

The past decade has seen a series of proposals to strengthen the formal standards of judicial review of agency rulemaking, most of them variations on the original "Bumpers Amendment." By now these proposals are essentially moot. There can be little doubt that judicial review is today altogether stricter and more detailed than Congress envisioned in adopting the 'arbitrary, capricious, or abuse of discretion' standard of the Administrative Procedure Act of 1946. Indeed, the courts' use of these words today bears no resemblence to their normal, everyday meaning. While everyone, regardless of political viewpoint, is pleased with <u>some</u> court decisions under current standards of review, it can hardly be said that the result has been greater agency accountability. This would be so only if the agencies had been ignoring clear Congressional mandates until the courts suddenly brought them into line. Instead, the usual case is that Congress does not issue the clear mandates in the first place, or else does not foresee the issues its laws will raise in specific instances--leaving the courts as well as the agencies adrift regardless of the "strictness" of judicial review.

The growth of judicial policymaking is not, as is often supposed, simply the result of "activist" legal doctrines among modern judges. It is primarily a consequence of the increasing breadth and economic importance of regulatory lawmaking. With freewheeling discretion delegated to administrative agencies, and with large stakes riding on the results of their proceedings, private groups have strong incentives to invest in litigating thoroughly every conceivable aspect of their decisions--and the courts must attend to these arguments. The reach of the Judicial branch is not determined simply by views of appellate judges, but also by the ingenuity of litigants in devising persuasive arguments within the context of whatever legal precedents may exist.

The general public has accepted the rise of judicial policymaking with remarkably little resistance. One reason is surely that the political legitimacy afforded agency rules by

public notice-and-comment procedures is itself such a thin substitute for lawmaking by two representative majorities plus the President. Indeed, the rulemaking process is inherently far less representative than the constitutional lawmaking procedures for which it substitutes. Rulemaking proceedings are closely attended by organized groups with large immediate stakes in the outcomes. Their arguments, of course, are usually couched in terms of the broad public interest. But in fact the interests of organized groups frequently conflict with the general public interest--whether this interest is defined by a vote of the Congress or suggested by the conclusions of an economic cost-benefit analysis.

The Executive branch has, of course, been strengthening its own oversight of regulatory policy for over a decade now. Presidents Ford, Carter, and Reagan have issued increasingly explicit Executive orders requiring agencies to assess the benefits and costs of their rules and to review them with officials in the Executive Office of the President. President Reagan's Executive Order 12291 requires regulatory agencies, to the extent permitted by statute, to fashion rules that will produce the greatest net social benefits; it seeks to guide administrative discretion towards decisions that are in the broadest public interest--which may, as I have said, be different than the interest of any notice-and-comment petitioner. The Order further directs agencies to report on their proposed and final rules to the Office of Management and Budget, and thus seeks to increase the accountability of the regulatory process by ensuring that individual rules are in harmony with the President's policies. 2/

2/ For a detailed discussion of Executive oversight of the rulemaking process, see Christopher DeMuth, Statement on H.R. 2327, The Regulatory Reform Act of 1983, before the Subcommittee on Administrative law and Governmental Relations, House Committee on the Judiciary, July 28, 1983.

The pre-Chadha legislative vetoes put the legislative branch directly "in the loop" of Executive branch decisions, and thus made Congress, at least in theory, more accountable to the public for agency actions. Although these were the Congress' most conspicuous response to the problems of galloping lawmaking-by-rulemaking, they were not Congress' only response. In fact, they were of much less practical significance than other forms of Congressional influence. Legislative vetoes of agency rules were exercised on only a few occasions. When Congress was strongly opposed to a regulatory decision, it was more likely to override that decision by statute, as in the cases of the saccharin ban and the automobile seatbelt-ignition interlock rule. In some cases where vetoes were exercised, as in the 1982 override of the FTC's used-car labelling rule (nullified by the Supreme Court shortly after Chadha), a statutory override with the President's signature was probably available. And appropriations riders barring or directing agency action have come into increasing use in recent years. They have (I am sorry to say!) been used or threatened on a number of occasions to prevent the Reagan Administration from undertaking important regulatory reforms.

On a day-to-day basis, however, the most important tools of Congressional influence over Executive policymaking have been the long-established informal ones: the growth of committee and subcommittee staffs working intimately with agency staffs and private groups; increasingly frequent oversight hearings; and the constant process of dialogue, negotiation, and compromise between Executive officials and committee chairmen and other Congressional leaders. And Congress has utilized several large institutions to help it with the details of these efforts--the Congressional Budget Office, the General Accounting Office, and the Office of Technology Assessment.

Many observers have expressed the hope that Congress will respond to the challenge of Chadha by becoming "more responsible"--by writing "better" laws that make the tough policy

choices Congress avoided by relying on legislative veto provisions instead. The problem of modern lawmaking is not, however, a matter of legislators avoiding their responsibilities. It is rather an institutional problem, inherent in the size and ambitions of today's Federal government and the inherently (and intentionally) ponderous nature of legislative decisionmaking. The Congress remains a diverse, collegial body of individuals representing a wide variety of differing and often conflicting interests and viewpoints. Congress is best suited to making broad decisions requiring the achievement of a consensus. So long as Congress feels that it is under such great pressure to write and finance so many laws, it will have great difficulty writing "better" or even more detailed laws that reclaim substantial lawmaking authority from the Executive branch.

It is this dilemma that Congress' regulatory veto advocates propose to address head-on. They recognize that, for purposes of practical impact and accountability to the public, there is no substitute for having Congress stand up and be counted on a concrete proposition--not <u>for or against clean air</u> or <u>for or against cancer</u>, but <u>for or against a specific level of control for a specific pollutant</u> or <u>for or against banning a specific product</u>. The regulatory veto advocates have clearly identified the correct problem; what remains to be seen is whether they have identified a workable solution as well.

* * * * *

<u>My second point is that the Chadha decision has a major effect on the regulatory veto debate</u>. On occasion, proponents of one or another regulatory veto device have claimed that their new approach would be functionally equivalent to the pre-<u>Chadha</u> legislative vetoes--implying that the Supreme Court's holding was an academic and punctilious exercise easily avoided by practical

men. It is important to recognize that these claims are incorrect: the principle that Congress may make policy only by making law as specified in Article I of the Constitution changes fundamentally the procedures now available for vetoing agency rules. These changes could affect the positions of those on both sides of the pre-Chadha legislative veto debate.

Pre-Chadha, there were a variety of institutional reasons why legislative veto procedures were enacted. Members of the House and Senate supported them to counterbalance broad statutory standards with greater influence over Executive interpretation and implementation. Members of the House supported them to share in regulatory influence provided the Senate by the confirmation process. Authorizing committees supported them to counterbalance the power of appropriations committees. Junior members supported them to equalize power held by authorizing committee chairmen. Program opponents supported them to dilute the power of program advocates. The House and the Senate supported them as a check upon the other body.

Under Chadha, however, the variety of veto procedures has been narrowed, and so have the possible motivations for supporting any legislative veto. To see this, consider the two paradigmatic regulatory veto mechanisms now available. Under one procedure--"statutory disapproval"--a law would provide that agency rules could go into effect only after a "report-and-wait" period, and that Congress could disapprove rules by joint resolution before the end of the period. Except for the procedures involved, this would be little different from the status quo, since Congress can always override a regulation by statute.

Under the second procedure--"statutory approval"--a law would provide that agency rules could go into effect only after a "report-and-wait" period, and then only if Congress had approved

the rule by joint resolution before the end of the period. This would be a considerable change from the status quo, and would permit a simple majority of either House to "veto" any agency "rule." This approach would "solve" the regulatory problem by virtually abolishing regulation itself--"rules" would not be independent Executive acts but rather proposals to the Congress. It would also flood Congress with thousands of minute decisions that could bring the legislative procers itself to a grinding halt.

Of course, the major proposals to establish a regulatory veto would modify these pure approval and disapproval procedures. The proposal sponsored by Senators Levin and Boren adopts the statutory disapproval approach--but features expediting procedures to move disapproval resolutions promptly to the floors for votes of the entire Houses without delay by committees or subcommittees. The authorizing committees are often champions of "their" agencies' programs, and can--through scheduling and other devices--block changes they oppose. By making program implementation more often subject to votes by floor majorities, the expediting procedures could make regulatory programs more responsive to majority sentiment. The proposal sponsored by Senator Grassley and Congressman Lott adopts the statutory approval approach (with expediting procedures)--but only for "major" rules (fifty or sixty a year), leaving the large majority of less significant rules covered by a statutory disapproval procedure similar to that in Levin-Boren.

Both of these proposals would give Congress greater responsibility and attempt to make Congress more accountable to the public for Federal regulations. To the extent they do so, however, it is at a cost: both would place new administrative burdens on the Congress, and both would limit Congress' ability to pick and choose among the issues that may come before it. And there are two other, fundamental respects in which they would differ from the pre-Chadha legislative vetoes, both arising from the requirement that Congress must act jointly (between the two

Houses always, and with the President unless his veto is overridden).

First, the President could "veto the veto" under the Levin-Boren procedure. If the President favors a rule issued by agencies, and vetoes a joint resolution of disapproval, a two-thirds majority in both Houses would be required to override his veto. On the other hand, the Grassley-Lott approach for "major" rules is closer to a one-House simple majority veto. Either House could refuse to enact into law a proposed major regulation by not approving the joint resolution of approval. Note that there is no constitutional form of the pre-Chadha two-house legislative veto. That the available forms are extreme ones--one-House simple majority versus two-House supermajority--may make it more difficult to forge a majority consensus behind any regulatory veto.

The second difference is that the President's role in the legislative process could change significantly. Under Grassley-Lott, once a major rule is proposed at least one House will be obliged to vote on it; if the first House to vote approves, the other House will then be obliged to vote as well. This stronger form of regulatory veto risks the current prerogatives of both the Executive and Legislative branches. The Executive would be obliged to persuade a majority of both Houses to put a major new regulation into effect or to make a major change in an existing regulation. But, at the same time, the Congress would lose some control over its calendar, and could not avoid voting on controversial issues it might prefer to avoid or delay. The President would be able to determine, several times each session, when and in what context Congress would have to stand up and be counted.

These are not arguments against the regulatory veto. They merely emphasize that, with the options properly limited by Chadha, we are faced with very different dynamics for Congressional and Executive review. No constitutional regulatory

veto could simply augment the power of one political branch at the expense of the other, so adopting one would involve risks and demand statesmanship at both ends of Pennsylvania Avenue. The new procedure also would affect the Judiciary. Indeed, to the extent agency rules were considered as having been enacted into statutory law, the courts could be removed altogether from review except on constitutional grounds.

* * * * *

My third point is that there are strong and serious arguments on all sides of the issues raised by the proposed regulatory veto devices. For each of these issues, we will need to weigh how the details of each regulatory veto proposal will affect the function and authority of each branch and its accountability to the public--and, most importantly, whether one of them will improve government operations.

1. Administrative Burdens for Congress. The opponents of regulatory veto proposals have good cause for concern over the potential volume and technical detail of the issues that would be coming into the Congress. These could require a great deal of time and attention under any of the regulatory veto proposals. Grassley-Lott in particular would entail a substantial increase in Congressional workload. Under Executive Order 12291, OMB reviews 40 to 50 "major" (over $100 million in impact) final rules and about 1,500 "non-major" final rules a year.3/ OMB does not review the rules of most "independent" regulatory agencies, which could involve an additional dozen "major" rules each year. Neither does OMB review most of the rules issued by the Internal Revenue Service.

3/ To illustrate the possible impact of the Grassley-Lott proposal, I am attaching a listing of 125 major final rules reviewed under Executive Order 12291 during 1981-83, which provides a brief explanation of each rule and a summary of any court challenges.

To place this in context, over the past ten years Congresses have passed about 200 public laws in the first session and 400 public laws in the second. Adding to Congress' annual legislative calendar 60 or more joint resolutions to affirm major regulations, plus an unknown number of regulatory disapprovals, could increase the number of legislative transactions considered by Congress from 10% to more than 25%.

2. Executive Accountability. Although the President and officials of the Executive Branch must work closely with Congress, there can be only one Executive. The President, like Congress, is accountable to the public. With so much execution of Federal law taking place through regulation, traditional Executive oversight mechanisms--budget and accounting controls--no longer suffice, and have been supplemented in recent years by regulatory oversight procedures (currently under Executive Order 12291). Any reform of the rulemaking process acceptable to the President must provide the President--the official charged by the Constitution to see to the execution of the laws of the United States--the means to coordinate and direct executive policymaking, including rulemaking.

Yet regulatory veto procedures could seek to limit Executive authority over the regulatory agencies. Agency regulatory management and staff may, even more than now, perform a balancing act between Congressional interests and the President's. Requiring agencies to forge new lines of responsibility to the Congress could threaten the ability of the President to fulfill his responsibilities as the Federal government's Chief Executive.

3. Judicial Review. A public law, unlike a regulation, is not subject to review under the Administrative Procedure Act and, other than for constitutional reasons, cannot be overturned by a court on the grounds of having been established in an 'arbitrary or capricious' manner.

The effect upon subsequent judicial review of a joint resolution approving--or even disapproving--a regulation is a matter that must be squarely addressed. We are unaware of any experience with requirements that rules take effect only if approved by a joint resolution, and do not know what effect such a procedure might have on judicial review. Similarly, we do not have experience with joint resolutions of disapproval of agency rules that are passed by Congress but are not signed by the President. Both of these possibilities are presented by the proposed regulatory veto provisions. This absence of experience compounds the difficulty of assessing with confidence appropriate mechanisms for a regulatory veto.

Regulatory veto statutes could provide that the effect of a joint resolution of approval is to preclude further judicial consideration of the rule, except, of course, on constitutional grounds. This would treat an "approved" rule as a statute. At the other extreme, the statute could provide that Congressional and Presidential approval has no effect on subsequent judicial review--that a rule so approved could then be overturned by a court for record inadequacies, procedural defects, or on any other ground provided by the Administrative Procedure Act or authorizing statute. A question worth deep reflection is whether the courts would feel comfortable doing this--or, if they did, whether the procedure would be constitutionally appropriate.

4. Agency Efficiency. Just as the regulatory veto process should not stymie Congress in its other legislative work, it should not stymie the ability of agencies to implement existing statutes. Any regulatory veto mechanism should contain emergency procedures allowing agencies to take prompt and lasting agency regulatory action, without the necessity of prior Congressional review. Any provision authorizing legislative veto must also state how changes to rules approved by a joint resolution can be altered by subsequent agency action. Must minor changes to such a rule also be approved by a joint resolution?

5. Scope. A statute establishing a joint resolution procedure either to disapprove or approve a regulation needs to define the regulatory statutes to which it will apply. Some existing proposals limit Congressional review to rules issued through the informal rulemaking provisions of the APA. However, rulemaking to implement certain regulatory statutes are not clearly subject to the APA and may not, therefore, be subject to the current regulatory veto bills. This includes most rules under the Clean Air Act, and possibly the hybrid rulemaking procedures of the Consumer Product Safety Commission and the Federal Trade Commission. It is not only necessary to determine which agencies should be subject to the legislative veto mechanism, but also which statutes administered by those agencies should be.

6. Procedures and Review Periods. The administrative details of the regulatory veto bills are also important, and can seriously affect whether or not the proposal would work. Both the major proposals would amend the Rules of the House and the Senate to expedite regulatory reviews. They set time limits for committee review of each joint resolution; provide procedures for discharge of each joint resolution and for floor consideration; and make the joint resolutions highly privileged--not subject to amendment and subject to limited times for debate. The agency's maximum "report-and-wait" period would be 90 days of continuous session of Congress. This would mean that, if an agency submitted a proposed rule to Congress after the middle of May of this year, the 90 days of continuous session as defined in the bills could run out by adjournment.

* * * * *

In summary, then, the Congressional advocates of regulatory review procedures believe that Congress should stand up and be counted on specific regulatory policies. It is also clear,

however, that any new, post-Chadha regulatory veto procedure presents some very different dynamics for Congressional and Executive relationships. The details of these new procedures may increase administrative burdens for Congress, affect Executive accountability, change the reach of judicial review, and affect agency efficiency.

Mr. Chairman, thank you for the opportunity to present these views.

The CHAIRMAN. Thank you.

Mr. DeMuth, I just want to ask you one question. What is the authority now for the creation of OMB?

Mr. DEMUTH. The original authority is the Budget and Accounting Act of 1921. OMB itself was created by Reorganization Plan No. 2 of 1970, which became effective on July 1, 1970.

The CHAIRMAN. Was there a legislative veto involved?

Mr. DEMUTH. I am not going to be able to be as detailed as I can on this. There have been various forms of reorganization plans. My understanding is that some forms offered serious problems under *Chadha,* and other forms did not. But I am afraid I could not give you more than that concerning the reorganizations plan. I should point out, however, that the organization of OMB was enacted into statutory law as part of the codification of title 31, United States Code, in September 1982.

The CHAIRMAN. Mr. DeMuth, we thank you very much. You have given an excellent statement.

Mr. DEMUTH. Thank you.

The CHAIRMAN. Gentlemen, the House is debating a very important foreign aid bill downstairs. We have now two distinguished professors, and we have three on the next page, so we have got seven more witnesses. I wonder if I would be imposing on the next witnesses if I would ask if you would be willing to submit your statement. Every one of these things will be carefully read, I can assure you of that. Would there be any objection by you if you submitted your statement and you gave a summary of your legal position on this matter?

All right. The first is Prof. Cass Sunstein, assistant professor of law and political science, University of Chicago, and Prof. Peter Strauss, professor of law, Columbia University. Will you gentlemen come forward? Mr. Sunstein, without objection, we will receive your manuscript in the record. Will you give us your view of the aspects of this matter?

STATEMENT OF CASS R. SUNSTEIN, ASSISTANT PROFESSOR OF LAW AND POLITICAL SCIENCE, UNIVERSITY OF CHICAGO

Mr. SUNSTEIN. Yes, sir, I would like to start with two short preliminary points and then go on to three somewhat short nonpreliminary points.

The first preliminary point has to do with the need to separate the question of deregulation and whether it is desirable from the question of oversight of the regulatory process. Those two questions are sometimes combined. Question No. 1, are we overregulated? Question No. 2, ought there to be new mechanisms to promote accountability in the regulatory process?

My suggestions have to do only with the question of accountability. I think the debate ought not to get confused with questions of whether deregulation is generally a good or a bad idea.

The second, very preliminary point, has to do with the need to separate two considerations usually mixed together as well. Administrative agencies are often created because Congress wants to pursue the goal of expertise, to make sure that experts make regulatory policy. One of the problems that comes from the creation of expert agencies is that one loses accountability.

The goal of expertise and the goal of accountability can't simultaneously be achieved. This suggests to me that Congress ought to be concerned with—and what some of the pending bills suggest a concern with—is ensuring that the accountable parts of Government, Congress and the President, make policy, and that the experts apply their expertise not to the broad policy questions, but instead to the questions of filling in the details.

Now, for the three major points. Point No. 1, the role of Congress ought to be in the first instance writing clear legislation. The legislative veto is an inadequate substitute for that, and there is no reason Congress shouldn't alter current statutes providing for public interest regulation, feasibility regulation in order to provide clearer guidelines. That role, to the extent that it is inadequate, should be supplemented with a more formal oversight mechanism to ensure that agencies in the implementation process adhere to statutory requirements, and to apprise Congress of changes in direction so that Congress can enact corrective legislation if it is necessary.

The second point has to do with the role of the President. President Reagan should be commended, at least in this respect. He has enacted an executive order which involves broader supervisory power over the administrative process. Something like that ought to be enacted into law, so that the President has clear authority to supervise both the executive branch and the independent agencies. Even if the Supreme Court has been correct in suggesting that the independent agencies are constitutional, there is no reason for the President not to be able to exercise supervisory authority over the Federal Trade Commission, the Federal Communications Commission, and so forth.

The CHAIRMAN. You say he has that authority?

Mr. SUNSTEIN. It is unclear under current law whether he does have that authority. The Supreme Court in the Humphrey's executor case said these independent agencies are independent in every-

thing except their appointment, and the President has shied away from testing that language. That is why Executive Order 12291 doesn't apply to them.

It is unclear under current law. So the President ought to be authorized by statute to oversee the independent agencies, and ought to be expressly authorized to oversee his own agencies. Perhaps there ought to be some kind of superagency which would be to some extent insulated from political pressures, and engage in that kind of coordinating and centralizing role.

Point No. 3 is that the Administrative Procedures Act is now outmoded to the extent that it distinguishes sharply between informal rulemaking and adjudication. Informal rulemaking is now the premier business of administrative agencies, at least in terms of importance, and rights of public participation are very weak in informal rulemaking. The statute ought to be amended to create greater procedural rights on the part of those affected by agency action or inaction, and that would include deregulation as well.

My proposal is that the salutory goals of the legislative veto can be fulfilled in a constitutional manner, in a fairly simple three-step process. Congress ought to make law. The President ought to be empowered to supervise all executive branch agencies, including the independent agencies, and the public ought to have greater rights of procedural protection, greater rights to participate in and comment on rulemaking.

The CHAIRMAN. Very interesting. Thank you very much, Professor Sunstein.

[Mr. Sunstein's prepared statement follows:]

Statement of Cass R. Sunstein

Assistant Professor of Law

University of Chicago

Before the Committee on Rules

United States House of Representatives

on

May 10, 1984

Mr. Chairman and Members of the Committee:

I am pleased to have an opportunity to discuss with you some directions that regulatory reform might take in the aftermath of the Supreme Court's invalidation of the legislative veto in INS v. Chadha, 103 S. Ct. 2764 (1983). It will be useful to begin with a brief explanation of why regulatory reform deserves especially serious thought on the part of Congress after Chadha.

The legislative veto was, of course, a response to the delegation of increasingly broad lawmaking authority to the executive branch. Especially in the last twenty years, American government has become, to an unprecedented degree, administrative government. Congress has authorized agencies to undertake regulatory activity without offering them much guidance for the task. Agencies have been told to regulate "unreasonable risks," to promote workplace safety "to the extent feasible," and to guard against "unfair" trade practices. In giving content to such vague terms, administrators must exercise considerable lawmaking authority.

All this has had two dramatic consequences. The first is the transfer of authority from Congress to the executive branch. Bureaucrats in the various agencies are given broad discretion to make law and policy--a severe intrusion on original conceptions of the separation of powers. The second consequence, in some ways even more fundamental, is an increased risk that governmental power will be used by well-organized groups to distribute wealth or opportunities in their favor. Administrative agencies are of course not subject to direct electoral control. The capture of

such agencies by a particular group--often the very industry they are charged with regulating--is a familiar phenomenon.

These two consequences are closely related. The framers designed the constitutional system so as to ensure against the likelihood that "factions" would be able to use the government to obtain wealth or opportunities at the expense of the rest of us. See The Federalist Nos. 10, 51. The principal safeguards were separation of powers and electoral accountability--safeguards that have been to an extent breached by the rise of the modern administrative agency. In these circumstances, the legislative veto was intended to reduce the problems caused by broad delegations to agencies by giving Congress an opportunity to exercise a supervisory role over regulatory decisions. The Supreme Court's decision to invalidate the veto depended in turn on the Court's perception that far from reducing the problem of factional power, the veto in fact increased it. See INS v. Chadha, supra, at 2782-2789; see also Bruff & Gellhorn, Congressional Control of Administrative Regulation: A Study of Legislative Vetoes, 90 Harv. L. Rev. 1369 (1977).

Whether or not one agrees with the Court, it is clear that the legislative veto was an attempt to respond to a genuine problem. No one designing a system of goverance in the first instance would come up with the current scheme, by which bureaucrats often make law pursuant to the vaguest sort of congressional guidance and subject only to intermittent presidential control. See T. Lowi, The End of Liberalism: The Second Republic of the United States (1979). Certainly the framers designed no such system. The task for the future is to generate alternative mechanisms, or surrogate safeguards, by which to promote the original goals of the separation of powers without dismantling the administrative apparatus that has proved to be indispensable since the New Deal.

In considering such alternative mechanisms, it is necessary to keep two fundamental points in mind. The first is that some of the most serious dilemmas of administrative law grow out of a desire to achieve two incompatible goals. The first goal is to give regulatory tasks to experts, or technocrats. A central

reason for the delegation of broad authority to administrative agencies has been Congress' lack of expertise in dealing with technically complex issues. The hope is that administrators will accumulate and apply the necessary knowledge to the difficult problems involved in regulation. The second--and competing--goal is to promote accountability in the regulatory process. Often the development of regulatory policy is entrusted to administrative agencies, rather than the courts, because of a perception that the relative accountability of the agency will ensure that administrative decisions do not depart too sharply from the desires of the public.

But it is difficult, if not impossible, to achieve the goals of expertise and accountability at the same time. Pursuit of the goal of experise makes it necessary to insulate regulators from politics, so that they can apply their knowledge without having to deal with the pressures imposed by the political process. This perception played a considerable role in Congress' decision to create the so-called "independent" regulatory commissions and also in the Supreme Court's willingness to uphold such commissions against constitutional attack. See Humphrey's Executor v. United States, 295 U.S. 602 (1935). In more recent years, there has been distrust of "expertise." The perception is that bureaucratic "experts," however much they know about the issue at hand, will not be able to generate some objective public interest. We have come to recognize that value choices are almost always at issue in the regulatory process and that such choices cannot be made merely on the basis of technical competence. For example, even perfect knowledge of the extent of the risk caused by exposure to carcinogens in the workplace cannot answer the question of what level of risk is acceptable in light of the costs of regulation. See Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607 (1980). This insight has played a major role in mounting distrust of administrative agencies and in recent efforts to increase political control over the regulatory process.

The best way out of the dilemma is to recognize that while it remains important to bring technical knowledge to bear on

regulatory problems, it is equally important to ensure that the basic value choices are made by those most accountable to the public. One cannot deal with the problems raised by carcinogens in the workplace, or even the questions of unfair trade practices, without considerable knowledge of the problem at hand. At the same time, the relevant value choices should, to the extent possible, be made by those with political accountability--principally, the Congress.

My second point involves the need to separate the question of whether we are "overregulated" from the question of how best to supervise the administrative process. To some degree, of course, the questions are related. But it is perfectly possible to believe that private markets often cannot be relied on to achieve either efficiency or justice and at the same time to be concerned about devising mechanisms for increasing the accountability of administrative agencies. In the current climate, the two issues have sometimes been mixed together in an effort not only to promote accountability, but also to reduce the extent of regulation. I speak here only to the problem of accountability. My suggestions about reform of the regulatory process are not intended in any way to endorse the current perceptions on the part of some that we now suffer from a general problem of "overregulation."

My remarks here about regulatory reform in the aftermath of Chadha will fall into three general categories. First, I suggest that Congress should reassert its lawmaking authority not through the so-called "regulatory veto," but instead through more careful delegations of authority and through continuing oversight of implementation by the executive. Second, the President should be authorized by statute to control and coordinate the regulatory process, including that part of the process entrusted to the "independent" agencies. Third, the Administrative Procedure Act should be amended to strengthen the procedural rights of both regulated industries and regulatory beneficiaries in notice-and-comment rulemaking. These are not new suggestions; they attempt to build on principles already reflected in the law. But they do, I think, have the potential of achieving the principal goals of

the legislative veto device without imposing significant costs or running afoul of the Constitution.

I. The Role of Congress

The Chadha decision struck most directly at Congress' efforts to supervise the regulatory process. Whatever one thinks of the decision, it seems clear that Congress ought to assume a greater role in that process. The hard questions involve not whether Congress should do so, but how.

One proposal, the so-called regulatory veto, would treat some or all agency regulations as recommendations that may not go into effect unless enacted by a joint resolution by Congress. See, e.g., Amendment No. 2655 to S. 1080, Cong. Rec. S 17081 (Nov. 18, 1983). The regulatory veto could apply to all regulations, or it could be limited to "major" rules, defined as those rules that would impose significant costs.

The regulatory veto is intended as a surrogate for the legislative veto--a method for Congress to supervise the administrative process without running afoul of Chadha. Notwithstanding this salutary goal, the device would be a most undesirable innovation. The first reason is that it is unnecessary. Congress already has the power to "veto" regulatory initiatives through legislation. Indeed, Congress has exercised that power on many occasions. If Congress wants an opportunity to see regulations before they go into effect, the Federal Register provides that opportunity. But if a more formal mechanism for congressional review is desirable, it can be provided through the "report-and-wait" device apparently approved by the Court in Chadha, see 103 S.Ct. at 2776 n.9. Such a device would require agencies to submit all or some rules to Congress before they could go into effect, thus giving Congress an opportunity to disapprove rules by joint resolution before the end of the prescribed period. Unlike the regulatory veto, the "report-and-wait" device would permit rules to become effective if Congress fails to act.

If Congress wants to oversee administrative activity with an eye toward possible enactments negating regulatory initiatives, then, the regulatory veto is unnecessary. But the proposed formal mechanism is a bad idea not only for that reason. It is also a bad idea because it would deluge the Congress with highly undesirable burdens. See McGowan, Court, Congress, and Control of Delegated Power, 77 Colum. L. Rev. 1119, 1146 (1977). Power is often delegated to the executive branch precisely because Congress has the time only to set general policy and seeks to avoid the details of implementation. If Congress were obligated to review all "major" rules--if such rules were not rules at all but only proposals--the details of implementation would become a significant drain on legislators' time.

Under the legislative veto device, of course, there was no such drain. Regulations subject to veto were not mere proposals. The veto came into play only when Congress believed it necessary; there was no need for Congress to act on any particular initiative. With the proposed regulatory veto, by contrast, Congress would be required to examine every proposed regulation and to treat it as if it were an ordinary part of the lawmaking process. On occasion, such supervision of the regulatory process is desirable. But it is not an appropriate mechanism to institutionalize and to convert into a general rule.

In short, the probable consequences of the regulatory veto would be to force Congress to become involved too deeply in the implementation process and to stall necessary regulation (or deregulation). These are significant prices to pay for an oversight role in which Congress can engage without a formalized review mechanism.

Although the regulatory veto is a bad idea, there is no question that Congress should assert a greater role in the regulatory process. The most obvious way for it to do so is by legislating more clearly. Indeed, clear legislation was at one point considered a constitutional requirement under the nondelegation doctrine. See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). The nondelegation doctrine seems now to be a dead letter. See Amalgamated Meat Cutters v.

Connally, 337 F. Supp. 737 (D.D.C. 1971). It is therefore lawful for Congress to accord to administrative agencies broad power to make law and policy. But in many circumstances, Congress should make clear to the executive branch what considerations are to govern the exercise of regulatory authority. There is no reason for Congress to tell agencies to regulate "unreasonable risks," or "in the public interest," or "to the extent feasible." Especially in the wake of Chadha, Congress should attempt to make the basic value choices and direct administrative agencies to adhere to them.

It is sometimes suggested that clearer legislation is now impossible in light of the size of the federal government and the increasingly complex nature of regulatory problems. But that view is too pessimistic. In the Clear Air Act, for example, Congress has laid down relatively precise--some would say too precise--guidelines. See, e.g., 42 U.S.C. 7473(b), 7475(d)(2)(D)(iii). There is no institutional barrier to a decision by Congress that it, not the executive branch, will make the difficult political decisions. The first and principal response to the Chadha decision should therefore be clearer legislation.

In some circumstances, however, detailed specification of legislative policy is undesirable or impossible. Policy is often best set by those who have experience with the matter at hand or who have the flexibility to adapt policy to changing social conditions. It is important for Congress to avoid not only open-ended grants of authority, but also undue specificity--especially in new areas in which detailed policy cannot easily be set in advance. See Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1695 (1975).

Congress should therefore attempt to supplement the guidelines enacted in a statute with careful and regular oversight of the regulatory process. See Ackerman & Hassler, Clean Coal/Dirty Air 127-128 (1981). Such oversight should be able to accomplish many of the salutary purposes sought to be achieved through the legislative and regulatory vetoes. Committees and subcommittees ought to keep track of the directions taken by the executive branch in implementing the law.

The goal would be to ensure against under-enforcement, over-enforcement, or enforcement in undesirable areas, and at the same time to become aware of the problems that emerge during implementation. Such oversight would make it possible for Congress to respond to undesirable implementation with corrective legislation. Moreover, a possible supplement to this role deserves serious consideration: development of a "regulatory budget" to make clear the advantages and disadvantages of regulation. See Litan & Nordhaus, Reforming Federal Regulation (1981).

II. Presidential Control

Presidents Ford, Carter, and Reagan have each attempted to increase presidential supervision over the regulatory process. President Reagan's Executive Order 12291, 46 Fed. Reg. 13,193 (1981), is the most ambitious (and controversial) of these efforts, for it grants officials in the Office of Management and Budget considerable power over the basic decision whether regulatory action should be undertaken.

For three principal reasons, presidential control over the regulatory process is desirable, at least at first glance. First, regulatory policy should to the extent possible be centralized and coordinated. Currently, regulatory policy is made by numerous agencies under numerous statutes. The result can be particularistic, ad hoc, and even conflicting policies. Power over energy matters, for example, is now granted to over a dozen agencies. Presidential supervision may in these circumstances serve to centralize and harmonize the regulatory process. See Bruff, Presidential Power and Administrative Rulemaking, 88 Yale L.J. 451 (1979).

Second, the President is an elected official and subject to a continuous process of public scrutiny. As a result, he is more likely to be accountable than the bureaucrats in the various agencies. If regulatory policy is concentrated in the President, or in an office close to him, public scrutiny and review should be promoted. The hoped-for result is that presidential control will diminish the likelihood that the power of government will be

usurped by narrow groups seeking to obtain wealth or power.

Third, the President is the only official in government with a national constituency. Unlike administrators in more narrowly focussed agencies, the President owes responsibilities to the public as a whole. At least in theory, and often in practice, this duty enables him to obtain a more comprehensive overview of regulatory policy, separate from the narrow interests that often threaten to dominate policy at the level of individual agencies.

These considerations suggest that Congress should take steps to ensure that the President, or those close to him, supervise the regulatory process. They also raise the question whether the legal status of the "independent" regulatory commissions should be rethought. Such commissions exercise considerable authority without being subject to close supervision by either the President or the Congress. The functions of the commissions do not differ from those of many agencies formally "within" the executive branch. The latter agencies frequently engage in rulemaking and adjudication, just like the independent commissions. In my view, there is no longer reason to put the independent commissions in a separate part of government without the usual sort of presidential control. Congress should supervise agencies, not by immunizing some subset of them from presidential supervision, but by enacting clear legislation and by monitoring agency action (and inaction) with a view to corrective legislation if it is necessary.

To argue in favor of presidential control over executive and "independent" agencies is not to answer the difficult question of how such control should be exercised. Notwithstanding what I have said about the President's institutional advantages, presidential control, at least as embodied in Executive Order 12291, creates a risk that regulatory policy will be determined by interest groups that have disproportionate access to the White House. There have been allegations that this has in fact happened under Executive Order 12291. This is a subject that warrants considerable concern. There is a potential "dark side" to accountability of this sort.

This possibility suggests that it might be preferable to create a separate institution, within the executive branch, to engage in the kind of oversight functions now entrusted by Executive Order to the Office of Management and Budget. Creation of another layer of bureaucracy is not, other things being equal, an attractive idea. But here other things may not be equal. There is much to be said in favor of the idea of an executive agency whose primary duty is to oversee the operations of the regulatory process. See J. Mashaw, Bureaucratic Justice 226-227 (1983).

The question of presidential control has recently been mingled with the question of whether cost-benefit analysis should be made a major component of the regulatory process. But the two questions are separate, and it is important to be quite careful with the use of such analysis. It is desirable, of course, to attempt to quantify the costs and benefits of regulatory activity. At the same time, use of such analysis tends to "dwarf soft variables," like health and safety. See Tribe, Trial by Mathematics: Precision and Ritual in the Legal Process, 84 Harv. L. Rev. 1329, 1361-1365 (1971). Moreover, questions of value often enter into the cost-benefit calculus, and it is important to avoid the illusion of neutrality and certainty in dealing with complex regulatory issues.

Perhaps more importantly, the use of cost-benefit analysis tends to promote the incorrect impression that the exclusive reason for regulation is to promote efficiency. Regulation is not solely concerned with efficiency. It is properly used to redistribute income or to help reshape preferences, as in the case of regulation of discrimination. While it may be desirable to require agencies to estimate the costs and benefits of their regulatory activity, it would not be appropriate to make considerations of cost and benefit decisive in determining whether regulatory action should be undertaken. Cost-benefit analysis is, of course, distinct from requirements of cost-effectiveness, which seek not to promote the goal of economic efficiency but instead to ensure that the relevant goal--whether distributional, economic, or something else--is pursued at the lowest cost. See Sunstein, Cost-Benefit Analysis and the Separation of Powers, 23 Ariz. L. Rev. 1267 (1981).

III. Procedural Safeguards in Notice-and-Comment Rulemaking

The Administrative Procedure Act (APA), 5 U.S.C. 551 et seq., is the basic charter of law governing the regulatory process. It was based on the simple perception that if administrative agencies were to exercise broad discretionary power, surrogate safeguards should be developed to promote the original goals of the separation of powers scheme. Those surrogate safeguards included strengthened judicial review and express procedural rights--rights of participation--for those affected by agency action or inaction.

The goals of the APA are no longer well-served by the statute, which is in important respects outmoded. The procedural protections of the APA were designed for two polar cases: adjudication and legislation. Rights of participation were extensive in adjudicatory proceedings, which were treated like trials. See 5 U.S.C. 554, 556-557. By contrast, few such rights were accorded in notice-and-comment rulemaking, which was treated like the legislative process. See 5 U.S.C. 553. Congress' failure to provide for such rights in the latter context should thus be unsurprising. The APA drafters assumed that the bulk of agency action would be carried out through adjudication and that rulemaking would be reserved for a relatively narrow category of situations which did not depend on a detailed inquiry into the facts.

This assumption has broken down in the last quarter century. With increasing frequency, agencies have shifted from adjudication to rulemaking, which is now the primary vehicle for making law and policy. See Scalia, Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court, 1978 Supreme Court Review 345. The result is a significant gap in the Administrative Procedure Act. Those affected by notice-and-comment rulemaking have minimal procedural safeguards. They have no right to participate in the process, except through the submission of written comments; they have no right to a detailed explanation of the grounds for agency action or inaction; and they have no right to a response from the agency to substantial criticisms that have been made of proposed courses of action.

To some degree, the gap has already been filled. Congress has expressly provided for strengthened procedural rights in particular statutes. Moreover, the courts have created and strengthened rights of participation through the so-called "hard look doctrine" created by the United States Court of Appeals for the District of Columbia Circuit. See Sunstein, Deregulation and the Hard-Look Doctrine, 1983 Supreme Court Review 177; Scalia, supra. Using this doctrine, the courts have by and large performed very well in applying the Administrative Procedure Act in a regulatory setting substantially different from the one imagined by its framers. The claims of judicial usurpation are for the most part illegitimate.

But the steps taken thus far are inadequate. The statutory provisions for hybrid rulemaking apply in a relatively narrow category of circumstances. Judicially-created procedural rights are applied on an ad hoc, after-the-fact basis. Moreover, such rights are of uncertain legal status after the Supreme Court's decision in the Vermont Yankee case. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978). It is therefore appropriate to consider an amendment to the APA that would take into account the dramatic changes in agency activity since 1948.

The amendment I propose would to a large degree codify the elements of the "hard look doctrine" created by reviewing courts. It would include requirements that agencies give detailed explanations for proposed rules; that agencies make available to the public the documents prepared by or for the decision that bear on such rules; that agencies make known to the public any analysis used to respond to public comments; and that agencies include in any decision proposing to act, or not to act, a detailed explanation of the decision, including a response to important critical comments from the public. Cf. Stewart, Vermont Yankee and the Evolution of Administrative Procedure, 91 Harv. L. Rev. 1805, 1813-1814 n. 36 (1978). It would, moreover, require disclosure of certain categories of "ex parte contacts"--secret communications by administrators with private parties--at least when substantive information is exchanged. This proposal would,

in short, create a kind of record requirement in notice-and-comment rulemaking, by forcing agencies to make available to the public (and reviewing courts) the basis for regulatory decisions.

Such requirements should apply not only to regulation, but also to deregulatory measures and, at least as a general rule, to decisions not to proceed with rulemaking after the notice-and-comment process. There is no reason to deny the beneficiaries of regulatory statutes--civil rights organizations, consumers, and workers--the same procedural protection accorded to regulated businesses. See Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Company, 103 S.Ct. 2856 (1983).

The purpose of these procedural requirements is identical to the purposes that underlie proposals for clearer legislation and for strengthened presidential control. The aim is to create surrogate safeguards for the original constitutional safeguards of electoral accountability and separation of powers. Procedural rights are hardly a cure-all, but by exposing the process behind agency decisions to public scrutiny and review, they should reduce the likelihood that governmental power will be used by particular groups to distribute wealth or opportunities in their favor.

IV. Conclusion

I have suggested that some of the goals sought to be accomplished through the legislative veto device can be achieved through other means. First, Congress' own role should consist of less open-ended grants of regulatory authority. Thereafter, oversight activity by the relevant committees--perhaps undertaken on a more formal, institutionalized basis--should be used to keep Congress apprised of problems that arise during implementation and to ensure that Congress is able to supply correctives if agencies enforce the law in improper ways. Second, Congress should authorize increased presidential control in order to increase accountability and to centralize and coordinate the administrative process. Finally, the APA should be amended to strengthen rights of public participation at the agency level,

especially in notice-and-comment rulemaking, in order to remedy the obsolete rulemaking/adjudication dichotomy of the current APA and at the same time to promote accountability.

These are hardly radical suggestions. They would largely build on principles reflected in measures already adopted by Congress, the President, and reviewing courts. Nor are they panaceas; procedural reforms are no substitute for effective personnel and, perhaps even more important, fair and effective substantive regulation. But initiatives of these sorts would, I believe, help to achieve many of the goals of the separation of powers scheme, promoting accountability and self-government without denying the continuing need for considerable regulatory intervention into the marketplace.

The CHAIRMAN. Now, Professor Strauss.

STATEMENT OF PETER L. STRAUSS, PROFESSOR OF LAW, COLUMBIA UNIVERSITY

Mr. STRAUSS. Thank you for having me here today. I have been listening with interest to the statements you have previously received, and agree with most of what I have heard, particularly from Mr. DeMuth and from Mr. Sunstein, with one small quibble I will get to in a moment. I am especially impressed with the risk that the legislative measures you are considering present to the efficiency with which Congress does its own work—a risk I think you, yourself, have recognized.

I want in that respect to underscore what my friends said about the virtue of writing clear legislation. It is not only helpful in getting agencies started down the right track. It is also the activity we tend to think about when we think about legislation, a very different kind of activity from the legislative veto. We don't think of the legislative function as a function of saying, "Oh, no that is not quite right. Go back and try again." The business of legislation is shaping the standards, not mere reactive negativism. In that respect it seems to me the advice you have just heard is sound.

I make a number of points in the testimony I have submitted to you.

The CHAIRMAN. Did you submit your statement?

Mr. STRAUSS. Yes, I have, which is in itself a distillation of two longer articles which I have written, which I believe your staff also have, which I would be happy to have you include in the record.

The CHAIRMAN. That will be done, Mr. Reporter. [See p. 787.]

Mr. STRAUSS. I want to address two or three issues here. First, you have been talking a good deal about the difference, if there is a difference, between the independent regulatory commissions and the executive regulatory commissions. I think it is time to put that

issue aside. My starting point is that in any discussion of regulatory agencies, you really ought to regard all—the Department of Agriculture as well as the Securities and Exchange Commission—as being outside the three named divisions of our Constitution. We tend to talk as if the Constitution was written in terms of the judiciary, the executive and the legislative branches. But if you will look at the text you will see that it is actually the Congress, the President and the Supreme Court; the text says next to nothing about the rest of Government. It left it explicitly to you, the Congress, to shape, to make whatever arrangements, might appear in your judgment to be appropriate for the structuring of the rest of Government.

In fact, whether we talk about the Department of Agriculture or the Securities and Exchange Commission, we see each of them performing all of the three characteristic functions of Government. The Department of Agriculture has administrative law judges in it. It has lawmakers—(rulemakers)—in it. It has executives in it. The principal issue for you in this very important matter you have before you, spurred by the *Chadha* case, is to decide what is the sensible structure for the three named heads of Government—the President, the Congress and the Supreme Court—to have vis-a-vis this large and unruly mass of bureaucrats.

The Constitution has some things to say, about this issue relevant to your concerns. Perhaps the principal statement it mades to which I believe one of your next speakers will also refer, is that the arrangements you make must recognize the need for shared authority, for balance—for what we identify in civics terms as the principle of checks and balances. This principle insists that Congress and the President act together in their oversight of the rest of Government it suggests that constitutional concerns become pressing at the point at which the Congress appears to have excluded the President from his performance of his assigned functions, while exercising political oversight functions of its own, both Executive Order 12291 and the legislative veto illustrate this in an interesting way.

Executive Order 12291 presents two sorts of issues that need to be kept distinct. The first concerns its primary requirements, inviting or demanding of agencies that they produce analyses; the second concerns its more controversial aspect, telling agencies what to do. That is an important distinction. Although for political reasons the President observes, the distinction between independent commissions and other commissions it is, in my judgment, a totally unimportant distinction.

The CHAIRMAN. You have made good points there. Of course one possibility that you indicated would be if Congress were to take the position that the President had the responsibility for supervising all executive functions of the Government, that is everything that is not legislative or judicial. Then the Congress could just send a resolution, maybe a concurrent resolution to the President saying we don't like rules 23 to 32 issued by the Federal Trade Commission, and we request you to get them changed. Then the President writes back and says I refuse to do it. Then Congress can vote a resolution of impeachment.

Mr. STRAUSS. Then you would have a nice issue between you and the President. I would want an opportunity to think about that in detail——

The CHAIRMAN. Yes, of course.

Mr. STRAUSS [continuing]. But I believe that that could be a useful mechanism.

The Humphrey's executor case you earlier heard discussed, decided only a very limited proposition. The proposition decided was that the Congress could give someone a fixed term from which he could not be removed except for cause. It didn't say anything about what cause is. It didn't say whether if the President gives a Commissioner of the Federal Trade Commission an order which the President is entitled to give him, and the Federal Trade Commissioner says, "I am sorry, Mr. President, I am an independent cuss and I won't obey your order," the President could then say, "You are fired." The burden of the longer analysis that I have put into print—which I don't want to burden you with today—is that he could.

One of the very few things article 2, section 2, of the Constitution says, explicitly about the authority of the President, is that he may "require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices." Well, there is at least the first part of Executive Order 12291. You don't have to look any further than that. Not only do you not have to look any further than that, but it is probably the case that if Congress wanted to say to the President, "Mr. President, you can't demand of the chairman of the Federal Trade Commission that he give you this kind of opinion in writing," it would be held improper for it to do so; the Constitution in this rather limited but nonetheless potentially powerful statement says that he may require the opinion in writing. And while it uses the words "executive departments," that is just an accident of history. The Constitution doesn't provide for executive departments. It only refers to departments three times; the constitutional convention rejected a full description, because it expected you, the Congress to provide whatever apparatus Government needed to act as the needs arose. They didn't want to tie your hands. They did leave this reminder of the political judgment to have a single politically responsible chief executive.

Now, can the President tell the agency what decision it ought to make, which is the second part of 12291. Here we go right back to the conversation you had with Mr. DeMuth. Mr. DeMuth and you discussed the difference between formal and informal controls. He was telling you you could lean on people to do things, and your response to him was "Yes, but I can't make them." I suppose that is precisely the distinction that could be operable in looking at 12291. As long as Congress retains political oversight over the work of the executive apparatus, and I don't for a moment suggest that you give it up, I don't see how you can exclude the President from also exercising political oversight over the apparatus of Government without offending the constitutional notions of balance, of sharing, of checks and balances.

Direction, on the other hand, is a different story. When you write a law the President is supposed faithfully to execute, the clause as-

signing responsibility for decision is as much a part of that law as any other. The argument that the President has the right to decide any issue that you direct an agency to decide, unbalances Government toward the Presidency, in my judgment just as denial of all Presidential participation would unbalance it towards the Congress.

Let me turn to the legislative veto for just a moment or two. I would analyze the legislative veto in the same way, with an eye to realistic assessment of its impact on checks and balances. What the court has done in the cases it actually decided could be supported in just those terms. Rather than rely on empty formalities, the Court could have reached the same result had it emphasized the imbalance of political controls under those acts. This would have far less harmful implications, because we wouldn't then be worrying about reorganization acts, about the War Powers Act, or about a variety of other settings in which Congress has used the legislative veto to sound effect and in which, in my judgment, it would be empowered to do so, although the Court has not yet spoken to them.

My judgment is based on a difference between the regulatory settings in which the Court actually acted, and the more political setting of budgets, war powers, reorganizations and the like. The difference is that in the latter cases you and the President are in effect working together. It is the President's own recommendation for a pay raise, the President's own recommendation for reorganization, that you veto or you don't veto. In the regulatory context, on the other hand the legislative vetoes not only asserted that Congress had this great political power over the action of an agency, but at the same time they held the President aside—they in effect said that the President didn't have the same power.

If the President had called the Attorney General and ordered him to have Mr. Chadha sent out of the country, there would have been an uproar and properly so; the statute you passed says that that decision is supposed to be made on the record. Similarly, if the President had called the Federal Trade Commission and ordered it not to adopt its used car rules, or had called the Federal Energy Regulatory Commission and ordered it not to adopt the rules that were in issue in its case, again there would have been an uproar. You would have said no, we never gave you authority to direct that, Mr. President.

As long as that is the case, as long as Congress excludes the President from political direction of the decision being made, then in my judgment Congress must bite the bullet and exclude itself as well. That is the problem that underlay the decision in the *Chadha* case. If Congress were prepared to recognize the Presidential veto over governmental action in every case in which it claimed the privilege of voicing its own disapproval, then different questions would be presented. We might not want to live in a world that was quite that political, but in such a world, the salutary principles of checks and balances would not have been unstrung.

The CHAIRMAN. There is no specific way for the President to exercise his executive veto?

Mr. STRAUSS. Yes, surely there is. In fact, if you were looking for a good model, the State of California, as you may know, has adopt-

ed a procedural device called the California Office of Administrative Law. It was analyzed some length in a recent issue of the Duke Law Journal by Professor Marcia Cohen, and you might want to speak to her about it. The office has the specific charge of reviewing every rule produced by every California agency for consistency with statutory charge, for necessity, for clarity of expression, and the like. It has been subject to some criticism but generally regarded as successful.

The CHAIRMAN. You go right ahead.

Mr. STRAUSS. I am really at the end. The model State Administrative Act adopted by the National Commissioners on Uniform State Laws in 1981 similarly provides a model for gubernatorial—that is, executive—control over agency rulemaking. I think that that could prove a much more efficient means of achieving national and political coordination of rulemaking than the proposals you now have before you.

The CHAIRMAN. Everybody knows that Congress has the control of the money used by agencies. Let's say that the Commerce Committee that set up a certain agency and his responsibility for its general oversight, can send a note to the Appropriations Committee saying that the record of this agency in compliance with our suggestions, has been inordinately poor and we hope you will cut their appropriations at least 30 percent. I don't know if anybody could do anything about it.

Mr. STRAUSS. Of course, that is precisely the mechanism that Mr. DeMuth was referring to in his testimony.

The CHAIRMAN. Thank you very much. Both of you have given us very valuable and somewhat innovative suggestions.

Mr. STRAUSS. Thank you very much.

[Mr. Strauss' prepared statement, with other material referred to, follow:]

Testimony of

PETER L. STRAUSS

Professor of Law, Columbia University

Before The

UNITED STATES HOUSE OF REPRESENTATIVES

Committee on Rules

Thursday, May 10, 1984

I am a professor of law at Columbia University Law School, specializing in administrative and constitutional law; my background includes three years in the Solicitor General's Office arguing cases in the Supreme Court, and two years as General Counsel of an independent regulatory commission, the Nuclear Regulatory Commission. In the past few months, I have published two analyses that I believe may bear on this Committee's work -- a commentary on the Supreme Court's legislative veto decisions[1] and, more recently, a lengthy analysis of some constitutional issues associated with presidential and congressional oversight of regulatory action.[2] I believe your staff has copies of these analyses, but I would be happy to provide additional copies for your record or to answer any questions you may have about them.

Perhaps the best use of this short time would be to give you a brief outline of these ideas. Their basic thrust is that in planning for congressional oversight of agency action you need to plan for the President's role too. A court satisfied that you have recognized the President's constitutional status and claims is not likely to balk at the arrangements you make. A court

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1. Strauss, Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision, 1983 Duke L.J. 789.

2. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573 (1984).

persuaded that you have increased Congress' role at the expense of the presidency will and should dig in its heels.

My starting point is that in thinking about regulatory agencies, you ought to regard all of them -- the Department of Agriculture as well as the SEC -- as being outside the three named divisions of our Constitution -- President, Congress, and Supreme Court -- in everything they do. They are outside the President, the Congress and the Supreme Court, but they are subject to the supervision and control of each. Here is something we don't often note about the words of the Constitution. They describe the President, the Congress, and the Court -- not the executive, legislative, and judicial branches, as we often loosely say. The Constitution doesn't create the infrastructure of government; it leaves that to Congress. All it creates are three heads, each with defined responsibilities; the agencies, as we all know, exercise each of those responsibilities at one time or another. That doesn't trouble us, precisely because the agencies are <u>not</u> one or another of these powerful actors; they are in the grasp of all three.

Thus, the important constitutional questions are the questions of checks and balances -- what are the constitutional means of control afforded each branch over the agencies, and how one might tell whether the basic scheme of constitutional checks and balances has been violated. The balance of political authority between President and Congress is one the Framers created to protect all of us from the ill effects that could come from the concentration of excessive power in any one of the three named heads of government -- Congress, President, and Supreme Court. Basically, the argument is that one should evaluate any proposed regulatory oversight technique -- Executive Order 12291 or legislative veto -- in terms of its tendencies to perpetuate or undermine that balance, the fundamental principle on which our government is organized.

What are the essential elements of the President's relationships with the agencies? The most important choice made about the Presidency in the constitutional convention of 1787 was that there should be but one chief executive, a unitary figure at

the head of all executive activity and politically accountable for it.[3] It was not simply that executive power was to be separated from legislative power, but that it was to be focussed in one politically accountable place -- in someone who might therefore be able to stand up to Congress (just as Congress would be able to stand up to him) and keep it in check. As Madison wrote in the Federalist Papers, the essence of the Framers' idea of checks and balances lay in "giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[4] In the words of my former colleague Abraham Sofaer, now an outstanding District Court judge in the Southern District of New York:

> "The Framers expected the branches to battle each other to acquire and to defend power. To prevent the supremacy of one branch over any other in these battles, powers were mixed; each branch was granted important power over the same area of activity. The British and Confederation experience had led the Framers to avoid regarding controversy between the branches as a conflict between good and evil or right and wrong, requiring definitive, institutionally permanent resolution. Rather, they viewed such conflict as an expression of the aggressive and perverse part of human nature that demanded outlet but had to be kept from finding lasting resolution so that liberty could be preserved."[5]

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3. This first appeared in response to the arguments of Roger Sherman for making the executive subsidiary to the legislature, which "should be at liberty to appoint one or more [executive heads] as experience might dictate." 1 M. Farrand, Records Of The Federal Convention 65 (1911). His views were defeated, however, id., as were all those who would have provided in the Constitution for the sharing of executive authority with a council of revision or a council of state -- and that despite the convention's concern that the President receive sound advice. 1 J. Elliot, Debates On The Federalist Constitution, at 159, 164, 214, 243, 257, 292; 1 M. FARRAND, above, at 93 - 102, 138 - 140; 2 id. at 73 - 80, 298, 367, 537 - 542.

4. The Federalist No. 51, at 349 (J. Madison) (J.Cooke ed. 1961). Madison conceded that Congress was better placed for this than the other branches; the choice of a two-part legislature was expected to generate an internal check within that body.

> "This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner that each may be a check on the other -- that the private interest of every individual may be a sentinel over the public rights." Id. at 350.

5. A. Sofaer, War, Foreign Affairs, And Constitutional Power: The Origins 60 (1976).

One may see the issue of balance of power among the three named branches of government as reflecting a process not an institution, with impermanence of resolution not only inevitable but desirable as an outcome. As former Attorney General Levi once wrote, the checks and balances idea creates "a tension among the branches, with each, at the margin, limiting the other, so that, in Madison's terms, "'ambition [could] be made to counteract ambition.'"[6]

With that very limited background, let me turn to two of the specific issues that I understand are troubling your committee, as an illustration how this analysis might work. I'll talk first about Executive Order 12291, and then the legislative veto.

Executive Order 12291, in my judgment, presents two sorts of issues that need to be kept quite distinct. The first is the requirement that specified kinds of analyses be performed and reported to the President, discussed with his aides, before any decision is taken on matters within the agency's discretion. The second is the suggestion that the President may be claiming to direct the agency how to decide -- what factors to give the most weight to, what decision principle to apply, perhaps even what decision to reach.

The first of these issues turns on one of the very few explicit limitations the Constitution contains on Congress' ability to structure the federal government. Article II, Section 2 says that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices." Of course, the Constitution doesn't provide for "executive Departments"; it refers to Departments only three times, without explanation; the Constitutional Convention rejected a full description because they expected you, the Congress, to provide whatever apparatus government needed as the need arose, and they didn't want to tie your hands. But they did

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6. Levi, Some Aspects of Separation of Powers, 76 Col. L. Rev. 371, 378 (1976)(quoting THE FEDERALIST NO. 51).

leave this reminder of the political judgment to have a single chief executive -- he could demand the opinion of anyone you gave the work of government to, in advance, and have a chance to reason with him. Otherwise he could hardly be held to political account for what happened; he could hardly be a counterweight to you. In my judgment that means the President can require E.O. 12291 analyses and a chance to talk about them -- even in private if that is what is required for effectiveness. And I don't see how you can avoid that by naming an agency "independent."

Can the President tell the agency what decision to make? Here one needs to distinguish carefully between suasion and direction. You have your own techniques for persuading agencies what they ought to do; if checks and balances are to work, and if presidential responsibility is to be maintained, he must be free to persuade whenever you are. Congress can establish the basis on which to control the President's actions only by renouncing its own political controls -- as, for example, you do when you provide that certain proceedings are to be conducted on the record. If you seek to curb the President without giving up your own controls, your effort looks like and should be treated as a power grab. Direction, however, is a different story. The law whose faithful execution is the President's charge includes the law that assigns decisional responsibility elsewhere. To argue that the President has the right to decide any issue left to agency discretion unbalances government toward the Presidency, just as denial of all Presidential participation would unbalance it toward the Congress.[7] I don't doubt that Congress could limit the President's authority to requiring analyses and discussions, so that the responsibility for decision (once the analysis was in hand) rested in the agency where Congress placed it.

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7. The difficulties were well stated in Professor Corwin's classic study of the presidency:

> Suppose . . . that the law casts a duty upon a subordinate executive agency *eo nomine*, does the President thereupon become entitled, by virtue of his "executive power" or of his duty to "take care that the laws be faithfully executed" to substitute his judgment for that of the agency regarding the discharge of such

(Footnote continued on next page.)

The legislative veto, too, could be analyzed in this way -- with an eye to realistic assessment of its impact on checks and balances. If the Court had done that in the Chadha case, rather than rely on empty formalities, I believe it would have reached the same result in the cases it actually decided, but with far less harmful impact overall. Again, the issue ought to be, what impact the legislative veto has on the distribution of authority over the agencies as between President and Congress and, in particular, whether it is consistent with the idea of a unitary, politically accountable chief executive. In my judgment, some legislative vetoes meet these tests, and others do not; the Court should have been prepared to distinguish among legislative vetoes on the basis of their political setting and consequences.

Thus the original contexts in which legislative vetoes were developed had few negative connotations for the distribution of government power. Reorganization acts, federal pay acts, issues involving foreign relations and defense, and the interstitial adjustment of appropriations are all matters affecting direct, continuing, political presidential-congressional relations. The President is actually on one side, the Congress on the other. Use of the veto in this context enhances the flexibility of government without, in my view, giving a significant advantage to either of the two great political branches of our government.

(Footnote 7 continued.)

> duty? An unqualified answer to this question would invite startling results. An affirmative answer would make all questions of law enforcement questions of discretion, the discretion moreover of an independent and legally uncontrollable branch of the government. By the same token, it would render it impossible for Congress, notwithstanding its broad powers under the "necessary and proper" clause, to leave anything to the specially trained judgment of a subordinate executive official with any assurance that his discretion would not be perverted to political ends for the advantage of the administration in power. At the same time, a flatly negative answer would hold out consequences equally unwelcome. It would, as Attorney General Cushing quaintly phrased it, leave it open to Congress so to divide and transfer "the executive power" by statute as to change the government "into a parliamentary despotism like that of Venezuela or Great Britain with a nominal executive chief or president, who, however, would remain without a shred of actual power."

E. Corwin, The President: Office and Powers 1787-1957, 80 - 81 (4th rev. ed. 1957); for contemporary efforts, see also R. Neustadt, Presidential Power -- The Politics of Leadership From FDR to Carter (1960); E. Hargrove, The Power of the Modern Presidency (1974); and Ledewitz, The Uncertain Power of the President to Execute the Laws, 46 Tenn. L. Rev. 757 (1979).

One cannot make the same statement about the regulatory cases the Supreme Court considered. The legislative vetoes in those cases sought to establish a very rigorous control for Congress while at the same time they excluded the President. The decision Congress vetoed in Chadha had been made on the record by an immigration law judge; the President could not have countermanded it. If he had attempted to tell the FTC or the FERC what rules to adopt, you would have been certain that he had acted illegally. With these legislative vetoes, then, Congress sought controls for itself while withholding similar authority from the President -- and in this way offended the checks and balances scheme. It was no longer possible to assert, in these respects, that we had a unitary executive, one capable of acting to check the Congress.

The point, again, is to avoid arrangements that separate executive action from the President. Our Constitution is instinct with the judgment that that is the one choice forbidden you. To be sure, there are officers of government who are not the President, but they are all in some form of political relationship to him (as they are all in other forms of political relationship to you). Let me emphasize that this includes the so-called independent regulatory commissions. While evidently their relationship with the President is more remote than that of most agencies doing the work of law-administration, it is important to see that the reasons why Congress has done this make them equally remote from your own political oversight. To maintain your own oversight while excluding the President -- which is what the legislative vetoes before the Court did -- threatens the deepest principles of our government; it would put an end to checks and balances and establish Congress' supremacy, once and for all. Where you empower the President as well as yourselves, in my judgment, the same issues are not presented.

Let me sum up in a positive way. As my articles develop in detail, the point to keep in mind in assessing the legislative veto or any like measure is its impact on the balance and tension between Congress and President. If a measure tends to enlarge Congress' powers at the President's expense -- or vice versa -- it is for that reason objectionable. Where Congress shares

political authority with the President, where each remains able to check the power of the other, the same objections cannot be made. That is why I think reorganization acts or budget adjustments, where the President participates, are so very different from the regulatory context, where in fact we have tended to exclude the President from participation. If Congress were prepared to recognize a presidential veto over governmental action in every case in which it claimed the privilege of voicing its own disapproval, different questions would be presented. In fact I do not think we would choose quite so political a regulatory world; but in such a world the salutary principle of checks and balances would not have been unstrung. Thank you.

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THE PLACE OF AGENCIES IN GOVERNMENT: SEPARATION OF POWERS AND THE FOURTH BRANCH

PETER L. STRAUSS

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COLUMBIA LAW REVIEW

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THE PLACE OF AGENCIES IN GOVERNMENT: SEPARATION OF POWERS AND THE FOURTH BRANCH

*Peter L. Strauss**

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* Professor of Law, Columbia Law School. B.A. 1961, Harvard University; LL.B. 1964, Yale University. Many colleagues and friends have contributed to the growth of this essay, which began as a paper for Columbia's Center on Law and Economics. Their counsel and its support are gratefully acknowledged. Jerome Feil '80, David Mangefrida '84 and Melissa Philbrick '84 were invaluable as research assistants.

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INTRODUCTION

For the past few years the Supreme Court has been struggling with issues of government structure so fundamental that they might have been thought textbook simple, yet with results that seem to imperil the everyday exercise of law-administration. Under what circumstances can Congress assign the adjudication of contested issues in the first instance to tribunals that are not article III courts? The past century has witnessed the profuse growth of legislation assigning to special adjudicative tribunals—administrative agencies and other article I courts—the power to hold trial-type hearings that might otherwise have been placed in the article III courts. Yet in a case challenging such an assignment in the context of the bankruptcy laws,[1] the Court could not summon a majority to agreement on an opinion. The plurality found the assignment unconstitutional employing reasoning that, despite its best efforts, appears to threaten much administrative adjudication and revive ghosts long thought quieted,[2] while the dissent opined in the face of intellectual difficulties

1. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

2. Id. at 76–82 (apparently reviving Crowell v. Benson, 285 U.S. 22 (1932)). For commentary on the significance of *Crowell*, see Schwartz, Does the Ghost of *Crowell v. Benson* Still Walk?, 98 U. Pa. L. Rev. 163 (1949); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 324–60 (2d ed. 1973) [hereinafter cited as Hart & Wechsler]; W. Gellhorn, C. Byse & P. Strauss, Administrative Law: Cases and Comments 277–96 (7th ed. 1979); L. Jaffe, Judicial Control of Administrative Action 87–94, 624–53 (1965).

with the governing language of the Constitution that it is "too late" to rely on the constitutional text.[3]

Can Congress empower bodies other than itself to adopt statute-like rules that acquire the force of law without either receiving bicameral passage in Congress itself or facing the possibility of presidential veto? Article II legislators—that is, executive rulemakers—have been acting at least since the turn of the century as if Congress could so empower them.[4] Faced with challenges to congressional efforts to retain political controls over administrative rulemaking in the form of legislative veto provisions, the Court struck down the legislative veto in a formalistically reasoned opinion[5] that struggled to avoid casting doubt on all rulemaking.[6]

What protection from litigious interference does the President have in his performance of office? The courts have recognized that congressmen, judges, and their aides require absolute privilege from civil liability for damage alleged to have resulted from their misperformance of office in order to protect their abilities to carry out central functions.[7] Yet the Court was barely able to find a similar privilege in the President personally,[8] and only one justice would have extended it to his closest personal aides.[9] The resulting isolation of the Presidency may be understandable given the outrageous conduct apparently involved in those lawsuits—the firing by the President of a whistle-blower[10]—but exposes the Presidency to external controls and corresponding risks of internal hesitation the courts have seemed quick to oppose for the other branches.

At the root of these problems lies a difficulty in understanding the relationships between the agencies that actually do the work of law-administration, whose existence is barely hinted at in the Constitution, and the three constitutionally named repositories of all governmental power—Congress, President, and Supreme Court.[11] When, for example, a federal agency adopts

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3. *Northern Pipeline*, 458 U.S. at 113 (White, J., dissenting).

4. See United States v. Grimaud, 220 U.S. 506 (1911).

5. INS v. Chadha, 103 S. Ct. 2764 (1983); see Strauss, Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision, 1983 Duke L. J. 789.

6. See 103 S. Ct. at 2785 n.16.

7. Butz v. Economou, 438 U.S. 478, 508–14 (1978); Stump v. Sparkman, 435 U.S. 349, 355–57 (1978); Gravel v. United States, 408 U.S. 606, 616–22 (1972).

8. Nixon v. Fitzgerald, 457 U.S. 731, 751–53 (1982).

9. Harlow v. Fitzgerald, 457 U.S. 800, 822–29 (1982) (Burger, C.J., dissenting).

10. But compare, as to the outrageousness of underlying conduct, Stump v. Sparkman, 435 U.S. 349 (1978) (judge authorizes sterilization of minor girl in pro forma "hearing" on unexplored petition of parent).

11. Note that this Article is concerned only with administrative as opposed to political action—that is, with settings productive of "agency action" in the Administrative Procedure Act sense, the end result of a body acting as an "authority of the Government of the United States" in some manner directly affecting members of the public. 5 U.S.C. § 551(1), (13) (1982); cf. Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971) (APA confers agency status only on administrative unit with substantial independent authority in the exercise of specific functions). We shall always be talking about governmental bodies in circumstances in which they are constrained to act under law enacted by Congress and subject to the possibility of judicial review. Government activities concerned with external relations and security are excluded from the inquiry.

a legislative "rule" following the procedures of the Administrative Procedure Act,[12] how is this act to be understood constitutionally? In a colloquial sense, the agency is acting legislatively—that is, creating general statements of positive law whose application to an indefinite class awaits future acts and proceedings. Validly adopted legislative rules are identical to statutes in their impact on all relevant legal actors—those subject to their constraints, those responsible for their administration, and judges or others who may have occasion to consider them in the course of their activities. Does it follow that in the constitutional sense what the agency is doing should be regarded as an exercise of the "legislative Powers . . . granted" by article I, "all" of which are vested in Congress? Or, given statutory authorization, is it to be regarded as an exercise of the executive authority vested in the President by article II, the judicial power placed in the Supreme Court (and statutorily created inferior courts) by article III,[13] or authority merely statutory in provenance? The

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This exclusion undoubtedly marks the largest part of executive authority as it might have been imagined by the political theorists on whom the drafters of the Constitution drew. Montesquieu, for example, describes as the "three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law." C. Montesquieu, The Spirit Of The Laws 151 (T. Nugent trans. 1949). The third, which he called "the judiciary power," id. para. 2, exists to punish criminals and determine individual disputes. It was best performed by courts and juries. That left public security and foreign affairs as the primary domain of the executive. A somewhat broader vision can be detected in the pages of the *Federalist* papers, see e.g., The Federalist Nos. 70–72 (A. Hamilton), but foreign and military affairs draw the bulk of attention.

This exclusion also sets off that aspect of governmental functioning that tends least to share the characteristics of legislative and judicial action, that tends least to be subjected to judicial (if not legislative) controls, and of which we are least likely to demand the characteristic and safeguarding attributes of those two forms of action, such as definitive, public statement of governing norms or reasoned, disinterested decision.

Thus, this Article addresses behavior that, in historical perspective, is not at the core of executive function. The distinction between political and administrative government had its counterpart in early writings about administrative procedure suggesting a distinction between "executive power" and "administrative power"—the first, concerned with those issues Chief Justice Marshall had identified in *Marbury v. Madison* as "[q]uestions . . . in their nature political," 5 U.S. (1 Cranch) 137, 170 (1803); the second, strictly statutory, and subject to presidential participation only to whatever extent might be provided by statute. See the elegant discussion of the writings of Freund, Wyman, Willoughby and Goodnow in Grundstein, Presidential Power, Administration and Administrative Law, 18 Geo. Wash. L. Rev. 285 (1950). One need not accept the proposition about complete congressional control of "administrative power" to find force in the distinction. The administration of regulatory schemes has qualities different from the conduct of foreign relations, warranting provision for a different albeit palpable degree of presidential (and for that matter congressional and/or judicial) involvement. The central purpose of this essay is to examine the constraints that may exist on Congress's shaping of the administrative power.

12. 5 U.S.C. §§ 551(4), 553(c) (1982).

13. Federal courts have long been authorized by statute to adopt rules for the governance of proceedings before them, rules which have the force of law on those subject to them and those administering them, and in this respect questions parallel to those discussed in the text respecting agencies necessarily arise. See Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 15–16 (1825).

Constitution names and ascribes functions only to the Congress, President and Supreme Court, sitting in uneasy relation at the apex of the governmental structure; it leaves undiscussed what might be the necessary and permissible relationships of each of these three constitutional bodies to the agency making the rule. Is it significant for any of these purposes whether the rulemaking authority has been assigned to a cabinet department or to an independent regulatory commission? Indeed, does it make sense to look to the Constitution, written so many years ago, for contemporary guidance or limits on the sorts of arrangements Congress can make?[14]

Three differing approaches have been used in the effort to understand issues such as these. The first, "separation of powers," supposes that what government does can be characterized in terms of the kind of act performed—legislating, enforcing, and determining the particular application of law—and that for the safety of the citizenry from tyrannous government these three functions must be kept in distinct places. Congress legislates, and it only legislates; the President sees to the faithful execution of those laws and, in the domestic context at least, that is all he does; the courts decide specific cases of law-application, and that is their sole function. These three powers of government are kept radically separate, because if the same body exercised all three of them, or even two, it might no longer be possible to keep it within the constraints of law.

"Separation of functions" suggests a somewhat different idea, grounded more in considerations of individual fairness in particular proceedings than in the need for structural protection against tryannical government generally. It admits that for agencies (as distinct from the constitutionally named heads of government) the same body often does exercise all three of the characteristic governmental powers, albeit in a web of other controls—judicial review and legislative and executive oversight. As these controls are thought to give reasonable assurance against systemic lawlessness, the separation-of-functions inquiry asks to what extent constitutional due process for the particular individual(s) who may be involved with an agency in a given proceeding

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14. Cf. supra text accompanying note 3. The reader will probably divine without the help of this footnote with what suppositions I approach constitutional interpretation, yet it may be helpful to try to mark a spot for myself along the interpretivist-noninterpretivist continuum. My supposition is that the Constitution is law, binding judges (as it says it does) along with the rest of government. What was perhaps the framers' strongest proposition, that no part of government could be trusted free of the constraints of law, applies equally to the courts, even if they are the "least dangerous" among the branches. Danger may come, after all, not only from the harm one can accomplish directly, but from the disarray that can result from unsupported readings about the powers of others under a complex scheme that must be at once effective and safe.

That places me among the interpretivists, but within that field the reader will probably find me at least eclectic, if not undisciplined. I think it warranted to bring to the task of interpretation any information or skills a lawyer might properly use in understanding written text, and the idea of seeking contemporary rather than fixed meaning. The larger, underlying structural judgments of the document, see C. Black, Structure and Relationship in Constitutional Law (1969), have the greatest claim, in my view, to continuing adherence.

requires special measures to assure the objectivity or impartiality of that proceeding. The powers are not kept separate, at least in general, but certain procedural protections—for example, the requirement of an on-the-record hearing before an "impartial" trier—may be afforded.

"Checks and balances" is the third idea, one that to a degree bridges the gap between these two domains. Like separation of powers, it seeks to protect the citizens from the emergence of tyrannical government by establishing multiple heads of authority in government, which are then pitted one against another in a continuous struggle; the intent of that struggle is to deny to any one (or two) of them the capacity ever to consolidate all governmental authority in itself, while permitting the whole effectively to carry forward the work of government. Unlike separation of powers, however, the checks-and-balances idea does not suppose a radical division of government into three parts, with particular functions neatly parceled out among them. Rather, the focus is on relationships and interconnections, on maintaining the conditions in which the intended struggle at the apex may continue. From this perspective, as from the perspective of separation of functions, it is not important how powers below the apex are treated; the important question is whether the relationship of each of the three named actors of the Constitution to the exercise of those powers is such as to promise a continuation of their effective independence and interdependence.

In the pages following I argue that, for any consideration of the structure given law-administration below the very apex of the governmental structure, the rigid separation-of-powers compartmentalization of governmental functions should be abandoned in favor of analysis in terms of separation of functions and checks and balances. Almost fifty years of experience has accustomed lawyers and judges to accepting the independent regulatory commissions, in the metaphor, as a "headless 'fourth branch'" of government.[15] Although the resulting theoretical confusion has certainly been noticed,[16] we accept the idea of potent actors in government joining judicial, legislative and executive functions, yet falling outside the constitutionally described schemata of three named branches embracing among them the entire allocated authority

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15. The President's Comm. On Administrative Management, Administrative Management in the Government of the United States 30 (1937). They are, of course, not "headless"; all accounts of their functioning recognize that at least the courts and Congress remain superior—if not dominating—entities in their appropriate spheres.

16. See, e.g., Justice Jackson's dissenting statement in FTC v. Ruberoid Co., 343 U.S. 470, 487-88 (1952):

> [Administrative bodies such as the FTC] have become a veritable fourth branch of Government, which has deranged our three-branch legal theories . . . . Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying "quasi" is implicit with confession that all recognized classifications have broken down, and "quasi" is a smooth cover which we draw over our confusion as we might use a counterpane to cover a disordered bed.

of government. What would be the consequences of so viewing *all* government regulators? I believe such a shift in view would carry with it significant analytical advantages by directing our focus away from the truly insignificant structural and procedural differences between the "independent regulatory commissions" and other agencies to the relationships existing between each such agency and the three named branches. Each such agency is to some extent "independent" of each of the named branches and to some extent in relationship with each. The continued achievement of the intended balance and interaction among the three named actors at the top of government, with each continuing to have effective responsibility for its unique core function, depends on the existence of relationships between each of these actors and each agency within which that function can find voice. A shorthand way of putting the argument is that we should stop pretending that all our government (as distinct from its highest levels) can be allocated into three neat parts. The theory of separation-of-powers breaks down when attempting to locate administrative and regulatory agencies within one of the three branches; its vitality, rather, lies in the formulation and specification of the controls that Congress, the Supreme Court and the President may exercise over administration and regulation.

Bits and pieces of history contribute to our assumptions about the place of agencies in government—most notably, that there is a something called an "independent regulatory commission" that is somehow different in what it does from a cabinet department, and that need have no relation with the President though it is strongly associated with Congress and the courts. These bits and pieces have led us astray. The Department of Agriculture and the Securities and Exchange Commission both adopt rules, execute laws, and adjudicate cases, all pursuant to statutory authority. Why is that not the forbidden conjoining of powers? The question has been more obscured than answered, perhaps, by describing what the agencies do as "quasi-adjudication" or "quasi-legislation," as if the operations performed were in fact not the same three characteristic operations of government our eighteenth-century political theorists insisted must be kept separate for public protection. If the constitutional scheme were to require locating these agencies in one or another part of government, as more formalistic separation-of-powers opinions have sometimes hinted,[17] which part would they be in? And how could they then be authorized to perform the functions associated with another part?

From the perspective suggested here, the important fact is that an agency is neither Congress nor President nor Court, but an inferior part of government. Each agency is subject to control relationships with some or all of the three constitutionally named branches, and those relationships give an assurance—functionally similar to that provided by the separation-of-powers notion for the constitutionally named bodies—that they will not pass out of control.[18] Powerful and potentially arbitrary as they may be, the Secretary of

17. See Id.

18. For example, one may understand the delegation doctrine in this functional way, rather than as an indication "where" in government rulemaking occurs. That doctrine requires both

Agriculture and the Chairman of the SEC for this reason do not present the threat that led the framers to insist on a splitting of the authority of government at its very top.[19] What we have, then, are three named repositories of authorizing power and control, and an infinity of institutions to which parts of the authority of each may be lent. The three must share the reins of control; means must be found of assuring that no one of them becomes dominant. But it is not terribly important to number or allocate the horses that pull the carriage of government.

Accommodating theory to the accepted present is perhaps the most difficult aspect of the task, given the highly political and informal cast of important presidential and congressional relationships with the agencies. Thus, a basic difficulty in writing about the President's legal authority over the affairs of government lies precisely in the infrequency with which that authority is tested in a legal rather than a political arena. Judicial pronouncements on presidential authority vis-a-vis the agencies, and vis-a-vis Congress, are few. But presidential dealings with Congress are daily matters of great portent, and congressional expectations about the relative authority of the President, Congress and the independents are both many and firmly established, and likely to be sharply enforced in the daily political moil.[20]

The driving forces behind this effort include my puzzlement at the Court's difficulties and a lawyer's premise that any acceptable outcome (that does not involve constitutional amendment) must respect the Constitution's text and, at least in broad outline, its history. I hope to address the significant intellectual difficulties created by the realization that the relationship between the fact of the federal government we have today and its essentially unrevised

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statutory authorization (a relationship with Congress) and a capacity on the part of the courts to assure legality (a relationship with the courts). The availability of at least limited judicial review, indeed, appears to be identified with increasing frequency as an essential element of the grant of rulemaking authority. See INS v. Chadha, 103 S. Ct. 2764, 2779–80 (1983); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 78–81 (1982).

19. For an account of the work of Goodnow and Willoughby strongly suggesting this differentiation between agencies and the named actors, see Grundstein, supra note 11, at 300–02. One must add that this checks-and-balances perspective deals only with the problem of control, and omits accounting for a "fairness" element that might be identified as central to the rationale for separation of functions—the proposition, long reflected in English ideas of "natural justice," that one is not to be a judge in one's own cause. See generally G. Wills, Explaining America 149–50 (1981). Perhaps it is sufficient to say that that element has never been controlling at the agency level; the nemo judex idea is limited to financial and other sharply personal interests in English law, see H. Wade, Administrative Law 400 (4th ed. 1977), as well as our own, see Withrow v. Larkin, 421 U.S. 35, 47 (1975). See Gibson v. Berryhill, 411 U.S. 564, 579 (1973), and Friedman v. Rogers, 440 U.S. 1, 18 (1979) for an indication that even disqualifying financial interests may be asserted only in the context of particular adjudicatory proceedings. See generally Strauss, Disqualifications of Decisional Officials in Rulemaking, 80 Colum. L. Rev. 990 (1980).

20. President Carter, like his predecessors, firmly denied the constitutional validity of the legislative veto, but in bargaining over continued authorization for the FTC he agreed to accept a form of legislative veto, 38 Cong. Q. 1148–49 (1980); 38 Cong. Q. 1407–09 (1980), and he kept that bargain. 38 Cong. Q. 1573 (1980). See also the comprehensive listing of presidential communications in Henry, Legislative Veto: In Search of Constitutional Limits, 16 Harv. J. on Legis. 735, 737 n.7 (1979).

eighteenth-century formal structure is uneasy at best; that it is difficult to accommodate both the fact of the changes and our continuing assertion that the Constitution is law.[21]

To achieve this accommodation, Part I of this Article describes contemporary government, with the purpose of identifying those aspects of the political landscape that any theory of the place of agencies in government must acknowledge. Part II examines the constitutional constraints—of text, of context, and of judicial interpretation—on Congress's ability to structure the work of law-administration as it deems best, in light of the three approaches just sketched and with the results suggested. I suggest a reinterpretation of some cases now taken as the basis for our analyses of government structure, and some criticisms of cases decided in the two terms of the Court just concluded. Part III then uses considerations of checks and balances and separation of functions to analyze relationships between the President and the agencies viewed without necessary regard for their placement in the governmental structure. I suggest that as Congress structures the government, it must recognize certain constraints—the need for basic parity between it and the President in political oversight of the agencies; and the President's substantial independent authority to communicate with and give directions to those who administer the laws. There emerges a framework for understanding the scope of Congress's authority to structure American government that stresses the continuance of opposed, politically powerful actors at the apex of government by requiring that those who do the work of law-administration have significant relationships with each.

I. The Shape of Contemporary Administrative Government

This Part of the Article seeks to describe the ways in which contemporary federal government is structured and performs its law-administration functions.[22] The effort proceeds from the premise that any useful legal analysis of the limits on Congress's ability to structure administrative government must, at least in large measure, accept the reality of the existing government. To no one's surprise, the description reveals a profuse variety of formal structures and a striking dispersion of governmental authorities. Both the variety and the dispersion are inconsistent with any notion that the powers of government are or can be neatly parcelled out into three piles radically separated the one from the other and each under the domination of its particular "branch."[23] Once one descends below the level of the branch heads named in the Constitution—Congress, President, and Supreme Court—separation of powers ceases to

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21. See Karl, Executive Reorganization and Presidential Power, 1977 Sup. Ct. Rev. 1, which also in somewhat mystic phrases illustrates and seeks to reason from the clash between politics and administrative science in the relations between President, Congress, and the continuing body of civil servants.

22. See supra note 11.

23. See supra note 15.

have descriptive power. Because agencies nonetheless exist in varying relationships with each of these paramount actors, the notion of checks and balances retains descriptive power and, hence, possible utility within the constraint of accepting the reality of the existing government.

However one counts its branches, the size alone of contemporary American administrative government places strains on the eighteenth-century model. The minimalist federal government outlined in Philadelphia in 1787 envisioned a handful of cabinet departments to conduct the scanty business of government, each headed by a Secretary responsible to the President and thinly peopled with political employees. Significant regulatory responsibilities were not in view; administration even of the public lands was decades in the future.[24] The eighteenth-century model relied heavily on the controls of politics over and among the branches of government to keep it within reach of the people, to subdue the risks of tyranny.[25]

The simple model of cabinet departments has long since been supplanted by a rich variety of governmental forms. Today, President and Congress must each deal with a continuing government whose dimensions and power were unprovided for. The civil service, largely insulated from politics, may appropriately be regarded as the fourth effective branch of government[26] wholly without regard to the arguably special position of the independent commissions. The character of bureaucratic decisionmaking has also changed. In the modern bureaucratic context, politics is paradoxically suspect. The notions of administrative science, for example, that governmental policy could be made by objective analysis performed outside the world of politics, may have found their first foothold with the independent commissions; yet today's technological rulemakings, occurring primarily within the executive branch, are strongly influenced by those notions.[27]

24.

> [T]he conditions of national life at the beginning and through much of the nineteenth century simply did not raise the issues of management on the dynamic and shifting scale that followed the Civil War. The framers had no reason to envisage the management of an industrial nation as the essential function of the office . . . [or to] forecast the development of extensive managerial bureaucracies to tend to social policy and related problems.

Karl, supra note 21, at 11.

25. See infra text accompanying notes 102–18.

26. K. Meier, Politics And The Bureaucracy: Policy-Making In The Fourth Branch Of Government (1979); H. Merry, Five-Branch Government 59–60 (1980); E. Hargrove, The Power of the Modern Presidency 79 (1974).

27. At the same time as the past behavior of agencies is criticized for its want of responsiveness and responsibility and for the failures of cocooned expertise, pressure for more rationalistic and "objective" modes of decision also mounts. Detailed cost, risk, and benefit analysis techniques are put forward as alternatives to "visceral estimates and political accommodations," L. Lave, The Strategy of Social Regulation 6 (1981), as the basis for policy decision. Interest-group representation in the courts, through expanded judicial review, is urged as a means of securing public accountability for agency action. Stewart & Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1195 (1982).

The following four propositions identify the significant features of modern administrative government that any structural account based on the Constitution must encompass:

> 1. The federal agencies are placed in the structure of federal government—as cabinet agencies, independent executive agencies, or independent regulatory commissions—without apparent regard for the functions they are to perform. Their internal and public procedures do not vary with their placement. The functions they perform belie simple classification as "legislative," "executive," or "judicial," but partake of all three characteristics.
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> 2. All agencies, whether denominated executive or independent, have relationships with the President in which he is neither dominant nor powerless. They are all subject to presidential direction in significant aspects of their functioning, and able to resist presidential direction in others (generally concerning substantive decisions).
>
> 3. All agencies have oversight relationships with Congress and the federal judiciary, and these relationships generally do not vary with the type of agency used.
>
> 4. The characteristics of the oversight relations of President and Congress with "executive" and "independent" agencies owe as much (or more) to politics as to law.

The pages immediately following take up each proposition in turn, necessarily with a broad and merely evocative brush. Some readers may be satisfied with the propositions; they should turn at once to page 596. Yet one's impression is that many assume radical differences between executive agencies and independent regulatory commissions in functions, procedures, and relationships with the rest of government. Acknowledgement both of the variety of forms government regulators take and of the similarity of their actions and control relationships is important as a point of departure for the later discussion.

A. *The Independence of Agency Function, Placement, and Structure*

Congress has employed many different forms of governmental authority in allocating the day-to-day work of government. It has created cabinet departments, cabinet-level agencies headed by individual administrators responsible to the President, independent regulatory commissions, federal corporations,[28] independent regulatory commissions within cabinet depart-

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One may fairly wonder at the wisdom of the radical exclusion of politics some thus seek. Cost-benefit analysis can inform but not resolve human equations pitting the manifold interests of various groups against one another. Invoking the judgment of lifetime appointees is a curious means for introducing democratic controls over agency functioning. The failures of administrative science to produce effective public policy might also be traced to the faulty premise that one can somehow free government of politics without also freeing it of responsibility to the people and responsiveness to those they directly select to represent their interest. Refusal to recognize the possibility of political controls over the bureaucracy's decisions, whatever the advantages of that refusal, tends to place sole reliance on the judiciary for the bureaucracy's connection with constitutional governance.

28. See, e.g., 16 U.S.C. § 831–831dd (1982) (Tennessee Valley Authority).

ments,[29] and more as means of carrying into execution the laws it enacts. And each of these bodies may itself be highly complex—an amalgam of agencies, administrations, offices, bureaus, and services, each headed by its own chief possessing statutory authority yet reporting to an assistant who reports to the agency head.

The allocation of law-administration among these forms does not follow simple functional lines. Although administrative law students and others sometimes talk uncritically as if the performance of regulation were a lodestone—as if all regulatory agencies were "independent regulatory commissions"—regulatory and policymaking responsibilities are scattered among independent and executive-branch agencies in ways that belie explanation in terms of the work agencies do.[30] Take, for example, workplace safety: the Mine Safety Act[31] is wholly administered by an executive department, at first the Department of the Interior and more recently the Department of Labor; the Occupational Safety and Health Act is administered in part by an executive agency, the Occupational Safety and Health Administration, and in part by an independent commission, the Occupational Safety and Health Review Commission, both placed in the Department of Labor;[32] nuclear safety is in the charge of a fully independent agency, the Nuclear Regulatory Commission.[33] Similar dispersions could be noted respecting antitrust policy,[34] economic policy,[35] consumer protection from fraudulent advertising,[36] and even rate regulation.[37] The diversity is characteristic of our pragmatic ways with

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29. See, e.g., Occupational Safety and Health Review Commission, 29 U.S.C. §§ 651-678 (1982) (in the Department of Labor); Federal Energy Regulatory Commission, 42 U.S.C. §§ 7171-7177 (Supp. V 1981) (in the Department of Energy).

30. That reality was well understood by the late Nathaniel Nathanson, whose essay Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the "Independent" Agencies, 75 Nw. L. Rev. 1064 (1981), looks in much the same direction as this one.

31. 30 U.S.C. §§ 721-740 (1982).

32. 29 U.S.C. §§ 656, 661 (1982).

33. 42 U.S.C. §§ 5841-5851 (1976 & Supp. V 1981).

34. 15 U.S.C. §§ 45, 46 (1982) (Federal Trade Commission); 15 U.S.C. §§ 4, 25 (1982) (Department of Justice).

35. Council of Economic Advisors (White House), the Department of the Treasury, and the Federal Reserve Board.

36. Federal Trade Commission, 15 U.S.C. §§ 52, 53 (1982); Department of the Treasury, 27 U.S.C. § 205(f) (1982) (intoxicating liquors); 27 C.F.R. §§ 4.1-4.80 (1983) (wines); and the Food and Drug Administration (Department of Health and Human Services), 21 U.S.C. §§ 301-392 (1982).

37. Federal Energy Regulatory Commission (Department of Energy), 42 U.S.C. § 7173(c) (Supp. V 1981); Department of Agriculture, Regulations Under the Packers and Stockyards Act, 9 C.F.R. 201.17-201.200 (1983) (packers and stockyards); Interstate Commerce Commission, 49 U.S.C. §§ 10,701-10,702 (Supp. V 1981).

government, reflecting the circumstances of the particular regulatory regime, the temper of presidential/congressional relations at the time, or the perceived success or failure of an existing agency performing like functions, more than any grand scheme of government.[38]

The diversity of form, however, ought not to conceal the substantial commonalities of internal structure, function, and procedure. Despite the attention often given asserted differences between single, politically responsible administrators and multimember independent commissions,[39] these organizations are more similar than different below the highest levels. In its regulatory work each is subdivided in accordance with the same principles of bureaucratic organization, relies upon staff protected by the same civil service laws,[40] performs the same functions, employs the same public procedures, and settles disputes using the same types of decisional personnel.

Imagine, for example, a single corporation operating a coal mine, a manufacturing plant, and a nuclear power station. The safety of its workplaces would be regulated by the three agencies noted above—the Department of Labor, OSHA/OSHRC (also within the Department), and the NRC. From its perspective, the placement of these regulatory agencies in the structure of government is essentially irrelevant. Each "legislates" in adopting the rules the corporation is compelled to obey; each engages in executive activity in conducting investigations, adopting policies within the "legislative" framework, or deciding to initiate formal proceedings; each "adjudicates" the ensuing complaints. The Administrative Procedure Act applies equally to all agency types. Case law involving agency procedure, judicial review, or presidential and congressional oversight gives no hint that an agency's "independence" vel non could be a significant factor in any decision about appropriate or fair procedures.[41]

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38. R. Cushman, The Independent Regulatory Commissions (1941).

39. E.g., The President's Advisory Council on Executive Organization, A New Regulatory Framework: Report on Selected Independent Regulatory Agencies 13-18 (1971); Hector, Problems of the CAB and the Independent Regulatory Commissions, 69 Yale L.J. 931, 935-37, 961-62 (1960); Minow, Suggestions for Improvement of the Administrative Process, 15 Ad. L. Rev. 146, 147-48 (1963).

40. 5 U.S.C. §§ 1103-1104, 2101-2105 (1982).

41. These generalizations, like almost all generalizations about administrative law, are overstated in some details; the relationship between OSHA and OSHRC, for example, has no counterpart in the NRC. Having a separate, "independent" appellate tribunal within an executive department, however, is neither the predominating pattern nor perceived as a requisite. Cf. R. Cass, Agency Rev. of Admin. Law Judges' Decisions: A Report to the Admin. Conference of U.S. 220 (1983) (independent review boards appropriate only for special class of decisions); Admin. Conference of U.S., Recommendations, 1 C.F.R. § 305-68.6 (1983) (delegation of final decisional authority subject to discretionary review by agency); Freedman, Review Boards in the Administrative Process, 117 U. Pa. L. Rev. 546, 572 (1969) ("legislation compelling all agencies to create Review Boards would be unwise"). The Recommendation of the Administrative Conference, Agency Structures for Review of Decisions of Presiding Officers Under the APA, 1 C.F.R. § 305.83-3 (1983), makes no mention of review board independence.

Beyond the identity of public procedures and the frequently mixed character of agency function lies the essential similarity of the human resources of all agencies. All are predominantly staffed by civil servants protected from political reprisal in the performance of their jobs. In consequence, even agency work outside the public procedures of the APA is substantially independent of political influence, whatever the apparent place of the agency in the governmental structure. As Presidents and political scientists are fond of remarking,[42] the White House does not control policymaking in the executive departments. The President and a few hundred political appointees are at the apex of an enormous bureaucracy whose members enjoy tenure in their jobs, are subject to the constraints of statutes whose history and provisions they know in detail, and often have strong views of the public good in the field in which they work.[43] The ability to contribute to what he regards as beneficial change is often what has motivated the bureaucrat to choose public employment. Presidents come and go while the governing statutes, the bureaucrat's values, and the interactions he enjoys with fellow workers, remain more or less constant. To be sure, he can be influenced by outside pressures; obedience to authority, avoidance of the pain of antagonistic committee hearings or budget reductions, and a general desire for the good will of the political leadership are undoubted factors in his behavior.[44] Winning budget support in Congress, or office space, or effective representation in judicial proceedings, are not trivial goods—even absent the political loyalties that may derive from appointment or the sharing of general aspirations about government policy. Nonetheless the bureaucracy constitutes an independent force—indeed, that fact is in some respects the dominating problem of the current administrative law literature[45]—and its cooperation must be won to achieve any desired outcome.[46]

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42. President Truman is reported to have described his authority as the power "to bring people in and try to persuade them to do what they ought to do without persuasion. That's what I spend most of my time doing. That's what the powers of the President amount to." C. Rossiter, The American Presidency 149 (2d rev. ed. 1960); see also E. Griffith, The American Presidency, The Dilemmas of Shared Power and Divided Government 43-51 (1976); H. Heclo, A Government of Strangers: Executive Politics In Washington (1977); D. James, The Contemporary Presidency 122-29 (1969); G. McConnell, The Modern Presidency 61-79 (1976); R. Neustadt, Presidential Power—The Politics of Leadership From FDR to Carter ch. 3 (1980).

43. For remarkable and sensitive accounts of the internal strengths and functioning of the American national bureaucracy, see the works of H. Kaufman, e.g., The Forest Ranger (1960) and The Administrative Behavior of Federal Bureau Chiefs (1981); see also H. Merry, supra note 26.

44. See infra text accompanying notes 70-74; cf. Kalt & Zupan, Capture and Ideology in the Economic Theory of Politics, Am. Econ. Rev. (forthcoming June 1984) (offering an economic explanation of altruism).

45. See, e.g., H. Merry, supra note 26, at 59-60; Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1676-88 (1975).

46. Experience under the present administration suggests this to be less clearly so when the issue is not which regulation shall be adopted, but whether regulation shall occur at all. Dismantling is perhaps one activity that—if generally tolerated—can be managed from the top.

B. *Presidential Direction of Agencies*

Viewed from any perspective other than independence in policy formation, the legal regime within which agencies function is highly unified under presidential direction. Many administrative functions are centrally performed, a product of congressional recognition that all agencies share many of the administrative needs of government, for which central management under presidential supervision is highly desireable.[47] Thus, the property of independent as well as executive-branch agencies is managed by the General Services Administration, and their contracts are entered in accordance with its procurement regulations.[48] The Department of Justice, to varying degrees, represents their interests in court;[49] the Office of Personnel Management and the Merit Systems Protection Board regulate their employment practices, pay scales and allocation of super-grade management posts.[50] The protection of national secrets, with one statutory exception,[51] occurs under an executive order,[52] which establishes both the regime for classification and the requirements for access; and the executive branch performs the investigations that qualify persons for clearance.[53] Government contracts contain nondiscrimination clauses, and an enforcement regime housed in an executive department has been established, again on the basis of an executive order.[54]

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47. Bruff, Presidential Power and Administrative Rulemaking, 88 Yale L.J. 451, 491-95 (1979).

48. Federal Property and Administrative Services Act of 1949, ch. 288, 63 Stat. 377 (codified as amended at 40 U.S.C. §§ 471-544 (1976 & Supp. V 1981)).

49. 28 U.S.C. § 516 (1982).

50. 5 U.S.C. § 1103 (1982) (Office of Personnel Management); 5 U.S.C. §§ 1205-1206 (1982) (Merit Systems Protection Board and Special Counsel); see also Reorganization Plan No. 2 of 1978, 3 C.F.R. 323, 323-27 (1978), reprinted in 5 U.S.C. § 1101 app. at 452-54 (1982), and in 92 Stat. 3783, 3783-85 (Office of Personnel Management and Merit Systems Protection Board powers); Implementation of Reform of Personnel Management System, Exec. Order No. 12,107, 3 C.F.R. 264 (1978), reprinted in 5 U.S.C. § 1101 app. at 456-60 (1982).

51. Atomic Energy Act of 1954, ch. 1073, §§ 141-146, 68 Stat. 919, 940-43 (codified as amended at 42 U.S.C. §§ 2161-2166 (1976 & Supp. V 1981)).

52. Exec. Order No. 12,065, 3 C.F.R. 190 (1978), as amended by Exec. Order No. 12,148, 3 C.F.R. 412, 418 (1979), and Exec. Order No. 12,163, 3 C.F.R. 435, 443 (1979).

53. There is no obvious statutory authority for either the government's loyalty-security program of the 1950's or its requirement that antidiscrimination clauses be inserted in government contracts. See Chrysler Corp. v. Brown, 441 U.S. 281, 304-12 (1979); Greene v. McElroy, 360 U.S. 474, 502-08 (1959).

54. See Exec. Order No. 11,246, §§ 201-212, 3 C.F.R. 567 (1966), as amended Exec. Order No. 11,375, 3 C.F.R. 684 (1966-1970 Comp.); Exec. Order No. 12,086, 3 C.F.R. 230 (1978); cf. Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

The examples in the text are far from exhaustive. Thus, the Federal Advisory Committee Act requires consultation with the OMB, following criteria intended to promote representativeness and reduce the numbers of advisory committees, before any advisory committee may be created. Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. § 1 (1982)). The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, 4331-4335, 4341-4347 (1976), gives the Council on Environmental Quality a coordinative role in the review and appraisal of

Even in the arena of policy, one readily finds major respects in which agencies' work is centrally managed.[55] The National Security Council coordinates interagency studies to develop national policy at the request of the President or a possibly affected agency, without necessary regard to the independence (or lack of it) of the agencies that may be affected.[56] Similarly, the Office of Management and Budget coordinates agency comments on some proposed rules, promoting conferences and other collaborative efforts in order to produce a result maximally acceptable among all agencies concerned.[57] OMB plays a coordinating role also when agencies find themselves in the jurisdictional disputes that are the inevitable consequence of the enormous number of regulatory measures Congress enacts and the many different agencies to which it assigns responsibility.[58] Although litigation or the seeking of a formal legal opinion from the Attorney General would be possible, for example, in the face of uncertainty whether the Nuclear Regulatory Commission or the Environmental Protection Agency had primary regulatory responsibility for radioactive discharges from NRC regulated plants into EPA regulated waters,[59] the more usual course is to put the matter before OMB, which will attempt more informally to bring the agencies to an understanding.

Other White House operations involve all agencies in the formulation or implementation of overarching national policy. Most prominent may be the OMB's annual creation of a national budget expressing the President's view of the relative priorities to be accorded the various efforts of national government. While Congress has occasionally limited the discipline of the budget process by requiring agencies simultaneously to provide the appropriate congressional committees their submissions to OMB,[60] the President's coordina-

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environmental impact statements throughout government. The President by executive order has authorized it to adopt rules prescribing the form those analyses must take. Exec. Order No. 11,991, 3 C.F.R. 123 (1977).

55. The policy bases for central direction are well set out in A.B.A. Comm'n on Law and the Economy, Federal Regulation: Roads to Reform 68–91 (1979) [hereinafter cited as Roads to Reform]. See also Bruff, supra note 47, at 474–75. However, Congress has occasionally made judgments precluding balancing, which the President as much as the agency concerned would be obliged to respect. See American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981); Verkuil, Jawboning Administrative Agencies: Ex Parte Contacts by the White House, 80 Colum. L. Rev. 943, 950 n.41 (1980).

56. 50 U.S.C. § 402 (1976).

57. See, e.g., Bruff, supra note 47, at 464–65 (discussing the "Quality of Life" review instituted by the OMB in 1971 to review environmental regulations). Although (given the political sensitivities on Capitol Hill) independent agencies' participation has been highly variable and unforced, OMB's "honest broker" function is an important one, as often useful to agencies as it is threatening. R. Katzmann, Regulatory Bureaucracy: The Federal Trade Commission And Antitrust Policy 140 (1980).

58. Roads to Reform, supra note 55, at 70–72, lists "sixteen federal regulatory agencies, within and outside the executive branch, each created and governed by its own separate statutes, with responsibilities that directly affect the price and supply of energy."

59. Cf. Train v. Colorado Pub. Interest Research Group, 426 U.S. 1 (1976).

60. The Interstate Commerce Commission, the Commodity Futures Trading Commission, and the Consumer Product Safety Commission are freed by statute from submitting to plenary

tive, policy-setting function is recognized in these provisions also. Overall, presidential coordination is an activity of importance, one in which the agencies generally cooperate and from which they receive benefit as well as occasional constraint.[61]

The independent agencies are often free, at least in a formal sense, of other relationships with the White House that characterize the executive-branch agencies. The President's influence reaches somewhat more deeply into the top layers of bureaucracy at an executive agency than at an independent commission. Where subsidiary officers in the executive agencies may be subject to presidential appointment and certainly require White House clearance, in the independent agencies only commissioners are appointed with required executive participation; staff appointments, even at the highest level, are made by the commission. The requirement that commission membership be at least nominally bipartisan does not prevent the appointment of political friends but doubtless lowers the political temperature. Typically, the independents have more authority to conduct their own litigation than executive-branch agencies do, although not exclusive authority. Executive-branch agen-

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oversight. See 31 U.S.C. § 1105 (1982), 7 U.S.C. § 4a(h) (1982), and 15 U.S.C. § 2076(k)(2) (1982) respectively. While current proposals of regulatory reform consider whether to exempt all independent regulatory commissions from OMB budgetary and legislative discipline, earlier congressional reaction to agency independence from budgetary discipline was quite the opposite. The Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 (reorganized by P.L. No. 97-258, § 1, 96 Stat. 877 (1982), codified as reorganized in scattered sections of 31 U.S.C.), which established a Bureau of the Budget within the Treasury Department, directed every department and establishment to furnish budget information to the Bureau, and that was taken to include the independents. Id. § 207, 42 Stat. 22. The only exceptions were for "the Legislative Branch of the government and the Supreme Court" which were to transmit their estimates to the President for inclusion in the budget without revision. Id. §§ 201(a), 213, 42 Stat. 20, 23. In 1939 the act was amended specifically to include "any independent regulatory commission or board" among the agencies subject to the budget act. Reorganization Act of 1939, ch. 36, 53 Stat. 561, 565 (codified at 31 U.S.C. §§ 701, 1101 (1982)). Representative Warren, a member of the Select Committee on Governmental Organization, explained this measure to the House in the following words: "With respect to title II of the bill, under the decision in the Humphrey case, we had something new to appear down here in respect of some of these agencies. They shrugged their shoulders and said 'We are not under any budgetary control,' quoting that case . . . . Now, all that title II does is to bring every single, solitary one of them under Budget control, and I believe everybody in this House favors that." 84 Cong. Rec. 2315 (1939); see also 84 Cong. Rec. 2306 (1939) (statement of Rep. Cochran).

61. See, e.g., R. Katzman, supra note 57, at 140:

> [M]anagement specialists in the Commission regard the OMB as a useful ally in instituting organizational changes that are designed to centralize control and are opposed by the bureau heads. Commented one commission staff member who worked closely with the executive director: "We know the bureau heads do not like procedures which enable the chairman and the other commissioners to get a better idea about what the troops are doing. So, we tell them it's just not a question of what the chairman and the other commissioners want. The Office of Management and Budget, which could make trouble for us, will react unsympathetically to requests for more attorneys if we don't accommodate them by tightening up our management systems."

cies have an obligation to clear legislative matters—draft statutes, budget submission, even testimony—with the Office of Management and Budget, an obligation from which some of the independents are excused.[62] One recent statute, the Paperwork Reduction Act of 1980,[63] specifically empowers the independents to overrule by majority the Presidential directives respecting the collection of information to which executive branch agencies are bound.[64] As a political matter, recent Presidents have not required the independent commissions to participate in the centralized oversight of rulemaking associated with presidentially required cost-benefit analyses of major proposals for rulemaking.

Yet these differences are at best matters of degree, overstated if taken to imply rigorous control within the executive branch. Even in executive agencies, the layer over which the President enjoys direct control of personnel is very thin and political factors may make it difficult for him to exercise even those controls to the fullest. An administrator with a public constituency and mandate, such as William Ruckelshaus,[65] cannot be discharged—and understands that he cannot be discharged—without substantial political cost. Also for political reasons, one may be certain that independent commission consultation with the White House about appointments often occurs, even if subdued—as in so many other matters—by the lack of obligation so to consult.

Presidential influence over the independent agencies is heightened by the special ties existing between the President and the chairmen of almost all of the independent regulatory commissions. Although all commissioners, including the chairmen, are appointed to fixed terms as commissioners, the chairman generally holds that special post at the President's pleasure.[66] His posi-

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62. Commodity Futures Trading Commission, 7 U.S.C. § 4a(h) (1982) (budget estimates, testimony, and legislative recommendations); Consumer Product Safety Commission, 15 U.S.C. § 2076(k) (1982) (same); Federal Election Commission, 2 U.S.C. § 437d(d) (1982) (same); Interstate Commerce Commission, 31 U.S.C. § 1105 (1982) (budget estimates). Compare the budgetary discipline to which agencies must otherwise conform. See supra note 60.

63. Pub. L. No. 96-511, 94 Stat. 2812 (codified as amended at 5 U.S.C. § 5315 (1982), 20 U.S.C. § 1221, 30 U.S.C. §§ 1211-1213 (1982), 42 U.S.C. § 292h (Supp. V 1981), 44 U.S.C. §§ 2904(10), 2905, 3501-3520 (Supp. V 1981)).

64. 44 U.S.C. § 3507(c) (Supp. V 1981). By requiring initial clearance from OMB and a public, reasoned act to overrule its guidance, even that provision suggests congressional respect for the President's central, coordinative function.

65. Mr. Ruckelshaus first served as administrator of the Environmental Protection Agency during the Nixon and Ford Administrations and was called to serve again during the Reagan Administration. He acquired a strong reputation for energetic and independent administration during his first term. See J. Quarles, Cleaning Up America: An Insider's View of the Environmental Protection Agency (1976). This reputation underlay the choice of him to replace Anne Gorsuch Burford, President Reagan's first administrator for the agency, after her resignation in the midst of strong criticism of her stewardship. See infra note 351.

66. See D. Welborn, Governance of Federal Regulatory Agencies 6-7, 37, 141 (1977); W. Cary, Politics And The Regulatory Agencies 5-24 (1967). The chairmen of the Federal Reserve Board and the Consumer Product Safety Commission enjoy statutory protection of tenure. 12 U.S.C. § 241 (1982) (Federal Reserve Board); 15 U.S.C. § 2053 (1982) (Consumer Product Safety

tion, moreover, gives him special influence over the agency's course, making it particularly likely that his views will find acceptance. Professor David Welborn's interesting and thorough study of regulatory commission chairmen reveals that they almost completely dominate the administrative side of commission business, selecting most staff, setting budgetary policy, and as a consequence commanding staff loyalties.[67] These administrative responsibilities, corresponding to presidential responsibilities for the government as a whole, doubtless underlie Congress's general recognition of the President's special claim to have his own choice as chairman.[68] Perhaps more surprisingly, the chairmen also dominate commission policymaking: commanding the staff, they are far less often in dissent from commission policy decisions than their colleagues. Here the White House connection is often less direct and generally more subtle,[69] but consultation and coordination on general policy issues of national interest naturally occurs.[70]

C. Agency Relations with Congress and the Courts

Within the domain of agencies we are discussing,[71] the existence of statutory limits and the potential enforcement of those limits in the courts imply oversight relationships in addition to those that agencies may have with the White House or the Secretary. In any matter of importance, the public, the press, the intended subjects of the policy, the courts, and interested congressmen and their staffs also become involved. And one may search both the law and the literature on congressional-bureaucratic relationships[72] or the operation of judicial review[73] in vain for an indication that the relationships between these overseers and the agencies varies in any regular way in accordance with agency structure. The rules of judicial review distinguish between

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Commission). The Federal Reserve Board, at least, operates in a setting in which public confidence has long been thought paramount, and Congress seeks no oversight of its own. See also Bruff, supra note 47, at 496, 499; Roads to Reform, supra note 55, at 85.

67. See generally D. Welborn, supra note 66.

68. It is not surprising to find, then, that most major internal reorganizations of regulatory agencies, undertaken at the chairmen's initiative, have coincided with the election of a new President. The personal, political loyalty of the chairman assures the President a substantial impact on agency administration, and consequent influence on policy.

69. Occasional political firestorms—such as the reaction to President Reagan's reported conversations with the FCC chairman concerning formulation of FCC television syndication rules—serve as reminders of the values the public and Congress attach to independence in substantive agency decisionmaking. See N.Y. Times, Nov. 4, 1983, at C26, col. 1.

70. See W. Cary, supra note 66, at 23-26.

71. See supra note 11.

72. E.g., R. Arnold, Congress and the Bureaucracy: A Theory of Influence (1979); W. Gellhorn, C. Byse & P. Strauss, supra note 2, at 103-26; W. Niskanen, Bureaucracy and Representative Government 138-68 (1971); Fiorina & Noll, Voters, Legislators and Bureaucracy: Institutional Design in the Public Sector, 68 Am. Econ. Rev. (Papers and Proceedings) 256-60 (1978); Weingast & Moran, Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission, 91 J. Pol. Econ. 765 (1983).

73. See, especially, R.S. Melnick, Regulation and the Courts (1983).

those proceedings held "on the record" and those that are not, but express no differences for such proceedings held in one type of agency or another. So also for congressional oversight relationships: budgetary controls, investigations, hearings, and all the general apparatus of congressional oversight are brought to bear across the board. As has often enough been noted, these relationships can be particularly important; congressmen and committee staffs tend to be longer-lived than Presidents and their appointees, and through hearings and budgetary actions can work much mischief.[74]

There are, to be sure, differences of tone. The uncertainty about what "independence" means shapes the behavior of the Congress, the President and the agencies alike. Congressmen tend to talk about the independent commissions in a proprietary way—these are "our" agencies, not so much independent as independent-of-the-President. One result of this attitude—hard to measure but suggested by local belief—may be a greater intensity of congressional political oversight of the independents. Even if congressional oversight is not itself measurably more intense, it may be the more effective if not answered by counterpressures; as a former FTC Chairman recently remarked, the independent agencies "have no lifeline to the White House. [They] are naked before Congress, without protection there," because of the President's choice not to risk the political cost that assertion of his interest would entail.[75] In any event, Congress's techniques do not vary; no particular form of dominion is asserted over "independent" agencies that is not practiced also on the agencies associated more directly with the White House. And, as already indicated, Congress generally provides for a large measure of presidential participation in the day-to-day administration, if not the policy formation, of those agencies.

D. *The Character of Presidential and Congressional Oversight Relations with Agencies is Determined as Much by Politics as by Law*

Perhaps the central fact of legislative-executive management of oversight relationships with the agencies is the extent to which behavior is determined by political factors rather than law. The White House's treatment of cost-benefit analysis by independent regulatory commissions in conjunction with major rulemakings is a notable example. Both President Carter and President Reagan were advised (correctly, in my view) that they had authority to include the independents in their executive orders promoting economic analysis of proposed rules as an element of regulatory reform.[76] Neither did include those

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74. See generally E. Corwin, The President: Office And Powers 1787–1957, at 184–85, 266–67, 291–95 (4th rev. ed. 1957); H. Heclo, supra note 42.

75. Remarks of Calvin Collier, Assembly of the Administrative Conference of the United States, Washington D.C. (Dec. 15, 1983). Chairman Collier noted only three respects in which independent and executive agencies differ: the set term of office, the statutory efforts to attain bipartisan membership on the Commissions, and the practical difference noted in the text.

76. See Executive Orders Nos. 12,044, 3 C.F.R. 152 (1979) (Carter), and 12,291, 46 Fed. Reg. 13193 (1981), reprinted in 5 U.S.C.A. 601 (West Supp. 1983) (Reagan). President Carter was

agencies, reasoning that the political costs of arousing congressional opposition, perhaps to the order as a whole, would be too great.[77] In fact, the independents generally have complied with these executive orders: they have participated in the Regulatory Council, publish regular agendas of rulemaking, are attentive to White House inquiries about their progress, and otherwise behave as if they were in fact subject to the discipline from which they have been excused.[78]

The reasons for this acceptance of presidential input are clear. The President's effective power over the independents would counsel against excluding his concerns even if political loyalties did not command attention.[79] If

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advised by the Department of Justice on the power to bind the independent regulatory agencies to the requirements of Exec. Order No. 12,033, see 43 Fed. Reg. 12,670 (1978), and wrote to the heads of the independent regulatory agencies urging them to follow Exec. Order No. 12,044. A copy of the letter is at 14 Weekly Comp. Pres. Doc. 563 (1978). See also Congressional Research Service, Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues That May Be Raised By Executive Order No. 12,291 (Comm. Print 1981); Hearings On S. 344 and S. 1080 Before the Senate Comm. on Governmental Affairs, 97th Cong., 1st Sess. 319-440 (1981); U.S. Dep't of Justice, Memorandum re Proposed Executive Order on Federal Regulation 7-13 (Feb. 12, 1981) (addressing the question of the legality of applying proposed Executive Order No. 12,291 to the independent regulatory agencies), reprinted in Role of The Office of Management and Budget in Regulation: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 97th Cong., 1st Sess. 158-64 (1981) [hereinafter cited as Hearings].

77. Most of the activities the executive orders sought to reach occurred within the executive branch; even though the rationale for the orders plainly reached the independents' activities, the White House could afford to give up on compliance at the fringes of its concerns in order to avoid a political ruckus—particularly if voluntary compliance could be expected. See remarks of C. Boyden Gray, Counsel to Vice President Bush and the Presidential Task Force on Regulatory Relief, quoted in Hearings, supra note 76, at 94 (reprinting a transcript of the Hall of Flags Regulatory Reform Briefing Before the United States Chamber of Commerce).

78. As reported in *The First 100 Days of E. O. 12291*, a report to the Presidential Task Force prepared by OMB, and released June 13, 1981, reproduced in Hearings, supra note 76, at 308-27:

> Independent Agency Actions: On March 25 Vice President Bush sent a letter to the "independent" regulatory agencies asking them to comply voluntarily with Sections 2 and 3 of the Executive Order and to comply with its overall spirit "to demonstrate to the American people the willingness of all components of the Federal Government to respond to their concerns about the unnecessary intrusion of government into their daily lives." Seven agencies have responded to the Vice President's request so far (Civil Aeronautics Board, Federa Emergency Management Agency, Federal Energy Regulatory Commission, Federal Home Loan Bank Board, Federal Mine Safety and Health Review Commission, Interstate Commerce Commission, and the Securities and Exchange Commission). All of these agencies indicated their willingness to abide by the spirit and principles of the Executive Order.

Id. at 315.

A copy of Vice President Bush's letter to the independents and the agency responses is found in Hearings, supra note 76, at 177-94. See also Implementation of the Paperwork Reduction Act of 1980: Hearings Before the Subcomm. on Federal Expenditures, Research, and Rules of the Senate Comm. on Governmental Affairs, 97th Cong., 2d Sess. 41-42 (1982) (list of agencies required by OMB to estimate number of hours required of public to comply with federal government requests for information).

79. A typical instance involved an appeal to Theodore Sorenson of the Kennedy administration to expedite consideration of the Federal Power Commission's budget. At the time the

the President's policies make good sense, or the importance or utility of coordination or a single policy is evident, the independents can be expected to comply. Its members are likely to understand that the view they bring to policy issues is intentionally specialized and shaped by the particular matters put into their charge, and that the President is in a position to learn and appreciate the views of other responsible agencies, and to supply a useful broader perspective.[80]

Another important consideration lies in the commissions' need for presidential good will. Congressional oversight can be just as political as presidential oversight and, with 535 members of Congress, much more complicated.[81] It can be useful to be associated with national policy, to have a big and politically powerful "friend," when appearing before Congress. The commissions need goods the President can provide: budgetary and legislative support, assistance in dealing with other agencies, legal services, office space, and advice on national policy. They share a commitment to achieving the public interest, and are likely to respect the President's motives and appreciate his political responsibility and support. They are flattered when their own advice is sought, and respectful of office when they are advised. In the circumstances, it is not surprising that the independent commissions can be susceptible to substantial presidential oversight.

On the other hand, for the executive agencies as well as for the independent commissions, the extent of presidential authority to command particular outcomes is uncertain, and the political context constrains as well as empowers presidential intervention. Congressional relationships not only serve as a source of unwanted pressure, but also can be used fruitfully to resist presidential pressures to do what the bureaucrat regards as wrong. The press

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Commission was engaged in a dispute with the Department of the Interior, the Commission's position being in opposition to the administration's. Sorenson made it known that his attention would return to the FPC's budget at about the time it resolved its dispute with the Interior Department.

80. See supra text accompanying notes 55-59. It is also the case that many general skills required by agencies are more efficiently exercised by a central authority. Consider, for example, the frequent provision for self-representation by the independent agencies on judicial review of their decisions. See, e.g., 12 U.S.C. § 1828(c)(7)(D) (1982) (comptroller of currency, Federal Reserve Board and Federal Deposit Insurance Corporations); 15 U.S.C. § 56(a)(2) (1982) (Federal Trade Commission); 28 U.S.C. § 2323 (1976) (Interstate Commerce Commission authorized to represent itself as a party); id. § 2348 (1976) (same authority granted to Federal Communications Commission, Federal Maritime Commission, and the Nuclear Regulatory Commission). Such provisions are responsive to the concern that the President's Department of Justice might not be sufficiently understanding of their positions. Yet what self-representation in court gains for the agencies in ability to defend their particular policies, it loses in capacity to deal with the common issues that characterize much judicial review of agency action: compliance with general statutes, such as the Administrative Procedure Act or the Freedom of Information Act, 5 U.S.C. § 552 (1982), standing, ripeness, and other like issues of reviewability, general standards of review, and, at an operational level, reputation and litigating competence in the judicial forum.

81. See Weingast & Moran, The Myth of the Runaway Bureaucracy: The Case of the FTC, Regulation, May/June 1982, at 33.

and others can also be brought into play. Finally, the governing statute, with the limited set of factors it may identify as relevant to any given policy decision and the assignment of primary decisional responsibility it makes, also serves to constrain the President's influence.

The limited documentation of the process by which OMB and other executive offices participate in rulemaking accounts for the informal nature of the conclusions of this Part as well as public fears of improper pressure. Much takes place over the telephone or in informal meetings, from which documentation is unlikely. OMB naturally fears that exposure, particularly to Congress, is likely to diminish its influence. The production of written documents takes precious time and resources from other tasks. And, much as our society values openness, it remains true that candor and the flexibility necessary for collaboration or compromise are more likely to flourish in the shade.[82] Yet one should not rush from acknowledging the paucity of information to the judgment that Congress's assignments of responsibility have been undone, that the President enjoys an iron control over the work of law-administration. Both because statutes place decisional authority in the agencies, not the President, and because the White House often lacks the personnel and knowledge to make detailed judgments about policy content, actual as well as legal placement of final decisions generally remains with the agencies.[83]

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82. Consider the following exchange between Representative John D. Dingell (D-Mich.), Chairman of the House Committee on Energy and Commerce and of the Subcommittee on Oversight and Investigations, and James C. Miller III, Administrator for Information and Regulatory Affairs, Office of Management and Budget, and Executive Director, Presidential Task Force on Regulatory Relief, after Dingell requested copies of the fifty-five rules returned by OMB to an agency for review:

> D: I will not ask for the originals. I will just ask for copies, and the Chair will advise I will be quite content to receive those. . . .
>
> M: We do not have an original.
>
> D: Well, who has the original?
>
> M: Sir, the flow of paper into our office is awesome. Under the Paperwork Reduction Act, the irony is that the paperflow in our office has increased from something like 3,000 transactions to 12,000 transactions, and so we do not even . . .
>
> D: I am impressed but all I am asking for is copies of papers that are supposed to be in your files.
>
> M: I do not know how you allege that, sir, not knowing what our filing system is. I have just said that we do not keep copies of the regulations.

Hearings, supra note 76, at 112.

83. The recent controversies between OSHA and OMB over alteration of that agency's cotton dust and lead rules suggest the agency's effective initiative and authority. See Lead Exposure Limits To Be Retained, Legal Times, May 30, 1983, at 1 col. 1. To the same effect, see the Environmental Protection Agency's lead standards, 40 C.F.R. §§ 60.120-.123, 60.180-.186 (1983) (lead smelters); 40 C.F.R. § 50.12 (1983) (ambient air quality standards for lead). For accounts of presidential interventions at EPA in prior administrations, see B. Ackerman & W. Hassler, Clean Coal/Dirty Air 86-103 (1981); J. Quarles, supra note 65 at 117-42; Pedersen, Formal Records and Informal Rulemaking, 85 Yale L.J. 38, 51-59 (1975).

In sum, any assumption that executive agencies and independent regulatory commissions differ significantly or systematically in function, internal or external procedures, or relationships with the rest of government is misplaced. Our government is characterized by a profusion of forms, each related in significant ways to Congress, President and Court. The choice of form has little relation to the work they do or the manner in which they perform it.

II. The Limited Constitutional Instructions About the Place of Agencies in Government

Just as the realities of the administrative state constrain any effort to describe it in purely legal and theoretical terms, so for a lawyer do the existing bodies of textual and decisional prescription of the Constitution. Although the latter resources are open to reinterpretation and fresh understanding—in the very light, for example, of the contemporary facts of government—the flexibility to reshape language or find error in past conception is no license to disregard them. An overall sense of continuity, of being anchored in the text and its interpretations, is central to our sense of the Constitution's place. This Part of the essay examines those legal resources—constitutional text, context, and interpretation—to see what constraints they may impose on Congress's undoubtedly large authority to structure the inferior parts of the federal government.

From this examination will emerge three general propositions about the three theoretical approaches to understanding the place of agencies in government identified in the introduction.[84] The first is that, as a textual and interpretational matter, the separation-of-powers model need and probably should be taken no further than its use for understanding the interrelationships of the three named actors (Congress, President, Court) at the very pinnacle of government. Subject to definitional issues, we accept (and the Constitution is reasonably explicit) that, as among them, only Congress may legislate, only the Supreme Court may adjudicate, and only the President may see to the faithful execution of the laws; and each is to have a significant function in these respects. In this way, "separation of powers" remains vital in suggesting the forms of control each of the three may exercise over the bulk of goverment. Yet in the agencies, as we have seen, powers are not in fact separated and the agencies are not responsible to only one of these actors. Although agencies certainly might be assigned to one or another of the executive, legislative, or judicial branches (but not more than one, if we are rigorously to pursue the separation idea), that signifies little for the functions they perform. No compelling textual or interpretive mandate requires such a formal placement to be effected.

A second proposition emerging from the cases is that considerations of individual fairness more closely associated with the idea of separation of

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84. See supra text following note 14.

functions often underlie the cases in which the idea of separation of powers appears to have played a significant role. The impulses for both congressional and judicial action may arise from individuals' needs for protection from political intervention in particular cases more than any general theory about place in government; the former can be provided without necessary regard for the latter.

Finally and perhaps most importantly, the text and particularly the context suggest a series of postulates about necessary relationships between the President and administrative agencies—relationships readily understood in checks-and-balances terms. The important constraint on Congress's ability to structure the work of law-administration lies in the need to perpetuate the tensions and interactions among the three named heads of the Constitution. Whatever arrangements are made, one must remain able to characterize the President as the unitary, politically accountable head of all law-administration, sufficiently potent in his own relationships with those who actually perform it to serve as an effective counter to a feared Congress. The central inquiry is to identify those relationships that are necessary, either to conform with the constitutional text or to preserve the possibility of the President's continuing effectiveness. Since this inquiry remains entirely sensible in the face of the realities of contemporary government—and indeed the political counterweight idea has lost none of its compulsion for us—the checks-and-balances approach remains a useful tool for analyzing and suggesting possible limits on Congress's ability to structure the administrative process.

A. *The Text and Context of the Constitution*

The text and structure of the Constitution impose few limits on Congress's ability to structure administrative government. One scanning the Constitution for a sense of the overall structure of the federal government is immediately struck by its silences. Save for some aspects of the legislative process, it says little about how those it names as necessary elements of government—Congress, President, and Supreme Court—will perform their functions, and it says almost nothing at all about the unelected officials who, even in 1789, would necessarily perform the bulk of the government's work. Thus, article I describes in some detail the makeup of the House and Senate, the subjects on which they might act, and the manner in which they may effectively legislate; but even this relatively full description talks only to the authority and actions of elected officials. One finds no mention there of important aspects of Congress's work, or of most persons who now work on its behalf—committees and their staffs, the General Accounting Office, the Congressional Budget Office, the Library of Congress.[85]

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85. To be sure, the committee system became particularly important with the emergence of the political party, and the explosive growth in staff has occurred in recent years. Nonetheless, it seems fair to describe article I as assuming much of what a legislature does, and providing only for what seemed likely to prove controversial or dangerous to citizens or the states.

For articles II and III, the limitations of description are even more striking.[86] Article II speaks directly only about elected officials, chiefly the President and his powers; it describes those powers in the most summary of terms. He is vested generally with "the executive Power,"[87] but what that is in the domestic context does not readily appear.[88] Putting aside foreign relations and military authority—a very large part of the Presidency, but not the focus of this essay[89]—he has the following powers and/or responsibilities:

> to appoint those "Officers of the United States . . . which shall be established by Law," subject to the requirement of senatorial confirmation and to the possibility that Congress might effectively limit this power to appointing "the Heads of Departments";[90]
>
> to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices";[91]
>
> "from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration" proposed legislation;[92]
>
> to "take Care that the Laws be faithfully executed."[93]

These provisions suggest a supervisory, perhaps even caretaker presidential role, in relationship to shadowy "executive departments" from which opinions might be sought. One is left to infer that there would be other officers possessing legal authority to act for the government, and one simply is not told whether the President or those officers are to act on those opinions.

Article III is more direct, denying any need for inferior federal courts unless and to the extent Congress chose to create them. Only the Supreme Court is a required element of the federal judiciary, and even for that institution central issues are left unspoken—its number, its term, its authority over the work of the other named actors. In almost all significant respects, then, the job of creating and altering the shape of the federal government was left to

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86. The ordering reflects the anticipated ordering in importance of the powers thus separated and the bodies exercising them. See The Federalist No. 51 (J. Madison) (Congress inevitably the most powerful); The Federalist No. 78 (A. Hamilton) (judiciary as "least dangerous" branch); G. Wills, supra note 19, at 128–29.

87. U.S. Const. art. II, § 1, cl. 1.

88. Both the legislative and the judicial powers are enumerated in the Constitution, the former by a reference to "Powers herein granted," U.S. Const. Art. I, § 1, the latter by a statement what it "shall extend to." U.S. Const. Art. III, § 2. "[W]hether intentional or not, [the absence of any similar language from the vesting clause of article II] admitted an interpretation of executive power which would give to the president a field of action much wider than that outlined by the enumerated powers." C. Thach, The Creation of the Presidency 1775–1789, at 138–39 (1923).

89. See supra note 11.

90. U.S. Const. art. II, § 2, cl. 2.

91. U.S. Const. art. II, § 2, cl. 1.

92. U.S. Const. art. II, § 3.

93. Id.

the future—to the congressional processes suggested by Congress's authority to adopt any law "necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[94]

If one moves outward from the text to its structure, the context in which it was drafted, the records and debates of the constitutional convention, and its initial implementation by the first Congress, one can identify a number of fundamental underlying judgments.[95] The text's omission to provide for the "Departments" it occasionally refers to[96] reflects a parliamentary history in which quite detailed proposals for cabinet structure were put forward. Some decisions respecting the allocation and sharing of power within such a structure were clearly taken, but then a determination was made to eschew detailed prescription as a means of underscoring presidential responsibility and preserving congressional flexibility within the constraints of the judgments that had been made.

1. *The President is to be a Unitary, Politically Accountable Head of Government.* — Of the decisions clearly taken, perhaps none was as important as the judgment to vest the executive power in a single, elected official, the President. The question was early debated. Roger Sherman, for example, believed that the executive should be subsidiary to the legislature, whose members "[w]ere the best judges of the business which ought to be done by the Executive department, and consequently of the number necessary from time to time for doing it. . . . [T]he legislature should be at liberty to appoint one or more as experience might dictate."[97] His views were defeated, however,[98] as were the views of those who would have provided in the Constitution for the sharing of executive authority with a council of revision or a council of state.[99] Even if monarchy was rejected for the new nation, that model of executive power was a familiar one. While it was understood that there would be departments responsible for daily administration, the Conven-

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94. U.S. Const. art. I, § 8, cl.18.

95. For a brief and well-regarded analysis of the development of article II, see C. Thach, supra note 88.

96. Departments are referred to in the necessary and proper clause of article I ("any department") and the opinion in writing ("executive Departments") and appointment ("Heads of Departments") clauses of article II.

97. 1 M. Farrand, The Records of the Federal Convention of 1787, at 65 (1911).

98. Id.; C. Thach, supra note 88, at 89–90.

99. All of the proposals for a formal advisory body were defeated, despite the convention's concern that the President receive sound advice. 1 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 159, 164, 214, 243, 257, 292 (J. Elliot ed. 1866 & Photo. reprint 1941) [hereinafter cited as Elliot's Debates]; 1 M. Farrand, supra note 97, at 93–102, 138–40; 2 id. at 73–80, 298, 367, 537–42. Thach ascribes the rejections to the experience in the states following the Revolution, in which governors encumbered by councils had proved weak and unable to provide either efficient administration or effective resistance to the power of state legislatures; New York, the one state whose governor was not so burdened, had seemed a model of efficient government. C. Thach, supra note 88, at 25–54.

tion clearly and consciously chose a single and independent executive over a collegial body subject to legislative direction.[100] "The principle that executive efficiency and executive responsibility varied in inverse proportion to the size of the executive body had been so strongly inculcated and in so many different ways that it was strong enough to force the acceptance of a new principle of executive organization."[101] That choice is one of central importance to the arguments of this essay; however the executive power is defined, it is argued, it must be in ways that respect this quite fundamental structural judgment.

If the Convention was clear in its choice of a single executive—and its associated beliefs that such a person might bear focused political accountability for the work of law-execution and serve as an effective political counterweight to Congress—it was ambivalent in its expectations about the President's relations with those who would actually do the work of law-administration and desirous of the advantages of congressional flexibility in defining the structure of government within the constraints of this choice. "The beginning of wisdom about the American Presidency is to see that it contains both principles [that is, administrative responsibility subordinate to the legislature and political equality with it] and to reflect on their complex and subtle relation."[102] Thus, the shadowy references to executive departments and, in particular, the opinions in writing clause,[103] seem to be residues of propositions such as Gouvernour Morris's proposal in the final days of the Convention for a council of state composed of the Chief Justice and Secretaries of Domestic Affairs, State, Foreign Affairs, War, Marine, and Commerce and Finance.[104] The Morris proposal would have respected the central political structural judgments that had been made. Under it, each of the identified departments and their Secretaries were to have been granted specific duties—for example, the Secretary of Domestic Affairs was "to attend to matters of general policy, the state of agriculture and manufactures, the opening of roads and navigations, and the facilitating communications through the United States; and he shall, from time to time, recommend such measures and establishments as may tend to promote those objects."[105] Yet each Secretary was distinctly under Presidential control, holding office at the President's pleasure. As a body, they were to be available to the President for the discussion of any matter he might choose to submit, and he could require from them "written opinions." Although each was to be "responsible for his

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100. The Federalist No. 70 (A. Hamilton), the first of the *Federalist* papers addressing the requisites of the presidency, is given over entirely to this choice, as the most important of the choices made, in its tendency to promote decisiveness and responsibility.

101. C. Thach, supra note 88, at 89.

102. Storing, Introduction *to* C. Thach, supra note 88, at vii.

103. U.S. Const. art. II, § 2, cl. 1. See supra text accompanying note 91.

104. See C. Thach, supra note 88, at 119-24; see also id. at 100, 138-39 (Morris's strong influence on article II).

105. 1 Elliot's Debates, supra note 99, at 250.

opinion on the affairs relating to his particular department,"[106] the possibility of ultimate decision was placed elsewhere: the President "shall, in all cases, exercise his own judgment, and either conform to such opinions, or not, as he may think proper."[107]

Certainly one consideration underlying rejection of the Morris proposal was the wish to leave to successive Congresses, through the medium of the necessary and proper clause, the flexibility required for shaping the government to the demands of changing circumstances. Another consideration was to enhance the accountability—and thus the power—of the President by denying him the chance to hide behind a council's approval of his acts.[108] Indeed, the immediate working out of the constitutional scheme by the first Congress largely paralleled the Morris proposal. Cabinet departments were promptly established, with day-to-day responsibilities for administration, but reporting to the President.[109] Following the Morris model, a practice of cabinet consultation on important issues, nonbinding but respected, quickly arose.[110] Presidential control over the cabinet was assured by the provision in this legislation—the decision of 1789, as it came to be regarded,[111]—that the Secretaries were to serve at the President's pleasure, not for a term of years, and thus could be removed by him without cause or senatorial assent.[112]

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106. 1 Id. at 250.

107. Id. at 251.

108. C. Thach, supra note 88, at 125. It is possible also to view the decision not to adopt the proposal as one largely of style. Note the curious wording of the necessary and proper clause, which speaks only of "powers vested *by this Constitution* . . . in any Department or Officer," not of powers vested by the legislature. It seems that the draftsmen continued to regard the departments as having a constitutional shape and constitutionally vested powers, whether or not made explicit. This lapse may be no more than stylistic, attributable to the heat of the Philadelphia summer and of other, more important controversies among the draftsmen.

109. Act of July 27, 1789, ch. 4, 1 Stat. 28 (Department of Foreign Affairs); Act of August 7, 1789, ch. 7, 1 Stat. 49 (Department of War); Act of September 2, 1789, ch. 12, 1 Stat. 65 (Department of the Treasury); Act of September 22, 1789, ch. 16, 1 Stat. 70 (Postmaster General); Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73 (Attorney General).

110. See A. McLaughlin, A Constitutional History Of The United States 238–47 (1935).

111. See Myers v. United States, 272 U.S. 52, 143 (1926).

112. Location of the appointment power in the President, with senatorial advice and consent, had not finally been decided upon for all officers of government until the closing days of the Constitutional Convention; see Hart & Wechsler, supra note 2, at 6; 2 M. Farrand, supra note 97, at 488–90, 538–40; and Hamilton had assumed in The Federalist No. 77 that "the consent of [the Senate] would be necessary to displace as well as to appoint." Federalist No. 77, at 459 (C. Rossiter ed. 1961). The question of removal authority was not explicitly discussed at the convention and was treated as open in the legislative debates of 1789; the decision to leave it with the President—carried in the Senate, after secret debate, by the Vice President's vote to break a tie—could well be regarded as one of political wisdom or respect for George Washington rather than a reflection of what the legislators experienced as constitutional compulsion. (The House debates are summarized in Myers v. United States, 272 U.S. 52, 111–39 (1926), and may be found in 1 T. Benton, Abridgement Of The Debates Of Congress, 85–90, 102–08 (New York 1857).) The failure of the convention to place the removal power explicitly in the President alone led to a constitutional crisis when President Andrew Johnson dismissed Secretary of War Stanton in apparent violation of the Tenure of Office Act, ch. 154, 14 Stat. 430 (1867), see A. McLaughlin, supra note 110, at 662–75, and the question of senatorial participation in removal that act raised was not

One ought not, however, mistake the drafters' possible ambivalance about presidential role and their willingness to trust the issue of governmental superstructure to future Congresses for a willingness to see the President assigned a role distinctly subordinate to Congress. In providing that Congress need not be convened until December of each year,[113] the draftsmen plainly anticipated a substantial executive function. Congress's articulated functions lay in the passage of legislation to create the framework of government and then to set the standards and appropriate the funds by which the business of government would be carried on. Inevitably that legislation would be episodic—enacted without necessary care for its relationship to existing law and having to be applied to future events, not foreseen, in light of the then existing corpus of law and the exigencies of the moment. Executive authority had to provide correctives for these inherent difficulties, and it was important that the chief executive have a body of individuals, held in his confidence, with whom to consult. The responsibility of government was to be focally his; but day-to-day administration and decision, of necessity, was to be entrusted to the hands of others.

2. *The Maintenance of Tension Among the Named Bodies.* — A central, coordinating and overseeing role for the President in relation to all government "officers" is required, also, to permit that office to serve as an effective check on the otherwise to be feared authority of Congress. The framers sought both to create a more effective national government than they had previously experienced, and to make it resistant to domination by transitory majorities or those who for the moment might be the public's political representatives. To those ends, the governmental structure they created embodies both separated powers and interlocking responsibilities; the purpose was to prevent both majoritarian rashness and the governmental tyranny that could result from the conjoining of power in a single source. Maintaining conditions that would sustain the resulting tension between executive and legislature was to be the central constraint on any proposed structure for government.[114]

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settled until the decision in *Myers*, sixty years later. See infra text accompanying notes 145–47, 163–65.

113. U.S. Const. art. I, § 4, cl. 2.

114. The success of these ambitions is to be measured by the richness and sweep of contemporary government's reach; by the specialization of function that has, overall, occurred; by the extent of political freedom we nonetheless enjoy; and by the continuing tensions among the three named branches over issues of political advantage.

In his recent Storrs Lectures at Yale Law School, my colleague Bruce Ackerman put the point in the following way:

> [T]he separation of powers [is] a vast machine by which each constitutional official is encouraged to question the extent to which other constitutional officials are successfully representing the People's true political wishes. Thus, while each officeholder will predictably insist that *he* speaks with the *authentic* accents of the People themselves, rival representatives in other institutions will often find it in their interest to deny that the representative has indeed represented the people in a fully satisfactory way. . . . As it works itself out in practice, the system emphasizes that *no legal form can enable any*

The Constitutional Convention arose out of dissatisfaction with a government dominated by the legislature, a dissatisfaction on both practical and theoretical grounds. In practice, legislative government did not work; legislatures were fragmented and episodic in their attention to the affairs of state, diffusing and defeating responsibility.[115] In theory, the joining of all government functions in one authority, unchecked by others, was an invitation to tyranny.[116] Interpenetration of function and competition among the branches would protect liberty by preventing the irreversible accretion of ultimate power in any one. As Madison wrote in the *Federalist* papers, the essence lay in "giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[117] Madison's strategy was given form in the veto power and in Congress's authority to create the infrastructure of executive government and to exercise plenary control over the President's expenditure of funds (and thus over the size and power of the executive establishment).[118]

The imprecision inherent in the definition and separation of the three governmental powers contributes to the tensions among them and in that way serves the same beneficial and protective functions as were anticipated from the creation of checks and balances. In the long interludes between congressio-

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> *small group in Washington, D.C. to speak unequivocally for We the People . . . .* Instead the House and Senate and Presidency each represent the People *in a manner of speaking*; each is [only] a metaphor . . . .

Ackerman, Discovering the Constitution 1-26 to 1-27 (unpublished speaking manuscript) (emphasis in original).

115. C. Thach, supra note 88, at 25–75; The Federalist No. 48, at 310–11 (J. Madison) (C. Rossiter ed. 1961) (quoting T. Jefferson).

116. Bruff, supra note 47, at 467–68, quoting The Federalist No. 48 (J. Madison). See generally Levi, Some Aspects of Separation of Powers, 76 Colum. L. Rev. 371 (1976); E. Corwin, supra note 74, at 3–30; A. Sofaer, War, Foreign Affairs, And Constitutional Power: The Origins 1–24 (1976); G. Wood, Creation of the American Republic, 1776–1787, at 527 (1969).

117. The Federalist No. 51, at 321–22 (J. Madison) (C. Rossiter ed. 1961). Madison conceded that Congress was better placed for this than the other branches; the choice of a two-part legislature was expected to generate an internal check within that body.

> This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights.

Id. at 322; see G. Wills, supra note 19, at 120.

118.

> My classes think I am trying to be funny when I say that, by simple majorities, Congress could at the start of any fiscal biennium reduce the President's staff to one secretary for answering social correspondence, and that, by two-thirds majority, Congress could put the White House up at auction. But I am not trying to be funny; these things are literally true . . . .

Black, The Working Balance of the American Political Departments, 1 Hastings Const. L.Q. 13, 15 (1974).

nal sessions, the President would have to make as well as execute national policy; execution cannot be separated from interpretation, nor interpretation from the exercise (within whatever bounds might be statutorily defined) of a policy function. How sharp the definition of bounds had to be (the delegation question as we now know it) or how far removed from the President the function of executing a given law could be placed were open questions. This imprecision invites the desired political rivalries that tend to keep the two more dangerous branches in check. At the same time it permits smoother functioning on issues of agreed importance than would a more rigid structure. With room left for interaction, change and growth over time, the relative strength of President and Congress could change with the political climate, without offending the constitutional structure.

> The Framers expected the branches to battle each other to acquire and to defend power. To prevent the supremacy of one branch over any other in these battles, powers were mixed; each branch was granted important power over the same area of activity. The British and Confederation experience had led the Framers to avoid regarding controversy between the branches as a conflict between good and evil or right and wrong, requiring definitive, institutionally permanent resolution. Rather, they viewed such conflict as an expression of the aggressive and perverse part of human nature that demanded outlet but had to be kept from finding lasting resolution so that liberty could be preserved.[119]

Thus, while the actual text of the Constitution says little about the structure of the federal government beneath the apex, the structure and history of the Constitution make clear the framers' decisions concerning the interdependence of the three branches and the place of the agencies as subsidiary to all three. One may see the issue of balance of power among the three named branches of government as reflecting a process not an institution, with impermanence of resolution not only inevitable but desirable as an outcome. "The constitutional convention of 1787 is supposed to have created a government of 'separated powers.' It did nothing of the sort. Rather, it created a government of separated institutions sharing powers."[120] Whether described as a "'permanent guerrilla warfare' between the executive and legislative branches," or as a "duty to act . . . coupled with a duty to act with care and comity and with a sense of the higher values we all cherish,"[121] the checks and balances idea embodied in the Constitution creates and demands the continuance of a "tension among the branches, with each, at the margin, limiting the other,"[122] so that, in Madison's terms, "'ambition [could] be made to counteract ambition.'"[123]

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119. A. Sofaer, supra note 116, at 60.
120. R. Neustadt, supra note 42, at 26.
121. Levi, supra note 116, at 391.
122. Id.
123. Id. at 378 (quoting The Federalist No. 51 (J. Madison)).

B. *Interpretations of the Constitutional Constraints*

In addition to constitutional text and context, the interpretations given the President's place in government by courts and others during the past two hundred years influence contemporary understandings of his relationship to the agencies and Congress's power to structure that relationship. Perhaps of particular importance here is the legal folklore about independent regulatory commissions, in some versions suggesting that parts of government responsible for the administration of important government programs can be put wholly beyond the President's supervisory reach. That folkloric view should seem surprising in light of the foregoing, and indeed a close look at the cases will show that that suggestion is hardly a necessary reading; the Court never had to confront so dramatic an assertion, and our understanding of its opinions can be reconstructed without much difficulty to reflect awareness of the need to maintain a tension among the named heads of government, in which all participate.

Quite different from the folklore is the proposition that Congress is free to choose between placing ultimate responsibility for decision with the President and giving that responsibility to those to whom it has initially assigned the work of administration. Even within what is undoubtedly the sphere of executive influence—for example, the conduct of law enforcement—that proposition finds support in the Constutional Convention's failure to adopt measures such as the Morris plan. The proposition seems undebatable where Congress can find circumstances, such as a need for objective decision, that warrant placing administration beyond the sphere of its own as well as the President's political influence. Yet note that neither choice effects or is a justification for presidential *exclusion*. However unserviceable rigid separation-of-powers arguments have become beneath the very top levels of government, the checks-and-balances idea retains force: congressional arrangements that threaten the viability of an independent, unitary executive capable of opposing the Congress's own assertions of power are, for that reason, suspect.

1. *The Early Interpretations.* — The Constitution vests all executive power in the President and, while contemplating delegation, clearly intends focused, personal responsibility for its exercise. Yet Congress could and did create responsibilities in the departments to be exercised by departmental heads, not the President. Those regimes were creatures of law, law whose faithful execution the President had as much responsibility to assure as any other; what, then, was to be his role? Attorneys general vacillated whether an appeal lay to the President from particular decisions of the secretaries, but the practice was to leave decision where the Congress placed it.[124] The difficulties were well stated in Professor Corwin's classic study of the Presidency:

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124. See, e.g., 1 Op. Att'y Gen. 624 (1823) (holding that no appeal would lie); 2 Op. Att'y Gen. 480 (1831) (same); 2 Op. Att'y Gen. 507 (1932) (same); 5 Op. Att'y Gen. 630 (1852) (same); 10 Op. Att'y Gen. 527 (1863) (same); 11 Op. Att'y Gen. 14 (1864) (same); 18 Op. Att'y Gen. 31 (1884) (same); 2 Op. Att'y Gen. 463 (1831) (holding that an appeal would lie); 6 Op. Att'y Gen. 326, 343 (1854) (same); 7 Op. Att'y Gen. 453, 464 (1855) (same); 15 Op. Att'y Gen. 94, 101 (1876) (same).

> Suppose . . . that the law casts a duty upon a subordinate executive agency *eo nomine*, does the President thereupon become entitled, by virtue of his "executive power" or of his duty to "take care that the laws be faithfully executed," to substitute his own judgment for that of the agency regarding the discharge of such duty? An unqualified answer to this question would invite startling results. An affirmative answer would make all questions of law enforcement questions of discretion, the discretion moreover of an independent and legally uncontrollable branch of the government. By the same token, it would render it impossible for Congress, notwithstanding its broad powers under the "necessary and proper" clause, to leave anything to the specially trained judgment of a subordinate executive official with any assurance that his discretion would not be perverted to political ends for the advantage of the administration in power. At the same time, a flatly negative answer would hold out consequences equally unwelcome. It would, as Attorney General Cushing quaintly phrased it, leave it open to Congress so to divide and transfer "the executive power" by statute as to change the government "into a parliamentary despotism like that of Venezuela or Great Britain, with a *nominal* executive chief or president, who, however, would remain without a shred of actual power."[125]

The Supreme Court had indicated in *Marbury v. Madison*[126] that a court could direct the performance of a nondiscretionary duty given to the executive.[127] In 1837, in *Kendall v. United States*,[128] it seemed to go further, giving the negative answer to Professor Corwin's question—that Congress could structure government so as to preclude the President from imposing his will on a cabinet officer.

Kendall was an action in mandamus, a direction to the Postmaster General to pay a specific sum of money which Congress by special statute had ordered paid but which the President wished withheld. At the time, as *Marbury* illustrates, a writ of mandamus was available only if it could be shown that its subject had been given no discretion in the performance of the function at issue. Finding the Postmaster under a legal obligation to pay, the Court directed that mandamus issue. It would be "alarming," said the Court, to assert that

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125. E. Corwin, supra note 74, at 80–81. For contemporary efforts, see R. Neustadt, supra note 42; E. Hargrove, supra note 26; and Ledewitz, The Uncertain Power of the President to Execute the Laws, 46 Tenn. L. Rev. 757 (1979).

The first Congress's differential handling of the Departments of State and War, on the one hand, and Treasury, on the other was drawn on by Freund and others to suggest a basis for distinguishing between "executive power" and "administrative power." See generally supra note 11. Stated as a proposition about complete congressional control, the distinction seems one example of Corwin's "flatly negative," and therefore unacceptable, answer. As a marker of differential authority, it has much more persuasive force. See infra note 277.

126. 5 U.S. (1 Cranch) 137 (1803).

127. See the full discussion of the case's significance for administrative law in Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1 (1983).

128. 37 U.S. (12 Pet.) 524 (1837).

> Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the discretion of the President.[129]

While this language might be understood as broadly confirming Congress's power to confer discretion on administrators beyond the President's control, the decision carefully avoided invitations to decide so large an issue.[130] Because the "duty" actually involved in the case left no scope for judgment, there was no need to decide what voice the President might have where the law offers a choice of possible courses of action—that is, where it confers discretion on the responsible administrator. The opinion holds only that the President and other executive officials must act within the law.[131]

Effective presidential power to control subordinates may be substantially a function of his ability to enforce his wishes, to remove persons in whom he lacks political confidence or, less broadly, who disobey his valid directives.[132] In *Marbury*, the Court had established that for some officers of government—in this case ones we have since come to call article I judges—Congress could constrain the President's removal authority over persons he appointed and who were not constitutionally entitled to tenure.[133] This proposition was extended to employees in "the executive Departments" in *United States v.*

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129. Id. at 610.

130. See the full discussion of the case, in the context of an effort to understand the President's relationship to administration, in Grundstein, supra note 11, at 309–19. See also Monaghan, supra note 127, at 14–16, 25.

131. See Decatur v. Palding, 39 U.S. (14 Pet.) 497 (1840). The restrictions on the effective use of mandamus are reflected in the rarity of its use during the nineteenth century as an instrument for judicial control of law-administration. See Monaghan, supra note 127, at 14–16; Hart & Wechsler, supra note 2, at 1381.

132. Presidential control has its roots in "the executive power" and the responsibility to "take care that the laws be faithfully executed," both express in the constitutional text, and not, as is often thought, in an arguable removal authority never better than implicit. While surely control is hard to effect without workable disciplinary tools in hand,

> the commonly accepted explanation that the presidential control over administration is an accidental result of the possession of the power of removal [is erroneous]. The exact reverse is the true explanation. The power of removal was rather derived from the general executive power of administrative control. The latter power has not been an extra-constitutional growth. It was the conscious creation of the men who made the Constitution.

C. Thach, supra note 88, at 158–59.

133. 5 U.S. (1 Cranch) 137 (1803). The offices in question were for Justices of the Peace in the nation's capital, who had been given a fixed term of office. An Act Concerning the District of Columbia, ch. 15, § 11, 2 Stat. 103, 107 (1801). Like so much else in the opinion, the discussion of the validity of this restriction is dictum, which Chief Justice Taft sought valiantly to defeat in his opinion for the Court in Myers v. United States, 272 U.S. 52, 139–44 (1926). Nonetheless, he was careful to recognize the existence of special considerations supporting restrictions on the President's removal authority in such cases, id. at 135, 157–59. See the discussion in Bruff, supra note 47, at 476–78.

Perkins.[134] That case involved a claim for pay allegedly owed to naval engineers who appeared to have been assured of office for a term by statute, but who had been honorably discharged by the Secretary of War when he found no position available for them. The engineers prevailed when the Court concluded that fixed tenure had been granted:

> We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest. . . . The head of a Department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto.[135]

The constitutionality of the civil service was thus assured—and with it, recognition of a sharp limitation of the President's power over the personnel of executive government.

Finally, the early Court established that neither the separateness of Congress, Court, and President nor the primary responsibilities assigned to each precluded Congress from authorizing the performance of other sorts of ancillary power. For example, while the Constitution placed the lawmaking function in Congress and the dispute-resolving function in the judiciary, the courts could be authorized to adopt rules of procedure to govern proceedings before them.[136] Delegations to territorial and district governments were commonplace, objectionable only if they created a territorial government in which the three functions of government were indistinct;[137] these delegations could include authority for persons who were not article III judges to exercise unmistakably judicial functions.[138] And the President (or other executive officials) could validly be authorized to engage in rulemaking.[139]

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134. 116 U.S. 483 (1886).

135. Id. at 485.

136. Such power has been statutorily conferred since the beginning of the republic, Judiciary Act of 1789, ch. 20, § 17(b), 1 Stat. 73, 83; see also 1 K. Davis, Administrative Law Treatise 158–59 (2d. ed 1978), and was early sustained in a noted opinion of Chief Justice Marshall, Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 15–16 (1825).

137. Springer v. Philippine Islands, 277 U.S. 189 (1928).

138. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855). Whether the last two cases (and their successors, e.g. Palmore v. United States, 411 U.S. 389 (1973)) "support a general proposition [that federal judicial power must be exercised by article III judges] and three tidy exceptions . . . or whether instead they are but landmarks on a judicial 'darkling plain' where ignorant armies have clashed by night," was the issue hotly debated by the plurality and dissenting opinions in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 91 (Rehnquist, J., concurring), discussed infra notes 238–56 and accompanying text. What was not debated, however, was that Congress could to a substantial extent (and in cases particularly important from a separation-of-powers and policy perspective) place judging in the hands of federal officials outside the federal judiciary defined in article III.

Crowell v. Benson, 285 U.S. 22 (1932), sustained Congress's power to assign to federal agencies initial decision of the great bulk of factual issues in what were essentially disputes

2. *The President's Removal Power and a Formal Approach to the Place of Administration.* — The accelerating growth of national government following the Civil War brought with it the civil service laws, the first of the independent regulatory commissions,[140] the heightened use of delegation and heightened concerns about it, and a general worrying about the relationship of the Presidency and administration. Perhaps disturbed by the consequences of relegating all this burgeoning authority to the President's political domain, and consistent with growing faith in scientific administration, leading commentators argued that "executive" and "administrative" authority were distinct—the latter belonging to professional public administrators, who could properly be placed outside the President's direction.[141]

Understanding of the relation between the Presidency and administration was shaped by two cases of the 1920's and 30's, *Myers v. United States*[142] and *Humphrey's Executor v. United States*.[143] Both tested the President's claim of inherent executive authority to remove presidential appointees from office in the face of statutory limitations on removal; both appeared to use a strictly formal, separation-of-powers approach to the place of agencies in government. The seemingly opposite conclusions to which they came are usually understood in terms of that approach as denying the independent regulatory commissions any determinate place in the tripartate structure of government.[144] Yet their conclusions can also be understood in light of the checks-and-balances approach, and so understood the opinions are both readily reconciled and consistent with the constitutional scheme.

Myers concerned a postmaster appointed to a four-year term under a statute which for fifty years had required senatorial assent to both appointment and removal of these officials. The President sought to remove him before the expiration of his term, without obtaining senatorial concurrence.

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between private parties under a federal compensation scheme, subject only to review for factual sufficiency (not correctness) and legal accuracy. See, e.g., Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv.L.Rev. 1362 (1953), reprinted in Hart & Wechsler, supra note 2, at 338–60. The reservation for de novo judicial determination of "jurisdictional" and "constitutional" facts has proved troublesome, see infra text accompanying notes 238–56, but has not obscured the more general proposition permitting assignment of essentially judicial decision outside the article III judiciary.

139. The Brig Aurora, 11 U.S. (7 Cranch) 382 (1813); Field v. Clark, 143 U.S. 649 (1892).

140. The first independent regulatory commission, the Interstate Commerce Commission, was in fact not "independent" when first created, but an element of the Department of Interior. Like so much else in American government, its evolution was the product of efforts to improve its practical workability after the lessons of experience, not the result of a new theory about the proper ordering of executive (or administrative) government; that came later. See R. Cushman, The Independent Regulatory Commissions (1941); W. Nelson, The Roots of American Bureaucracy, 1830–1900 (1982).

141. See Grundstein, supra note 11.

142. 272 U.S. 52 (1926).

143. 295 U.S. 602 (1935).

144. See supra notes 15–16.

The resulting litigation was difficult and portentous; special counsel was appointed in the Supreme Court, and the cause had to be argued twice there before the Court could reach its conclusions—conclusions stated in opinions of unusual length and elaborateness. A divided Court found that reserving congressional participation in the removal of an executive officer unconstitutionally invaded the President's executive function. The Court's opinion, written by a former President, suggested that the President enjoyed an inherent authority to remove every officer of government he was empowered to appoint (other than a judge protected by article III).[145] It appeared to eradicate the executive/administrative distinction by establishing the President's disciplinary control as universally available.[146] Congress acknowledged the apparent sweep of this decision by ceasing to provide removal protections in statutes creating new government agencies.[147]

Humphrey's Executor resulted from President Roosevelt's effort, on the authority of *Myers*, to remove a commissioner of the Federal Trade Commission before the expiration of his seven-year statutory term. Here, a statute enacted before *Myers* required specification of cause for removal, but did not require senatorial concurrence. The President suggested no "cause" for Hum-

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145.

> The view of Mr. Madison and his associates was that not only did the grant of executive power to the President . . . carry with it the power of removal, but the express recognition of the power of appointment . . . enforced this view on the well approved principle of constitutional and statutory construction that the power of removal of executive officers was incident to the power of appointment. It was agreed by the opponents of the bill [to establish a Department of Foreign Affairs], . . . that as a constitutional principle the power of appointment carried with it the power of removal. Roger Sherman, 1 Annals of Congress, 491. This principle as a rule of constitutional and statutory construction, then generally conceded, has been recognized ever since.

272 U.S. at 119 (citations omitted). Strikingly, Chief Justice Taft extended this view even to government officials performing as judicial substitutes.

> [T]here may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affects the interests of individuals, the discharge of which the President can not in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised.

Id. at 135.

146.

> The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.

Id. at 122.

147. See, e.g., Communications Act of 1934, ch. 652, 48 Stat. 1064, 1067 (current version at 47 U.S.C. § 151, 154 (1976)) (FCC); Securities Exchange Act of 1934, ch. 404, 48 Stat. 881, 885 (current version codified at 15 U.S.C. § 78a, 78d (1982)) (SEC).

phrey's removal beyond political incompatibility—a reason plainly insufficient under the statute. This challenge arose, however, at a time when presidential rather than congressional hegemony may have seemed the more palpable threat; it was decided on the same day that the Court invalidated the National Industrial Recovery Act, once the centerpiece of the New Deal, on the ground of excessive delegation to the President.[148] Here, unlike *Myers*, decision appears to have been easy. Acting scant weeks after argument, the Court unanimously repudiated the *Myers* dicta and found that Congress could validly impose a "cause" requirement on the discharge of a Federal Trade Commissioner; given the circumstances, the Court did not have to say what cause could be.

Reading both opinions, one is struck by their emphasis on a radical separation of powers within government, with a concomitant need to place agencies *in* one or another branch, maximally free from intrusion by the others. For the *Myers* Court, "the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires."[149] From placement of the Post Office Department in the executive branch and the absence of any constitutional provision for congressional participation in removal, all else followed. For the *Humphrey's Executor* Court, "[t]he fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed, and is hardly open to serious question."[150] As the legislative history of the Federal Trade Commission Act established a purpose that "the commission was not to be 'subject to anybody in the government but . . . only to the people of the United States;' . . . 'separate and apart from any existing department of the government—not subject to the orders of the President;'"[151] the Court said the President could exercise no authority over its members beyond the constitutionally explicit one of appointment. Viewing both the unquestioned congressional purpose to remove the FTC from politics and the agency's particular functions, the Court described it as "an agency of the legislative or judicial department of the government,"[152] exercising in those contexts only an "executive function—as distinguished from executive power in the constitutional sense."[153]

More than *Myers*, but perhaps in consequence of that decision, the reasoning of the *Humphrey's Executor* Court seems open to question. Remarkably, the Court did not pause to examine how a purpose to create a body

148. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
149. 272 U.S. at 116.
150. 295 U.S. at 629.
151. Id. at 625.
152. Id. at 628.
153. Id.

"subject only to the people of the United States"—that is, apparently, beyond control of the constitutionally defined branches of government—could itself be sustained under the Constitution.[154] Later, the opinion tells us that the agency is in *both* the legislative *and* the judicial branches, because of the functions it performs, but not how an agency can at the same moment reside in both the legislative and the judicial branches, consistent with the "fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence . . . of either of the others."[155] Nor does the Court explain its distinction between "executive function" and "executive power." Of course the commission was carrying out laws Congress had enacted; in that sense its functions could hardly have been characterized as other than executive, whatever procedures it employed to accomplish its ends. And, of course, the public procedures it employed were no different than those used by any cabinet department for similar purposes.[156]

If the formal question where in government to place the agency is put aside, however, it is not hard to understand the Court's result. It described the FTC's functions as follows:

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154. Cf. Ackerman, supra note 114. The Court's assurance about what seems a difficult question might be a product of the theoretical division between executive and administrative power (although it would be hard to locate such a division in the constitutional scheme). See Grundstein, supra note 11, at 287. Or perhaps it was the result of the times—not only of *Schechter*, but of growing executive totalitarianism in Europe—in which resistance to broad executive authority was only to be expected. Certainly it is noteworthy that the two (and only) successful invocations of the delegation doctrine, *Schechter* and Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), each involved actions undertaken directly in the President's name under statutes that at a time of national economic emergency, may have appeared to have thrown control of the entire process of government into the President's hands. Congress appeared to have given that potent, apical actor free rein, setting no standards by which the courts could act as a brake on his decisions. (In *Ryan* one had the further, unedifying spectacle that the law the President created was private—hidden in an administrator's desk, where even the Congress might not readily know what it was.) See Jaffe, An Essay on Delegation of Legislative Power: II, 47 Colum. L. Rev. 561, 571 (1947).

155. 295 U.S. at 629. Similarly formal approaches to agency placement might also be thought to underlie the troubling aspects of the Court's near-contemporaneous judgment in Crowell v. Benson, 285 U.S. 22 (1932), discussed supra note 138. While sustaining the assignment of many "adjudicatory" questions to administrative agencies subject to judicial review, the Court there insisted on de novo judicial determination of so-called jurisdictional facts on which the constitutionality of applying a statute might depend, as necessary to protect the article III function. Principles that would make that reservation workable did not readily appear but—at least until apparently revived by the plurality opinion in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), see infra text accompanying notes 253–56—that aspect of the decision slumbered in "deserved repose." Estep v. United States, 327 U.S. 114, 142 (Frankfurter, J., concurring); see also W. Gellhorn, C. Byse & P. Strauss, supra note 2, at 293–96.

156. While rulemaking is sometimes described as "quasi-legislative" and adjudication on the record as "quasi-judicial," see supra note 16, the possibility of such descriptions has not been thought to be a reason why these functions cannot constitutionally be performed in the executive. Rather, it has formed a basis for constraints on their performance: that rulemaking must be in accordance with a sufficiently defined delegation to canalize executive authority, Schechter

> (1) The FTC could direct cessation of unfair methods of competition in commerce, *after* full-dress adjudicatory hearings;
> (2) It could conduct investigations culminating in a report to the Congress with recommendations for legislation;[157] and
> (3) It could act 'as a master in chancery' in antitrust suits brought by the Attorney General and referred to it by a district court.[158]

Assurance of impartiality and the absence of political controls of any character are centrally important to two parts of the statutory scheme as thus described; providing information-gathering service to Congress (not the President) characterizes the remainder. So far as the Court was educated to the Commission's functions, the FTC did little as to which unified policy direction was even arguably relevant.[159] Thus, the need to maintain tension between the named branches was not implicated. The Court was acutely conscious, however, of the extent to which the Commission acted in circumstances calling for judicial impartiality and the removal from politics that might tend to protect it.

> The Solicitor General, at the bar, . . . with commendable candor, agreed that his view . . . necessitated a like view in respect of the Interstate Commerce Commission and the Court of Claims. We are thus confronted with the serious question whether . . . the judges of the legislative Court of Claims, exercising judicial power, continue in office only at the pleasure of the President.[160]

Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring); that adjudication must be in accordance with procedures meeting constitutional tests of fairness, Goldberg v. Kelly, 397 U.S. 254 (1970); and that both (apparently, but never definitively) must occur within the ambit of judicial review, id. at 278 (Black, J., dissenting). See also Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 86 n.39 (1982); INS v. Chadha, 103 S. Ct. 2764 (1983).

157. The brief which Humphrey's executor filed with the court indicated that 50% of the FTC's budget was spent for this function. Although the Court has accepted this as a "legislative" function, Buckley v. Valeo, 424 U.S. 1, 13–14 (1976), see infra text accompanying notes 177–85, it is not inevitably so; the Constitution explicitly places the function of recommending to Congress "such Measures as he shall judge necessary and expedient" in the President's hands. U.S. Const. art. II, § 3.

158. *Humphrey's Executor*, 295 U.S. at 620–21.

159. The Court noted that the President was also authorized to direct investigations, but passed over that inconvenient attachment to the executive branch as "so obviously collateral to the main design of the act as not to detract . . . ." Id. at 628 n.1.

160. Id. at 629 (citation omitted). Recall the ease with which Chief Justice Marshall had upheld a similar restriction on the President's removal power over judges of certain legislative courts in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). See supra note 133 and accompanying text. Contrast the rigid separations *apparently* enforced by the *Humphrey's Executor* opinion with the unconscious ease with which the Court speaks of judges of a "legislative" court "exercising the judicial power." That puzzle would return, and defeat efforts at intellectually satisfactory explanation in separation-of-power terms, in Glidden Co. v. Zdanok, 370 U.S. 530 (1962), sustaining the Court of Claims as an article III court.

Thus, the result can be fully explained by the apolitical character of the judgments to be reached, and the constitutional appropriateness, if not necessity,[161] of assigning such judgments to an apolitical process.[162]

Once fairness considerations are taken into account, these cases can be seen as explained by the difference between a limitation on independent and executive agencies, but between presidential power that implicates a struggle between the branches and one that does not. *Myers* can readily be limited to the issue presented by the provision for senatorial concurrence in removal, the Tenure of Office Act problem. Although the *Myers* Court talked at times as if it regarded the use of fixed terms of office and "for cause" requirements to restrict the President's removal authority as equally difficult, that equation is not convincing. Reservation of senatorial approval for removals suggests political power struggles between President and Senate that are not connoted by a judgment that fixed tenure in office, with limitations on discharge, will be useful for the ends of public policy.[163] Indeed, the Court acknowledged that certain types of executive activity could properly be placed beyond the President's directory power for reasons of public policy;[164] and that Congress could validly have given the Postmaster tenure protection by placing him in the civil service, rather than attempting to reserve a political authority over discharge.[165] Only heads of departments *must* be presidential appointees, and even for them tenure protection need raise no question of imbalance between the executive and legislative branches, of aggrandizement of Congress's political power at the expense of the President's. The issue of aggrandizement seems inevitable, however, where Congress asserts the right itself to control the removal question. It has not only limited the President's ordinary political authority by imposing a "for cause" requirement, but also greatly expanded its own political authority by insisting on a voice in that determination. The latter measure defeats any claim that the measure has an apolitical end such as assuring objectivity.

Humphrey's Executor, in turn, could be understood as having turned on precisely this distinction between those limitations on removal where Congress

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161. Kalaris v. Donovan, 697 F.2d 376, 398–99 (D.C. Cir.), cert. denied, 103 S. Ct. 3088 (1983), upheld assignment of on-the-record adjudicatory functions to persons found subject to unexplained removal by the secretary of their department.

162. Wiener v. United States, 357 U.S. 349 (1958), involving the War Claims Commission, underscores the point. "[T]he nature of the function that Congress vested in the . . . Commission"—to adjudicate according to law—is "the most reliable factor for drawing an inference regarding the President's power of removal." Id. at 353; see also infra text accompanying notes 199–215; Bruff, supra note 47, at 499.

163. See C. Thach, supra note 88, at 66–67, for an account of an influential experience with this problem during the Revolutionary War.

164. The Court hinted this to be so for duties "peculiarly and specifically committed to the discretion of a particular officer . . . [or] duties of a quasi-judicial character," 272 U.S. at 135. However, the opinion goes on to assert that an unintelligent or unwise exercise of these duties *could* be the reason for an after-the-fact removal.

165. Id. at 161.

has retained some role and those in which it has not. Whether or not one numbers the FTC among "the executive Departments," the purpose to make it "free from 'political domination or control'"[166] in exercising functions for which that quality is evidently desirable establishes a justification for some tenure protection. The FTC Act imposes no congressional intrusion analogous to that presented to the Court in *Myers*; on its facts, it does not even foreclose some presidential involvement in FTC policy formation. The President had given Commissioner Humphrey no particular directive; he had asked no advice that Humphrey then refused to give; he did not, perceiving insubordination, direct him to leave. His request for Humphrey's resignation was founded in failure of trust, not breach of discipline. Consequently, the Court found only that Congress could legitimately insist that one holding the office of Federal Trade Commissioner serve on terms other than those of a personal adviser. It did not have to say whether the President could give the FTC Commissioners binding directives, or if so of what sort, or what might be the consequences of any failure of theirs to honor them.[167]

So reading *Humphrey's Executor* would underscore that presidential claims to participate in the FTC's (and other independent agencies') policymaking have not been excluded by that opinion's apparently broad statement that "[t]he authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted . . . ."[168] "Quasi-legislative," as that Court used the phrase, referred not to policy formation but to the exercise of investigatory authority in support of reports to the Congress. Reports to the Congress, unlike rules, have no direct impact on the relationship between citizens and their government; in them, the President's claim to participate has a different character.[169] The FTC of that era was not a rulemaker; it reached its policy conclusions through adjudications. The concern for "quasi-judicial" agencies reflects the Court's focus on the legislative requirement of impartiality, of freedom from *any* political direction to secure procedural fairness. *Humphrey's Executor* did not consider the question whether Congress constitutionally could create an administrative body free from the political direction of the President but subject to such direction from congressmen and their committees, and empower that agency to make law.[170] Congress can be conceded the power to forbid unilateral presidential removal

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166. *Humphrey's Executor*, 295 U.S. at 625.

167. See E. Redford, The President and the Regulatory Commissions 20 (1960).

168. 295 U.S. at 629.

169. See U.S. Const. art. III, § 3. While the judgment to place "the executive Power" in the President seems and was intended to exclude its unsupervised placement in others, one is hard put to imagine a need for exclusivity in recommending legislation.

170. At the time of *Humphrey's Executor* political influence on rulemaking does not seem to have been considered a problem. In part this was because the overwhelming majority of agency business was handled through formal and informal adjudication. See Attorney General's Comm. on Administrative Procedure, Administrative Procedure in Government Agencies, S. Doc. No. 186, 76th Cong., 3d Sess. (1940) (pt. 21); S. Doc. No. 10, 77th Cong., 1st Sess. (1941) (pt. 2). In

for "no reason at all" of an FTC Commissioner regarded as principally an adjudicator, without implying that total removal of the FTC as a policymaking organ of government from presidential oversight or control would be within its power.

3. *The Checks-and-Balances Approach to the Place of Administration:* Buckley v. Valeo *and the Early* Nixon *Cases.* — Decisions about government structure stemming from the political turmoil of the Nixon Presidency suggested that the Court might be ready to abandon the pigeonholing of agencies as "executive," "legislative" or "judicial" in favor of considering the impact of particular challenged provisions respecting them on the balance of authority among the institutions defined in articles I, II and III. The view that there exist "three airtight departments" was described as "archaic,"[171] and seemed on its way to being replaced by a checks and balances approach that, like that of the framers,[172] gave central attention to "whether [an] Act disrupts the proper balance between the coordinate branches."[173] The Court thus seemed ready to turn to the central but difficult work of assessing structural arrangements in functional terms—in terms of their contribution to or detraction from the maintenance of tensions among the named branches.

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addition, much of such rulemaking as was done was apolitical in nature. The Interstate Commerce Commission, for example, had issued only 20 tariff circulars through 1939 dealing with rate setting, and these concerned the form and style of the tariffs, not their content. S. Doc. No. 10, supra, at 45 (1941) (pt. 11). In general, however, political influence was accepted as appropriate in rulemaking procedures:

> In an ordinary trial the question is whether the facts bring the case within a rule or principle of law . . . . The issues are always of limited scope, relating to the particular circumstances or transactions, and the evidence bearing upon them can be incorporated into a record.
>
> The situation is different in rule making or other discretionary determinations which involve, in effect, the formulation of new policies. . . . Such choices must be made in the light of facts; but the chief issues are not factual. They relate either to the proper balancing of objectives . . . or to a choice of methods to achieve given objectives . . . .
>
> It is true that the discretion thus exercised in administrative rule making operates within statutory limits and is not unfettered. Nevertheless, within these limits the important questions always are what is desirable or what is workable in order to carry out the directives contained in the statute.

Attorney General's Comm. on Administrative Procedure, Final Report: Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess. 117 (1941).

171. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977) (quoting the U.S. District Court for the District of Columbia, 408 F.Supp. 321, 342 (1976)). See also L. Jaffe, supra note 2, at 28–30; W. Wilson, Constitutional Government in the United States (1908); Cox, Executive Privilege, 122 U. Pa. L. Rev. 1383, 1387–91 (1974); Ratner, Executive Privilege, Self Incrimination, and the Separation of Powers Illusion, 22 UCLA L. Rev. 92, at 92–93 (1974); Van Alstyne, The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause, Law & Contemp. Probs., Spring 1976, at 102.

172. Recall that for Madison the central issue was "giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the other," supra text accompanying note 117.

173. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977).

One example of this approach is *United States v. Nixon*,[174] President Nixon's failing effort to resist the subpoena that made inevitable his resignation. The opinion has language that invokes the rigid separation-of-powers analysis: addressing the lawfulness of its own claim to assess the President's assertion of executive privilege in the case, the Court reasoned that "the 'judicial Power of the United States' vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto."[175] Once the Court has asserted its entitlement to pass on the claim of privilege, however, its analysis turns on "checks and balances"; the test becomes one of balance among competing legitimate claims, of possibly threatened interference with core function:

> [T]he Framers . . . sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence. . . . To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim . . . would upset the constitutional balance of 'a workable government' and gravely impair the role of the courts under Art. III. . . . [I]t is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch. . . . The President's broad interest in confidentiality of communications [while constitutionally based,] will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.[176]

This checks-and-balances inquiry—a comparison of impacts on "essential functions"—is both diffuse and subject to conscious or unconscious manipulation; it is at the same time at the heart of the framers' formula.

This more functional inquiry assumed particular importance in *Buckley v. Valeo*,[177] a case concerning the necessary character of presidential and congressional relationships to an administrative agency. *Buckley* presented a series of challenges to the Federal Election Act and to the Federal Election Commission (the Commission) the Act created and empowered; significant for our purposes was a separation-of-powers challenge to a provision for direct legislative appointment of some members of the Commission. The Commission was authorized, inter alia, both to conduct investigations—the quasi-legislative activity considered in *Humphrey's Executor*—and to engage in rulemaking, the quasi-legislative activity which had not been at issue in that case. Were the FEC only empowered to conduct investigations, the Court

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174. 418 U.S. 683 (1974).

175. Id. at 704. As a proposition that the three named actors of the Constitution must remain distinct the observation is unexceptionable; at that moment, however, the Court did not have to rationalize the phenomenon of article I courts. See infra text accompanying notes 238–56 (discussing *Northern Pipeline*).

176. 418 U.S. at 707–13.

177. 424 U.S. 1 (1976).

reasoned, the appointment provisions would not have been objectionable; such powers are "in the same general category as . . . Congress might delegate to one of its own committees."[178] But rulemaking "represents the performance of a significant governmental duty exercised pursuant to a public law,"[179] and is *therefore* to be exercised only by officers of the United States—by persons subject to appointment by the President (with or without senatorial assent) or by a head of one of "the executive Departments."

Buckley is not always clear how it is regarding the mass of government outside the legislative branch. At some points, the opinion speaks confidently of the "three essential branches of Government"[180] among which all powers are distributed, and writes of functions in "the administration and enforcement of public law"[181] as if it were describing activities of one—the executive—of those three branches. At other points it seems somewhat more hesitant about the independent regulatory commissions, as when it refers to "'Heads of Departments' . . . [which] are themselves in the Executive Branch or at least have some connection with that branch."[182] All that was necessary, after all, was to decide that Congress could not vest in *itself* appointment power for the head of an agency that would be exercising a "significant governmental duty . . . pursuant to a public law." Just as the Court in *Humphrey's Executor* seems to have thought it enough for its purposes to show that the FTC's functions were *not* executive to place the FTC beyond the President's removal claim, the *Buckley* Court may have found it sufficient to characterize the FEC's functions as "not legislative" to remove it from Congress's appointments claim.

When one is playing a shell game, however, it is important to maintain the observer's confidence that one of the shells does contain the pea, even if it is not the shell currently under examination. By characterizing as a function having to be exercised outside the legislature just that quasi-legislative activity (rulemaking) that previously had been described with some uniformity as the result of a delegation of *legislative* power, the Court destroyed that illusion, breaking through any separation-of-powers notion that the powers of government generally could be neatly parcelled into three uniquely empowered entities. The Court insisted that the central issue was to be the character of the relationships between that agency and the named heads of government, and not the formal structure of the agency in question.[183] Those conclusions could

178. Id. at 137.

179. Id. at 141.

180. Id. at 121.

181. Id. at 139.

182. Id. at 127; see also id. at 141 (functions "of kinds usually performed by independent regulatory agencies or by some department in the Executive Branch").

183. Id. at 124-43. The Court indicated that it was looking to the fundamental values of the Constitution in determining the effect of the appointments clause. It noted that the system of presidential nomination with senatorial confirmation was the final product of long deliberation on how to avoid granting any one branch excessive power over nominations. Id. at 127-31. It then found use of this system required whenever the test just quoted in the text was satisfied—as, of course, it was for the FEC. Id. at 131-43.

be reached without having to "put" the FEC anywhere; the claim to that power and relationship does not depend on where the agency "is," so much as the necessity of maintaining the desired sharing of authority among the named actors of the Constitution. In this way, the *Buckley* Court's reasoning stands the *Humphrey's Executor* distinction between executive function and executive powers on its head, repudiating the dicta about "independence."[184] Precisely because they exercise a substantial function in "the administration and enforcement of public law, those agencies are to be numbered among the Departments" so fleetingly and inconclusively referred to in article II. *Buckley* thus seems to have eliminated any sense that the independent regulatory agencies were somehow to be regarded as having a place in the structure of government fundamentally different from that of executive agencies.[185]

These themes also appear in the next separation-of-powers case, *Nixon v. Administrator of General Services*,[186] which involved challenges on separation-of-powers grounds to the responsibilities Congress had imposed on the General Services Administration for processing former President Nixon's papers. Again the Court appeared to rely to some extent on the placement of the GSA in the Executive Branch in assessing the challenged arrangements.[187] Its central inquiry, however, seemed independent of location as such:

> [I]n determining whether [an] Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions . . . [and] whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.[188]

Vigorous dissents by the Chief Justice and Justice Rehnquist sought to distinguish between what Congress might provide respecting the papers of the President himself, and what it might require of a "legislatively created [Executive] department." Yet the majority's general analytic proposition necessarily rested—as Justice Powell made express in a concurrence[189]—on an assessment of the extent to which the President could claim, solely because the GSA was

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184. Others have also suggested the problems with *Humphrey's Executor*. See, e.g., Bruff, supra note 47, at 478–83; Nathanson, supra note 30, at 1099–109; Verkuil, supra note 55, at 953–55.

185. This implication of the *Buckley* Court's reasoning, that "independent" agencies are within reach of the President's "executive power," was given warranted emphasis by the D.C. Circuit in its recent opinion disapproving Congress' legislative veto of a FERC rule. Consumer Energy Council of Am. v. Federal Energy Regulatory Comm'n, 673 F.2d 425, 472 (D.C. Cir. 1982), aff'd mem., 103 S. Ct. 3556 (1983).

186. 433 U.S. 425 (1977).

187. Id. at 441.

188. Id. at 443.

189. 433 U.S. at 500, 503–04 (Powell, J., concurring).

an executive agency, power to control policy outcomes and represent his views in any particular dispute over privilege before the courts.

The checks-and-balances concerns with relationship and effective functioning thus suggested seem to be paralleled by analytic developments in other contexts in which the structural constraints of the Constitution are the central issue. Debate over the tenth amendment, for example, revived by *National League of Cities v. Usery*,[190] resolved into near unanimity in formulating the relevant inquiry (if not its application): whether a challenged measure threatens the integrity of the states in the constitutional scheme.[191] Allocation of authority between state and nation, like that between executive and legislature, can be understood as a means of protecting individuals from overwhelming governmental power; deciding what is required to preserve that protection for citizens has characterized the recent judicial debates more than a cataloguing of activities inherently for the states qua states. The same may also be suggested for the public debate—not yet captured in litigation—whether the Constitution constrains Congress's authority to make exceptions to the appellate jurisdiction of the Supreme Court. What would "prevent the [Judicial] Branch from accomplishing its constitutionally assigned functions"[192] is widely accepted as the appropriate inquiry to be made.[193]

Inquiry along these lines has substantial advantages. It permits the judiciary to recognize the inescapable merger of some governmental functions, and permits it, as well, to tolerate periodic changes in relative political effectiveness as between President and Congress, Congress and Court, Nation and States. Our political history has been characterized by the emergence of first one and then the other as the more forceful national political presence; even if it were desirable, it seems unlikely that courts could sustain the constant intervention that would be required to maintain a fixed relationship.[194] Rigid molds are more easily broken; permitting growth and change makes more likely the enduring of the essential form.

Indeed, the questions formulated on this approach make largely irrelevant to constitutional analysis where a given government function—or the

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190. 426 U.S. 833 (1976).

191. See, e.g., EEOC v. Wyoming, 103 S. Ct. 1054 (1983); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

192. See supra text accompanying note 187.

193. Hart, supra note 132, at 1365, reprinted in Hart & Wechsler, supra note 2, at 33. But cf. Wechsler, The Courts and the Constitution, 65 Colum. L. Rev. 1001, 1005 (1965):

> I see no basis for this view [prohibiting alteration of appellate jurisdiction motivated by hostility to decisions of the Court] and think it antithetical to the plan of the Constitution for the courts—which was quite simply that the Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power.

194. This insight appears to underlie Professor Choper's argument that the question of allocating authority between President and Congress should be left entirely to their political

bureaucracy as a whole—is placed on the governmental organizational chart. Whether "in" or "out" of the constitutional executive branch, a given agency will nonetheless have a relationship with that branch requiring the questions of "proper balance," disruption of executive branch function, and "overriding need" to be assessed.[195] Whether or not the Securities and Exchange Commission is "in" the executive branch, it is within reach of the President's article II powers to execute the laws, insofar as it executes the laws; and it may also be within reach of his article I veto authority to the extent that it exercises a genuinely legislative function. This approach, it may be noted, fits the Department of Agriculture as easily as it does the SEC. Both are hybrids in the functions they perform, legislating and adjudicating as well as executing.[196] Neither is within the ambit of any special executive role the President may enjoy in military and foreign affairs[197] and both are charged by Congress with responsibility for discrete legislatively defined tasks, in which the President's right to participate is questionable[198] and subject, at least, to some forms of legislative constraint.

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processes, and regarded as nonjusticiable by the courts. See J. Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court 260–379 (1980). Professor Choper believes that President and Congress each have sufficient controls over the other's actions, and as each is sufficiently under the control of the electorate, that judicial correction of "mistakes" is unnecessary; and, further, since any effort to contain the two branches by judicial pronouncement would expose the courts to retaliation by a far more powerful branch, such intervention is also unwise—a wasting of the Court's limited political capital. He points out that judicial resolution of questions such as delegation and removal authority have been at best highly limited successes that would not be missed.

Adoption of Professor Choper's proposal would require, at the least, a substantial departure from existing "political question" law, and a further dilution of the duty to decide which many regard as an essential element of judicial review. Choper's point does not appear to be (and hardly could be) that the Constitution embodies a commitment of any questions respecting the distribution of authority between President and Congress to those two branches; that would permit, at least in theory, complete obliteration of the distinction between the two. Doubtless it is true, as he suggests, that electoral forces would inhibit sudden, massive changes, although in times of emergency even that may not be true. More significant may be the accretion of authority or practice in one or the other branch, to the point where intended capacity to function, independently and as a check on the other branch, is substantially impaired. Put in that perspective, which seems to be the perspective of the recent cases, it seems possible to preserve both substantial room for political byplay as between President and Congress, and a decisional role for the courts. See also Monaghan, Book Review, 94 Harv. L. Rev. 296 (1980).

195. "[T]he Constitution requires that executive functions be performed under direction of the President. . . . Any other rule permits the crippling of the President's executive power and loads the quasi-judicial independent bodies with constitutional contraband." R. Cushman, supra note 140, at 459.

196. See generally supra text accompanying notes 47–64.

197. See supra note 11.

198. President Nixon's attempt to direct tax investigations for political ends was regarded as grounds for impeachment, H.R. Rep. No. 1305, 93d Cong., 2d Sess. 141–45 (1974); his interference with antitrust actions against ITT was also open to question. Both the Treasury and the Department of Justice are cabinet departments, and the President's instructions concerned investigation and prosecution, quintessential executive responsibilities.

C. *Separation of Functions and Considerations of Individual Fairness*

Much of the force apparently attached to the issue of "place" in the cases separating the President from the agencies has its source in considerations of fairness—notions more readily ascribed to the idea of separation of *functions* than separation of *powers*. Separation of powers, as a theoretical concern, has to do with the general tendency of certain governmental structures to result in (or prevent) tyrannical government—that is, a government no longer under the control of the people. Separation of functions suggests a much more atomistic inquiry, asking what combinations of functions or impacts of external influence will interfere with fair resolution of a particular proceeding. Recall the horror expressed by the *Humphrey's Executor* Court at the idea that a judge of the "legislative" Court of Claims might be subject to presidential discipline in "exercising judicial power."[199] That the Court accepted her sitting on a *legislative* court suggests that the issue for the Court was not (or not only) one of place but one of function. Wherever she is located in government, a judge ought not to be connected with the controversy or the parties, ought not to be interested in the outcome, must learn from the parties only what they convey in the presence of each other, and—above all—ought not to be called upon to explain her decision in the political forum. External or political intervention in on-the-record decisionmaking would be regarded as inappropriate, whether done by the President or any other political figure (e.g., a legislator),[200] whether in an independent regulatory commission or in a traditional executive department. These are judgments we reach wholly without regard to the balance of advantage between Congress and the White House in overseeing the day-to-day functioning of political government. Within agencies themselves, executive *and* independent, these judgments are reflected in the creation of officials (administrative law judges, appeal bodies, judicial officers) remarkably free of organizational responsibilities or political supervision, who perform on-the-record judging functions.[201]

This separation-of-functions rationale provides, in effect, a politically neutral basis for supporting congressional judgments about governmental structure that might otherwise appear to threaten presidential function.[202]

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199. See supra notes 145-48 and accompanying text.

200. Humphrey's Executor v. United States, 295 U.S. 602, 629-30 (1935); Pillsbury Co. v. FTC, 354 F.2d 952, 964 (5th Cir. 1966).

201. See W. Gellhorn, C. Byse & P. Strauss, supra note 2, at 752-59.

202. Other neutral bases could be imagined. For example, it has long been argued that the conduct of monetary policy, although not carried out using formal procedures, must be free of the suspicion of political influence. See, e.g., the arguments of Alexander Hamilton for a national bank in his Report to the House on a National Bank of December 13, 1790, recounted in G. Gunther, Constitutional Law—Cases And Materials 105 (10th ed. 1980). While bankers are not by reputation evenly distributed between the two major parties or free of political interests, that judgment is nonetheless one which if congressionally made may be entitled to respect. Similarly, a few rulemakings are required to be conducted following trial-type procedures, and others are thought to be special because although in form rulemakings they produce trial-like results—allocating valuable rights among a limited number of specially interested participants. Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

Legislative judgments that certain types of decision are preferably made in the absence of *any* political intervention tend to defeat arguments that statutory provisions for agency independence reflect the outcome of competition between Congress and President for political dominance. Acquiescing in such judgments has no strong implications for the allocation of authority between the political branches, and raises few threats to the scheme of checks and balances. The very judgment made requires that the relationship between Congress and the agency be affected equally with that between the President and the agency; where these considerations come into play, it would be inappropriate for either to intervene unless as a party.[203] The President has no regular apparatus for coordination or control over adjudication corresponding to the OMB's role in rulemaking; congressional representatives generally do not employ their oversight techniques in efforts to influence agency adjudication. Statutes sharply restrain permitted contacts in on-the-record proceedings, within and without the agency,[204] and the courts appear sensitive to the possibility that the detachment and objectivity requisite to on-the-record decision—separation of functions as distinct from separation of powers—may have been compromised when such contacts occur.[205] No distinction is made, either in law or in practice, between independent and executive agencies in this respect.[206]

By contrast, other agency functions are regarded as appropriate for less formal decision and for political oversight—again, whether performed in executive or independent agencies. Processes of policy formation undertaken within an existing legislative framework, in general, and informal rulemaking, in particular, are examples. These proceedings are not subject to statutory constraints on outside contacts or record formation and are not expected to occur with the antiseptic impartiality of on-the-record trials.[207] Save for a few

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203. Note that the argument here is premised on a congressional judgment having been reached about what fairness to participants may require. Although regularly enforcing on-the-record constraints, the courts have not *required* that agency adjudicators be placed beyond the possibility of political supervision. See, e.g., Marcello v. Bonds, 349 U.S. 302, 311 (1955); Kalaris v. Donovan, 697 F.2d 376 (D.C. Cir.), cert. denied, 103 S. Ct. 3088 (1983).

204. 5 U.S.C. §§ 554(d), 556(b), (d), 557(d)(1) (1982).

205. American Public Gas Ass'n v. Federal Power Comm'n, 567 F.2d 1016, 1068-70 (D.C. Cir. 1977), cert. denied, 435 U.S. 907 (1978); Pillsbury Co. v. FTC, 354 F.2d 952, 963-64 (5th Cir. 1966).

206. See 5 U.S.C. § 551(1) (1982); cases cited supra note 205.

207. See, e.g., Sierra Club v. Costle, 657 F.2d 298, 400-01 (D.C. Cir. 1981). Nathanson noted that

> In the ordinary rulemaking proceedings the parties are not identified in advance. Neither are conflicting interests established in advance among those subject to the proposed regulation . . . . In such a situation the very concept of ex parte communications is strikingly out of place; there are no parties to begin with, and it is not known what parties will develop and what their conflicting interests will be.

Nathanson, Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings, 30 Ad. L. Rev. 377, 396 (1978). See generally Strauss, supra note 19, at 1036; Verkuil, supra note 55, at 975-76.

exceptional cases, agency rules are made following highly informal procedures not required to be on the record, and are characterized by frequent consultation within and without the acting agency.[208] Few statutes to date, and no constitutional norm, inhibit agency officials from discussing their rulemaking decisions with staff, or even having staff participate in development and presentation of rulemaking proposals; few require such discussions to be noted or recorded.[209] Similarly, the procedures for testing decisionmaker objectivity in adjudicatory settings are generally inapplicable in rulemaking; the rulemaker may be strongly driven by a political agenda, and reviewing courts ask only whether his mind was "unalterably closed" to persuasion on factual issues.[210] Legislators and executive officials who would not bring judges before them to explain past decisions or to be pressured respecting future ones feel and are free to engage in contemporaneous questioning of agency policymaking and to attempt to influence it.[211] Perhaps the outcomes would be affected by demonstrations of political coercion, the use of legally irrelevant factors, or the use of interagency consultation to provide a conduit for the submission of private material out of public view.[212] In general, however, the courts, like the legislature, have thus far accepted the more informal and political character of rulemaking as appropriate.[213]

This is not to say that the issue of political participation in informal rulemaking is uncontroversial from a procedural perspective. The tempo of public debate over these issues has notably increased in recent years. Legisla-

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208. Varying degrees of formality have been introduced for particular agencies in recent years through the legislative development of hybrid rulemaking procedures, more elaborate than the norm in informal rulemaking though not as formal as on-the-record rulemaking would be. See generally W. Gellhorn, C. Byse & P. Strauss, supra note 2, at 191–210.

209. But cf. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (codified as amended at 15 U.S.C. §§ 45, 46, 50, 57(a), 57(b)(1)–(4), 57(c), 58 (1982); Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified at 5 U.S.C. §§ 551, 552, 552b, 556, 557; 5 U.S.C. app. I § 10 (1982); 39 U.S.C. § 410 (1976 & Supp. V. 1981)).

210. Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1170 (D.C. Cir. 1979), cert. denied, 447 U.S. 921 (1980).

211. See Sierra Club v. Costle, 657 F.2d 298, 404–10 (D.C. Cir. 1981); Weingast & Moran, supra note 72, at 791–92.

If there is any difference to be observed in this respect as between independent and executive branch policymakers it is that congressmen, feeling perhaps more proprietary towards the independents, feel freer to intervene in their affairs. See supra text accompanying note 75. Thus, powerful committees may insist on early notice of proposed rulemaking, or ask that an agency await congressional consideration of an issue before precipitously making rules. See Home Box Office, Inc. v. FCC, 567 F.2d 9, 52 n.112 (D.C. Cir. 1977).

If there is a difference between congressmen and the President, it is that no constitutional authority directly supports the congressman's claim to suggest to the agency or department how it should interpret or apply existing law. See the discussion of *Sierra Club v. Costle*, infra text accompanying notes 360–70.

212. See Sierra Club v. Costle, 657 F.2d 298, 405 n.520 (D.C. Cir. 1981); D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972).

213. See generally Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981); Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151 (D.C. Cir. 1979), cert. denied, 447 U.S. 921 (1980).

tive changes in the direction of greater formality in the decision process have repeatedly been proposed and received broad support.[214] More elaborate exposure of the basis on which decision is reached, and explanation of the agency's reasoning process, are common ground in otherwise controversial statutory proposals for reform of rulemaking procedures.[215] But these proposals are made, as they should be, without significant regard for the character of the agency involved as independent or not. It is, in other words, important what questions are asked. "To what branch does rulemaking belong from a structural perspective?" suggests one sort of answer; and that seems often to have been the way questions have been put. "What claims do the constitutionally designated institutions have to participate?" and "What arrangements best protect the appropriate procedural claims of individual participants in agency proceedings?" suggest different sets of issues, ones that seem better matched to the procedures of government as it now functions and to the considerations that govern Congress's decisions about its shape.

D. *Conflict Between the Models or a Return to Formalism? The Work of the Past Two Terms*

The preceding pages should suggest that of the three approaches commonly used to describe our government's structure,[216] the checks-and-balances model, understood in light of the fairness aspirations of the separation-of-functions principle, best describes the complexity of contemporary government in terms that permit adherence, as well, to the framers' vision. The seeming bright-line simplicity of separation of powers, never in fact fully embraced by those who wrote the Constitution,[217] is neither necessary as a matter of text, context or past interpretation for those parts of government not named in the Constitution itself, nor possibly successful in describing that bulk of government as it is. Courts have been able to reconcile the reality of modern administrative government and the strict separation-of-powers model, as in *Humphrey's Executor*, only by blind feats of definition—internally inconsistent while at the same time effectively negating the ability of a unitary, competent President to serve as an essential check against legislative hegemony.

Yet an analysis framed in terms of interference with the capacity to maintain one's core function is more effective as a means of organizing debate than as a rule for deciding cases.[218] It leaves more room for judicial fact-

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214. For discussion of the various reform proposals introduced in recent years, see Strauss, Regulatory Reform in a Time of Transition, 15 Suffolk U.L. Rev. 903, 911–12, 920–26 (1981).

215. Id.

216. See supra text following note 14.

217. See supra notes 114–23 and accompanying text.

218. For similar debate despite apparent agreement on verbal formulae, see EEOC v. Wyoming, 103 S. Ct. 1054 (1983) (tenth amendment issues); see also the dissent of the Chief Justice in Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 504, 511–13 (1977) (Burger, C.J., dissenting).

finding and the operation of judicial discretion than "bright-line" formulae such as those employed in *Humphrey's Executor* appear to. To one who takes from constitutional history, above all, a sense that the framers both intended effective government and placed our protection from overwhelming government in continuing struggle among its parts rather than rigid demarcation of function, that is not troublesome. However, the bright line has its allure for justices faced with the responsibility to decide particular cases in ways that will guide the future conduct of others, future justices included.[219] The most recent outcropping of separation-of-powers cases to reach the Court suggest the justices may be responding, once again, to certainty's siren call. Three decisions of the Supreme Court's past two Terms,[220] each the product of a sharply divided Court, suggest both the difficulties a court may encounter with a strict separation-of-powers analysis and the advantages of the checks-and-balances analysis that turns on the interrelationships of government.

1. Nixon v. Fitzgerald *and* Harlow v. Fitzgerald.—*Nixon v. Fitzgerald*[221] is another heritage of the Nixon years, the outgrowth in this instance of the strongly vindictive treatment alleged to have been accorded a civil servant who had "blown the whistle" on a major defense contractor. Fitzgerald sued the former President, his personal staff aides, and departmental officials for damages; the defendants asserted that their acts had been privileged. For all but the President, eight justices held in a companion case (conformably with existing precedent) that the defendants—including cabinet members and presidential aides at the highest level—enjoyed only a qualified privilege.[222] As for the President, however, five justices concluded that, at least absent a contrary statute, he enjoys an absolute immunity from civil liability for acts performed in office, by virtue of office.[223] Four dissenters would have found the outcome no different for the President than for any other officer of government.

The cases have two implications for this essay. First, they indicate an awareness by the Court of the centrality of personal immunity to the President's ability to perform his functions without the fear—a fear from which Congress and the courts are also protected—that the parties hurt by his policy decisions can recover damages from him. Second, the willingness of four justices to limit personal immunity for the President in a way they would not

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219. See Deutsch, Precedent and Adjudication, 83 Yale L.J. 1553 (1974).

For an interesting discussion, majority and dissent, of the new virtues and vices of overthrowing an established "bright line" test in favor of a more contemporary balancing approach in the dormant commerce clause/preemption context, see Arkansas Elec. Coop. Corp. v. Arkansas Pub. Comm'n, 51 U.S.L.W. 4539 (1983).

220. INS v. Chadha, 103 S. Ct. 2764 (1983); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Nixon v. Fitzgerald, 457 U.S. 731 (1982).

221. 457 U.S. 731 (1982).

222. Harlow v. Fitzgerald, 457 U.S. 800, 819-20 (1982).

223. Nixon v. Fitzgerald, 457 U.S. 731 (1982). Justice Powell wrote for himself, the Chief Justice, and Justices Rehnquist, Stevens and O'Connor.

consider for the Congress or themselves, reflects an apparent failure of the functional analysis undertaken in *Buckley*—a failure underscored by the Court's refusal in the companion *Harlow* case to accord similar protection to the President's personal aides.

Although constitutional considerations plainly guided the Court's policy choice, its decision was not in a strict sense one of constitutional law. It is hard to discern to what extent the constitutional prerogatives of the Presidency join with what the majority regarded as the functional requirements of being the sole chief executive to support the conclusion that absolute immunity is appropriate.[224] As in previous cases in which the Court had considered the immunities of prosecutors and judges,[225] the privilege question was presented in a common law setting—that is, as a matter requiring judicial resolution in the absence of a dispositive statute—and the Court professed openness to the possibility that different factual judgments might be reached by legislators.[226] The majority relied heavily on its reading of constitutional history for the proposition that the President's "unique position in the constitutional scheme"[227] warrants a judicial determination of freedom from liability for damages. The opinion describes the immunity it finds as "a functionally mandated incident" of that position,[228] "rooted in the the separation of powers under the Constitution,"[229] and supported its finding by judicial reasoning of a familiar sort demonstrating all the destructive implications of the President's being subject even to the possibility of civil suit.

The majority's guesses about the impact of possible civil liability on the President's ability to function are merely that; the four dissenters strongly disagree about that impact as well as the reading of constitutional history.[230]

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224. 457 U.S. at 749–54. The Chief Justice, concurring, sought to "underscore that the Presidential immunity derives from and is mandated by the constitutional doctrine of separation of powers," id. at 758, but his disagreement with his colleagues in *Harlow*, see infra text accompanying notes 232–35, strongly suggests that that was a personal view.

225. See Butz v. Economou, 438 U.S. 478, 508–14 (1978); infra note 228.

226. *Nixon v. Fitzgerald*, 457 U.S. at 748 n.27.

227. Id. at 749.

228. Id. Both the majority and dissent use "functional" in two senses, without noting the difference. The first use, as here, refers to a mode of analysis like that suggested in this Article: absolute immunity derives from the need to maintain the President's function as an effective unitary executive able to balance the power of Congress. The second use refers to immunity conditioned on the type of work an official is performing: prosecutorial functions require absolute immunity, and other executive functions do not. See, e.g., id. at 755–57, 785. The latter, function-by-function approach is not strongly related to the structural concerns of the analysis undertaken here.

229. Id. at 753 (quoting United States v. Nixon, 418 U.S. 683, 708 (1974)).

230. From the constitutional perspective it is hard to give more than rhetorical credence to Justice White's assertion in dissent that the majority had placed the President above the law. 457 U.S. at 780. The Court has done the same for itself in its interpretation of judicial privilege, and the speech and debate clause accomplishes much the same for elected congressional officials; it would be remarkable if equivalent protection was not available for the other named principal of the Constitution. One lower court has noted this difference in treatment of the President and of legislators and judges. See Senate Select Comm. on Presidential Campaign Activities v. Nixon,

The differences do not appear to have been methodological; all the justices appear to have agreed that any immunity must be justified on functional grounds and that the appropriate criterion is the prospect of significant interference with official function.[231] The disagreement, instead, turned on the impact of this potential liability. The very fact of this disagreement over an issue of social fact, one well suited to legislative judgment, may well explain the majority's reservation of the case in which Congress has passed a statute explicitly creating the possibility of civil liability.[232] Whatever the resolution of the issue, the focus by all the justices on the impact of immunity on the ability of the President to carry out his job as unitary executive and counterweight to Congress was correct. At the same time, the sharp division on the impact question illustrates the difficulty of reaching judgments premised on considerations of constitutional structure and an assessment of impact on function.

To the extent that constitutional reasoning figures in the *Nixon v. Fitzgerald* result, it is reasoning that sharply distinguishes the President from the entire remainder of executive government.[233] The companion case, *Harlow v. Fitzgerald,*[234] held that senior presidential aides, White House officials who are the President's most intimate and responsible associates in performing the functions of his office, cannot make the same claims to quasi-constitutional protection as may the President. Like cabinet officials, they are entitled only to a qualified privilege that could be overcome by showing that they knew or should have known that the action would be tortious.

> The undifferentiated extension of absolute "derivative" immunity to the President's aides therefore could not be reconciled with the

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498 F.2d 725, 729-30 (D.C. Cir. 1974). Defeat at the polls, impeachment, and the liability of subordinates who inevitably will have to do the dirty work remain available remedies. To be sure, the Court has asserted that it is "not because of their particular location within the Government but because of the special nature of their responsibilities" that judicial and prosecutorial officials enjoy absolute immunity. Butz v. Economou, 438 U.S. 478, 511 (1978). For this reason, the Court extended the immunity to judges in administrative agencies as well as to article III courts, to prosecutors in the independent SEC as well as to those in the Department of Justice. Nonetheless, no article III judge (or his state equivalent) lacks the privilege even for conduct only arguably judicial, see Stump v. Sparkman, 435 U.S. 349 (1978), and in this sense absolute privilege is at least hinted to be part of the constitutional structure.

231. See 457 U.S. at 755-57 (majority); id. at 785 (dissent).

232. Another possible reason for leaving open the question of statutory reconsideration may lie in judicial recognition that the like assessment of immunity for judges and prosecutors could be taken as an indication of its vulnerability to self-interest. Whether persons acting as judges or prosecutors enjoy an absolute privilege had been decided on the basis of the justices' necessarily intuitive (and self-interested) judgments about the special nature of judicial and prosecutorial responsibilities, together with the opportunities for correction of error that exist in the litigation context. See Butz v. Economou, 438 U.S. 478, 508-14 (1978); Stump v. Sparkman, 435 U.S. 349 (1978).

233. 457 U.S. at 749-53 & n.31. The case in this respect adopts what had been a dissenting perspective offered by the Chief Justice in Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977). See supra text accompanying notes 186-89.

234. 457 U.S. 800 (1982).

> "functional" approach that has characterized the immunity decisions of this Court . . . . Our decision today in *Nixon v. Fitzgerald* . . . in no way abrogates this general rule. As we explained in that opinion, the recognition of absolute immunity for all of a President's acts in office derives in principal part from factors unique to his constitutional responsibilities and station. Suits against other officials—including Presidential aides—generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself.[235]

The Chief Justice, dissenting, would have extended the President's privilege to his personal aides, who like the legislative aides in *Gravel v. United States*[236] (or law clerks whose immunity is yet untested), are but "alter egos" to their bosses.[237] For the other justices, however, separation of powers as a constitutional matter concerns the President, not the presidential office or agencies performing the daily work of government. Their reasoning can be criticized for its failure to accept for the President, as they had for Congress and themselves, a realistic need for trusted personal aides to carry out his job as a unifying force and a counterweight to Congress. Yet the result also underscores the Constitution's silence about the structure of the agencies, and the possibility of treating them as lying outside its explicit structures although subject to the control of all three named bodies.

2. Northern Pipeline Construction Co. v. Marathon Pipe Line Co. — *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[238] demonstrates the difficulty of applying a strict separation-of-powers analysis to governmental bodies other than the three named actors of the Constitution, and suggests the greater utility of the checks-and-balances model. The case arose out of a provision in the amended bankruptcy act creating bankruptcy judges outside of article III (although subject to review by article III courts). These judges were given a range of powers closely resembling those of article III judges and authorized to decide all matters in the bankruptcy proceedings—including issues in litigation between private parties that would ordinarily be resolved in state courts (for example, the existence of a contractual obligation), but that might be swept into the bankruptcy proceedings. Their

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235. Id. at 811 & n.17.

236. 408 U.S. 606 (1972).

237. The Chief Justice argued that the lack of absolute immunity for cabinet officials need not imply the same lack for personal aides:

> [The dissent in Nixon v. Fitzgerald] suggests that a President and his cabinet officers, who serve only "during the pleasure of the President," are on the same plane constitutionally. It wholly fails to distinguish the role of a President or his "elbow aides" from the role of Cabinet officers, who are department heads rather than "alter egos." It would be in no sense inconsistent to hold that a President's personal aides have greater immunity than cabinet officers.

457 U.S. at 828 (Burger, C.J., dissenting); see also Senate Select Comm. v. Nixon, 498 F.2d 725, 729 (D.C. Cir. 1974).

238. 458 U.S. 50 (1982).

judgments would become final if unchallenged, but were subject to review, ultimately by article III courts. One question for the Court was whether the Constitution requires bankruptcy issues to be decided by article III judges, or whether it suffices for Congress to place initial decision in other hands, subject to the possibility of judicial control—whether, for purposes of the Bankruptcy Act, judges must be "in" the judiciary or merely controlled by the judiciary. If article III judges must decide, a second and related issue arose—whether the bankruptcy judges could be regarded as "adjuncts" to the courts, acting within article III although not article III judges, like United States magistrates. No majority of the Court could agree on a structural resolution, although six justices agreed that article I bankruptcy judges could not properly decide private disputes arising under state law that would ordinarily be decided by state courts.

The Court's resolution of the first issue—what adjudicatory business must necessarily be submitted to article III judges—is the matter of chief interest here.[239] Justice Brennan's plurality opinion[240] appeared to seek a bright-line definition of what types of action were inherently judicial and thus had to be performed within the judicial branch, rather than being overseen by it. On the basis of an inquiry into constitutional text, history, and the Court's cases, the opinion identified three classes of cases, apparently judicial in character, that need not be tried in article III courts: cases heard before territorial courts or the courts of the District of Columbia (for which Congress enjoys plenary legislative authority), cases properly assigned to courts-martial, and decisions respecting claims against government that Congress would be free to commit entirely to executive discretion.[241] All other federal adjudicating must be done by article III judges.

The dissenters[242] examined the same materials as the plurality but came to a sharply differing conclusion: the Court's cases permitting the assignment of judicial functions to other than article III judges cannot be reconciled with any theory of the article that requires all stages of certain types of decisions or

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239. The second argument, that bankruptcy judges might be regarded as adjuncts to article III courts, drew principally on the decisions in Crowell v. Benson, 285 U.S. 22 (1932), and United States v. Raddatz, 447 U.S. 667 (1980). The plurality's negative conclusion was grounded chiefly in the extensive powers granted bankruptcy judges over the matters before them, which it characterized as including "all 'essential attributes' of the judicial power." 458 U.S. at 84–85. As a feature distinguishing the Bankruptcy Act provisions from those that had been upheld respecting workmen's compensation commissioners (*Crowell*) or United States magistrates (*Raddatz*), this characterization of the scope of authority is persuasive. See Kalaris v. Donovan, 697 F.2d 376, 388 (D.C. Cir.), cert. denied, 103 S. Ct. 3088 (1983). Yet the more striking characteristic of this argument is its assumption that one *must* place the agency-adjunct *within* the judicial branch. If judicial and other powers must be rigidly separated, this argument saves the "judicial" function *only* at the cost of abandoning rulemaking and executive functions. Thus, this argument, too, ultimately demonstrates the frustrations of applying a strict separation-of-powers approach below the three named heads of government.

240. Written for himself and Justices Blackmun, Marshall and Stevens.

241. 458 U.S. at 64–70.

242. Justice White wrote for the Chief Justice and Justice Powell.

functions to be conducted in article III courts.[243] Modeling their analysis on *Buckley*'s inquiry into impact on function, the dissenters would have disapproved the creation of legislative courts on constitutional grounds only if they concluded that such tribunals threatened to emasculate the courts, aggrandizing the authority of the political branches at their expense and depriving citizens of the protection that can be supposed to come from an independent judiciary's authority finally to resolve issues of law—that is, if the use of legislative courts threatened to disrupt the scheme of checks and balances. The legislative courts created by the Bankruptcy Act pose no such threat because they are specialized, deal "with issues likely to be of little interest to the political branches,"[244] and are subject to review by article III courts on terms that protect the core judicial functions of determining the meaning and application of law, and of exercising some control over determination of the relevant facts. Evidently, however, the dissenters' judgment that no such threat was present—like judgments about the impact of tort liability on the performance of official function—is highly subjective and open to debate.

In many respects, the opinions are astonishing.[245] No majority of justices could agree on proper methodology for analysis of primary issues of constitutional structure. Nor could a majority agree on identifying what central functions of the judicial branch Congress could not place elsewhere, or on which materials to rely in answering that question, or even on whether a coherent body of decision (using whatever referents) must ultimately emerge from a course of decisions. Three members of the Court went so far as to suggest that the justices could abandon the effort to give meaning to the Constitution's words—that the development of precedent and practice had made it "too late" to rely on the "simplicity of the principle pronounced in Art. III."[246]

Although the plurality opinion did not deny that Congress's authority to create administrative bodies is extensive, the Court's disagreement whether (or when) the judicial function can be satisfied by judicial oversight nonetheless raised fresh questions about the viability of statutory arrangements for administrative adjudications long accepted as proper in the presence of adequate provisions for judicial review. As the plurality itself recognized, only the last of the three categories it identified—the "public rights" doctrine of *Murray's*

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243. Id. at 105-13 (White, J., dissenting). Justices Rehnquist and O'Connor, concurring, limited themselves to the proposition that removal of a case that would otherwise be decided by state common law courts to federal bankruptcy jurisdiction required that the federal court of destination be an article III court. Id. at 91.

244. Id. at 115 (White, J., dissenting). At the opposite end of the spectrum are criminal defendants and the objects of intended speech regulation, whose cases often hold deep political interest.

245. Not the least surprising aspect of the decision was the Court's assertion that it could continue in effect for an interim period an allocation of judicial authority that it had found Congress could not constitutionally enact. Id. at 88; 103 S. Ct. 199 (extension of stay of mandate); 103 S. Ct. 662 (refusal to grant second extension).

246. 458 U.S. at 113 (White, J., dissenting).

Lessee v. Hoboken Land & Improvement Co.[247]—might permit avoiding the shadow thus cast on adjudications performed within "the executive Departments" or, at least, outside the article III judiciary. Under that doctrine, if "Congress would be free to commit such matters completely to nonjudicial executive determination . . . there can be no constitutional objection to Congress's employing the less drastic expedient of committing their determination to a legislative court or an administrative agency."[248] But to make administrative adjudication turn on whether Congress could commit the matters completely to nonjudicial executive determination is both insufficient and unhelpful.

The Court's analysis is insufficient because it leaves in shadow a great deal of administrative adjudication. As the plurality seemed to recognize but not confront, the whole point of the "public rights" analysis was that *no judicial involvement at all* was required—executive determination alone would suffice.[249] If the availability of judicial review is a due process requisite of some administrative adjudications—and the cases seem to be telling us that it is[250]—the "public rights" analysis does not support the initial administrative determination in those cases.[251]

The plurality's analysis is unhelpful because it avoids the central question in the case: if article III control by judicial review is constitutionally satisfactory for resolution of disputes concerning public rights that could not be made subject to wholly executive disposition—a point thought to have been passed long ago—why is it not equally satisfactory for the resolution of disputes concerning the bankruptcy laws? The difficulty is heightened by the apparent agreement by plurality and dissent that in congressionally created programs Congress can assign adjudication to agencies, not article III courts, when the dispute is between the government and private citizens.[252]

This is not the place to work out a theory of judicial task under article III that distinguishes fully among those settings in which article III courts must perform their functions *de novo*, those in which article III courts must be involved *at least* to the extent of supervision of other tribunals' results, and those in which article III courts need not be involved at any stage.[253] What

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247. 59 U.S. (18 How.) 272 (1885).

248. 458 U.S. at 68 (citation omitted).

249. The plurality hinted at the necessity of judicial review to support some types of administrative adjudication, id. at 69 n.23, but failed to see how that cut against reliance on the "public rights" doctrine.

250. Goldberg v. Kelly, 397 U.S. 254 (1970), repudiated the corresponding proposition—that since government didn't have to create welfare programs it was free to adopt whatever procedures it might wish for denying welfare claims—while broadly indicating the constitutional necessity that judicial review be available. See also, e.g., Atlas Roofing Co. v. Occupational Safey & Health Review Comm'n, 430 U.S. 442 (1977) (administrative assessment of civil penalty).

251. Nor can the agency-as-adjunct argument be made without embracing an equally large contradiction. See supra note 239.

252. 458 U.S. at 80 (plurality); id. at 94 (White, J., dissenting). One would think, however, that judicial impartiality is even more important when one party is the government than when not.

253. See Monaghan, supra note 127, at 18-20 (discussing *Crowell* and *Northern Pipeline*).

must be evident, however, is that the second of these sets can no longer be treated as empty, whatever may once have been the case.[254] And if it is not empty, the "public rights" doctrine cannot provide valid responses to separation-of-powers questions involving the judiciary. The central test to determine the appropriateness of an administrative structure must be the effectiveness of a relationship with article III courts to achieve the ends sought by article III, rather than the placement of a function in article III. This will be so whether one analyzes that relationship with a political impact test of the sort offered by Justice White, an historical analysis seeking out those questions most closely associated with jury and/or judicial decision, a comparison of regulatory regimes with the judicially administered remedies they replace, or some other alternative. While it seems entirely possible to defend the result in *Northern Pipeline* on some such terms,[255] the plurality approach reopens doors long thought nailed shut. We have in fact agreed that the review relationship is adequate to assure article III protections in all but the most extraordinary of situations, including many in which that relationship could not constitutionally be dispensed with.[256] Seen in this light, the plurality's assurances that administrative adjudications were not put in doubt by its approach to *Northern Pipeline* ring hollow; that a separation-of-powers argument could not be employed without casting so much doubt on central arrangements of government long thought secure suggests the difficulty of that approach.

3. INS v. Chadha. — Equally large questions were raised about settled arrangements of government and the viability of "separation of powers"—in this case, respecting the activities of article II legislators, rather than article I judges—by the decision last Term in *INS v. Chadha*,[257] the legislative veto case. It is some indication of the disarray in the Court respecting separation-of-powers issues that the three opinions reaching the constitutional issues in *Chadha*, deeply differing with one another on both approach and outcome, were written by the three justices who had joined the previous term's dissent in *Northern Pipeline*. I have written at some length elsewhere[258] about the diffi-

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254. That is, for some of the cases we have been sweeping in under the "public rights" label, due process considerations would prevent Congress from leaving non-article III actors free of the control of judicial review.

255. Thus justices Rehnquist and O'Connor suggested that the displacement of common law cases from state courts of ordinary jurisdiction to a federal bankruptcy tribunal requires the use of article III tribunals in light both of the character of the cases and the special considerations that come into play when state authority is displaced. 458 U.S. at 90–91.

256. One need consider only the disappearance of the "constitutional fact" question from contemporary teaching and thinking about administrative law, once the Court's decision in St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936), and widespread use of administrative law judges had settled issues about the possible objectivity of administrative fact-finding. See also Monaghan, supra note 127, at 18–20.

257. 103 S. Ct. 2764 (1983).

258. Strauss, supra note 5.

culties of the several opinions[259] in that case. There, I sought to show the importance of a distinction no justice had observed, between use of the veto in matters affecting direct, continuing, political, presidential-congressional relations and use of the veto in a regulatory context. I argued that the Court had to reach only the latter situation and that only that situation presents the constitutional difficulties that troubled the Court. Here, my purpose is to focus on the implication of the Court's failure to make that distinction for the choice between the separation-of-powers and checks-and-balances models in assessing congressional arrangements for governmental structure. The *Chadha* majority's invocation of the compartmentalization inherent in "separation of powers" cast doubts that it struggled to dispel on the continued viability of agency rulemaking; attention to checks-and-balances issues could have resolved the case without imposing that doubt—or, for that matter, undercutting the utility of the legislative veto in the political context.

Jagdish Chadha was a deportable alien found by an immigration judge of the Department of Justice's Immigration and Naturalization Service (the Department) to have established a claim to a compassionate suspension of deportation under section 244 of the Immigration and Nationality Act.[260] Under that statute, refusals so to find are subject to judicial review while favorable findings are to be transmitted to Congress, to take effect only if neither the Senate nor the House of Representatives repudiates them by resolution during the two sessions following.[261] In Mr. Chadha's case, the House adopted such a resolution at the last possible moment, without printed text, debate, or significant explanation. The issue before the Court[262] was the validity of that resolution—that is, of what might be described as the condition Congress attached in conferring on immigration judges the authority to suspend deportations. This problem had two aspects: the first, unimportant here, was whether the "legislative veto" regime must meet the formal constitutional requisites for legislation, bicameral consideration and presentment to the President for possible veto;[263] the second was whether the regime violated

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259. The Chief Justice, writing for himself and five others, found the legislative veto unconstitutional in an opinion broadly indicting all such provisions; Justice Powell, writing for himself, would have decided the case on grounds applicable principally to this statute; Justice White dissented in an opinion that seemed unqualifiedly supportive of the legislative veto. Justice Rehnquist also dissented, but on the nonconstitutional ground that (in his view) the suspension and legislative veto provisions of the statute were not severable, so that effective relief could not be given to Chadha.

260. 8 U.S.C. § 1254 (1982).

261. This mechanism—the occasion for 111 out of 230 legislative vetoes ever exercised by Congress under any statute through the summer of 1982—had been adopted to substitute for a prior practice of granting all such relief through private bills passed by the Congress, while maintaining congressional control. See Smith & Struve, Aftershocks of the Fall of the Legislative Veto, 69 A.B.A. J. 1258 (1983).

262. A number of procedural hurdles not relevant here had to be passed before the Court could reach the merits.

263. The majority's reasoning on that point was conclusory. Of course the formal requirements must be met before Congress can adopt some new statement of affirmative principle as law

the separation of powers by granting to Congress functions reserved to the President or the courts.

In finding such a violation, the majority opinion strikingly returns to the formalities of *Humphrey's Executor* at the same time as it repudiates the particular use to which they were put in that case. Although denying any purpose to suggest that the three branches of government are "hermetically sealed," the opinion makes its dominant metaphor an expression of fear lest the "hydraulic pressures" of power-seeking burst the boundaries of each branch's appropriate function—a palpable evocation of the "air-tightness" of the *Myers-Humphrey's Executor* approach.[264] Where the *Humphrey's Executor* Court accomplished its ends by placing "quasi-adjudication" and "quasi-legislation" outside the executive branch, however, the *Chadha* majority identifies both as executive branch activities[265]—a characterization consistent with *Buckley v. Valeo*[266]—and thus finds a significant question whether Congress has usurped the President's power.

Note that the decision here subjected to congressional review cannot easily be characterized as the President's: it was made in the first instance by a civil servant strongly protected against political interference in his judgment and required by statute to decide the case before him "on the record."[267] The difference between decisions that are explicitly presidential and those that are not is that the compartmentalization inherent in the separation-of-powers idea is an essential element of the framer's plan only for the former. Special questions *are* raised when the acting body is one of the named actors of the Constitution—Congress, President, and Supreme Court—who occupy the apex of power and whose excesses are for that reason the most greatly to be

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binding upon the citizenry or the government. The problem for the case was to determine whether they properly apply to a standardless, contentless expression of disapproval of an immigration judge's decision, with no possibility of expressing more than a simple negative as to the (proposed) suspension of a particular deportation order whose validity had been made conditional on the failure of either house to express such a negative. The Chief Justice's majority opinion solves the problem by treating the immigration law judge's action and the House resolution as distinct legal acts—*as if* the suspension were a final act, then reversed by the resolution. He is thus enabled to characterize what the House did in Chadha's case as "altering . . . legal rights," 103 S. Ct. at 2784, and hence (in his view) within the requirements of bicameralism and presentment. Yet, under the statutory scheme as Congress enacted it, Chadha's technical right to remain in the country could not be conferred by the INS alone; it is conferred if the INS acts *and then neither house of Congress does*. To say that he has acquired a right that the House is now purporting to take away is to assert the desired conclusion, not to reason to it. See generally Strauss, supra note 5.

264. 103 S. Ct. at 2784; see supra text accompanying notes 149-50.

265. 103 S. Ct. at 2785 n.16.

266. See supra text accompanying notes 177-85.

267. Immigration judges are neither statutory administrative law judges nor bound (in terms) by the Administrative Procedure Act, 5 U.S.C. §§ 551, 553-710 (1982); see Marcello v. Bonds, 349 U.S. 302, 309 (1955). Nevertheless, they serve under statutes and well-established rules and administrative arrangements providing equivalent safeguards from political oversight. See 8 U.S.C. § 1252(b) (1982); 1A C. Gordon & H. Rosenfield, Immigration Law and Procedure § 5.7 (1982); 2 id. § 8.12(b) (1983).

feared. It is the potential powerfulness of those heads of government that gives special meaning to the formalities of the document. For the inferior parts of government, subject to law and the webs of control woven by all three of the named heads,[268] the same risks do not arise; agency actions are of lesser concern than the President's for just this reason. Presidential actions are more threatening to the stability and balance of government, to the containment of power at its apex, than any authority given an agency under partial control of all three named heads of government is likely to be.[269] For the agencies, the questions of relationship suggested by *Buckley* and *Nixon v. Administrator of General Services* have greater constitutional significance.

The problem with using a compartmentalization approach below the very apex of government is illustrated by the trouble the majority encountered in rationalizing agency rulemaking. Reconciling the proposition that an action that alters legal rights is "legislative in purpose and effect" with its characterization of rulemaking as an executive function[270] posed the same difficulties for the Court as it had had to face, in the context of agency adjudication, in *Northern Pipeline*. "To be sure," the Court acknowledged, "rule making . . . may resemble 'lawmaking,'"[271]—indeed, from the familiar perspectives of administrative law, the end product of rulemaking resembles lawmaking far more than did the House Resolution in *Chadha*. But, asserts the Court, since the President is doing it, it is not "lawmaking": "'[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker,'"[272] quoting Justice Black's troubling majority opinion in *Youngstown Sheet & Tube*. Both halves of this proposition—that the President himself is acting when an agency adopts a rule, and that the activity is not "lawmaking"—are seriously problematic.

The very purpose of delegation is to permit the delegate to create legally binding prescriptions—that is, to act *as if* it were a legislature, albeit within legislatively created substantive and procedural constraints. Of course the agencies *are* lawmakers, in any conventional sense of the term, when they engage in rulemaking pursuant to statutory authorization.[273] If the President

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268. For the immigration judge, one such control might be judicially enforced apoliticality. For example, many would think Chadha would have had a cogent complaint had the President called the Attorney General on the telephone and instructed him to tell the sitting immigration law judge that Chadha's deportation order was not to be suspended, because the President had concluded that the statutory criteria were not met; it would be asserted that Congress had validly delegated the function of on-the-record decision to the immigration law judge, irrespective of "where" in government he might be placed. See supra text accompanying notes 199-206.

269. See supra note 154.

270. *Chadha*, 103 S. Ct. at 2784, 2785 n.16.

271. Id. at 2785 n.16.

272. Id. (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952)). As Professor Bruff has pointed out, the opinion must be understood as the product of a context in which no issue of delegation was involved. "Justice Black's separation of powers analysis was sufficient to dispose of the case at hand, but it was unduly simplistic. His broad dictum . . . is refuted by the reality of executive power under most legislation." Bruff, supra note 47, at 472.

273. Indeed, in recent contexts the Court has stressed this point by insisting on explicit statutory authorization for any agency seeking to adopt "legislative"—that is, legally binding—rules. See, e.g., Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979).

is himself engaging in rulemaking under delegation, then the argument that "lawmaking" is restricted to the legislative branch is in serious difficulty.[274] The Court seems to make the *Youngstown* passage mean: "The President does not act legislatively because he is the chief executive; the House does, because it is part of Congress. What the President does is *ipso facto* executive; what the Congress does, legislative."[275] The Court identifies agency rulemaking with presidential rulemaking; it then asserts that, because the President can only act executively, rulemaking is safe from any claim that requirements of presentment or bicameralism apply—however like lawmaking it is.

Freeing ourselves of the equation of presidential with agency action would make it possible both to acknowledge the lawmaking character of rulemaking and to place it in the constitutional structure in ways that promise continued adherence to the basic values of the constitutional scheme. Congressional delegations of regulatory authority are most often made not to the President, but to some executive branch or independent agency. It is, to say the least, not at all clear that the President is entitled to participate in the proceedings of these bodies to the extent suggested by calling him the delegate.[276] Since rulemaking may seem especially problematic when it is in fact performed by the President, one ought not rush to identify an agency with him when its functions remain generally in the control of all three branches of government. Treating an agency as if it were inevitably "here" or "there" tends to create the logical puzzles we have seen the Court working so hard to avoid.[277]

Suppose the Court had been willing to dissociate the agency from the President and had focused primarily on the question of the relationships between the agency and the three named heads of constitutional authority. From that perspective the legislative veto issue might have looked rather different. The question would then be what impact the legislative veto could

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274. Reconsider, in this light, the Court's negative reaction to the delegation in the National Industrial Recovery Act, see supra text accompanying note 148, and its emphatic statement in *Humphrey's Executor*, on the same day it took that action, that precisely because the agency was acting quasi-judicially and quasi-legislatively, it was "in" the legislative and judicial branches, and "no part" of the executive branch. See supra notes 148–53 and accompanying text.

275. Another suggestion that the Court intends this approach is found in a repeated "presumption" that a governmental body is acting within its delegated sphere. See *Chadha*, 103 S. Ct. at 2784.

276. See, e.g., United States v. Nixon, 418 U.S. 683, 694–96 (1974) (departmental regulation freed special prosecutor from direction by President in prosecutorial choices, a quintessentially executive activity); Sierra Club v. Costle, 657 F.2d 298, 405–08 (D.C. Cir. 1981) (discussion of presidential participation in rulemaking). For further discussion, see Nathanson, supra note 30, at 1099–109; Strauss, supra note 5, at 807–12; Verkuil, supra note 55, at 963–70.

277. The *Chadha* Court came close to realizing the problems of a formal separation-of-powers analysis when it distinguished the Department of Justice's action from the House of Representatives' by invoking the functional consideration that the Department's actions had been authorized, and consequently limited, by a statute. 103 S. Ct. at 2785 n.16. That fact, with the attendant processes of review, made the bicameral process unnecessary as a check. Understood as a proposition that the actions of the Department of Justice were not a matter of concern precisely because they were *not* the President's but the actions of a subordinate part of government, this distinction may be helpful.

be expected to have on the President's own relationship with the agency and, in particular, on his claim to function as the sole head of government. A veto mechanism need not defeat such a claim; indeed, the more it seemed that the action being taken was fairly to be characterized as the President's own, the less objectionable the veto might be. From a checks-and-balances perspective, the need for cross-checking institutions of control is the more urgent where authority is to be exercised by one of the named heads of government. For example, in the reorganization context it might readily be argued that Congress could afford to confer the authority to initiate restructuring of government on the President only if it reserved the counterbalancing possibility of "legislative veto" disapproval. The President, gaining the initiative through the authorizing legislation, would hardly lose in the exchange.[278]

Where the action clearly is not the President's, on the other hand, the legislative veto begins to appear, not as a device for sharing enlarged responsibility within government, but as a means for enhancing congressional political controls at the expense of presidential ones. At least within a certain range, we have seen that Congress readily can exclude the President from political control of regulatory outcomes.[279] Yet the rationale for these measures, and for the apparent offense they give to the President's claim to serve as the unitary head of executive government, equally requires that Congress exclude itself from such controls. A measure that enhances Congress's political controls while isolating the President would threaten both his position as unitary head of government, and his continuing capacity to function as a political counterweight to Congress. Thus, in *Chadha*, Congress's reserved power to disapprove a proposed suspension is made even more problematic by the "on-

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Taken as an assertion of the difference between the necessary controls over the actions of the President and those over the actions of the Congress, however, the Court's argument proves too much. The House's action, no less than the Department's, was authorized and limited by a statute, and could occur only within its terms—subject, no doubt, to judicial correction if they were exceeded.

If, for example, the House had sought to act after the statutory time had expired, or to attach a condition to Chadha's remaining, it seems clear that habeas corpus would have relieved him of any deportation order and established his right to permanent residence. That the House's judgment *within those bounds* did not have to be explained and was not open to review suggests other bases upon which the statutory mechanism could be questioned. See Strauss, supra note 5, at 799. However, it is hard to understand how these difficulties turn the House's exercise of its very limited options into a "legislative" act. The judgment suspending Mr. Chadha's deportation order was equally free of the possibility of review (unless in the Congress, pursuant to the act), even if entered in an entirely unauthorized manner—for example, in response to a bribe, or, less dramatically, without considering one of the required factors or in consideration of an irrelevant one. The *Chadha* Court did not find in this a reason to regard the Department's action to be legislative; indeed, it seemed to take reassurance from the fact that the most lawless of acts by the INS suspending an otherwise valid deportation order would not be subject to correction in any forum. 103 S. Ct. at 2787 n.21.

278. See Strauss, supra note 5, at 815. For an indication of the trouble sown by the Court's approach, compare EEOC v. Allstate Ins. Co., 570 F. Supp. 1224 (S.D. Miss. 1983), with Muller Optical Co. v. EEOC, 33 Fair Empl. Prac. Cas. (BNA) 420 (W.D. Tenn. Nov. 10, 1983).

279. See supra text accompanying notes 199-206.

the-record" regime within the Department that impairs direct presidential control. If the President is excluded from directing that a given rule be adopted, amended, or rejected while Congress is able to assert that authority, one has lost the intended focus of responsibility and balance.

Viewed in another light, such a use of the legislative veto is an end run around the President's claim to participate in legislative action through his own veto; if Congress could by a single legislative act establish a body subject to its political domination and free of presidential control for the adoption of positive law, then the engine for veto avoidance would have been defined. The difference between this view and what the Court appeared to be doing in *Chadha* lies precisely in the amount of attention given the actual role of the President in the action made the subject of a possible legislative veto. Under this view, it is not the veto alone, but the veto in conjunction with the congressional delegation of power away from the President—the assertion of differential claims to political control favoring the Congress and tending to create a multiheaded executive—that is the objectionable measure. Note that it is not necessary in this analysis to know where in government the agency is located, or how to characterize the function it is performing.

* * *

The preceding review of the existing institutions of American government and of the body of textual, contextual and interpretational constraints bearing upon them should cast doubt on the idea that our Constitution *requires* that the organs of government be apportioned among one or another of three neat "branches," giving each a home in one and merely the possibility of relations with the others. President, Congress and Supreme Court are undoubtedly to be distinct in form and in function; below that level the text does not speak, sharp distinctions are frequently hard to find in fact, and the Court's occasional efforts to find them in theory have repeatedly led to embarrassments.

Thus to recognize that most of administrative government[280] lies outside the constitutionally defined structure would not defeat the purposes either of separation of powers or of the system of checks and balances. The notions of checks and balances and (as an identifier of strong claims to attenuate political controls across the board) separation of functions are more vital in understanding the place of agencies in government. So long as separation of powers is maintained at the very apex of government, a checks-and-balances inquiry into the relationship of the three named bodies to the agencies and each other seems capable in itself both of explaining fully the results of past inquiries into the permissible structures of government below its apex, and of preserving the framers' vision of a government powerful enough to be efficient, yet sufficiently distracted by internal competition to avoid the threat of tyranny. This approach reflects common political science and presidential perceptions of the way government actually works without the evident conceptual embarrassments of "the qualifying 'quasi.'"[281]

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280. See supra note 11.

281. See supra note 16.

A focus on checks and balances could tend to emphasize struggles among the three branches for positions of control, and to ratify the bureaucrat's sense that he constitutes a legitimate fourth force in government, making control that much harder. Such a focus would be consistent with article II's references to the President, rather than an executive branch, a limitation which seems to have figured so prominently in the result in *Nixon v. Fitzgerald*. This approach might also provide the means that many have sought to understand the administrative functions of government without requiring either radical dissociation of agencies from the controlling institutions outlined in the constitutional text[282] or total abnegation of judicial control over congressional choices respecting governmental structure.[283] Emphasizing the preservation of unresolved tension among the named branches also aids in understanding the allocation of control authority and control mechanisms as between the President and Congress. If the question is how much control the President must be permitted to exercise, this model underscores the absence of any significant distinctions between the independent commission and most if not all executive departments. There remains a single President as the politically responsible head of law-administration.

III. "Checks and Balances" as a Limit on Congress's Authority to Create the Structure of Government

This Part of the essay supposes that government agencies charged with administering public law are *not* to be regarded as having been placed in one or another branch but rather exist as subordinate bodies subject to the controls of all three. Having thus put the agencies, in some sense, "out" of the executive branch, perhaps the most pressing question that remains is what if any relationship between an agency and the President might Congress (and the courts) still be required to honor. The issue what constraints exist on Congress in giving structure to government is thus to be assessed under the somewhat elusive checks-and-balances approach partially adopted in *Buckley* and *Nixon v. Administrator of General Services*.[284]

From the text, three principal constraints emerge: that the President must appoint at least the head of any agency doing the work of government; that the agency in doing that work must have a relationship with the President consonant with his obligation to see to the faithful execution of all laws;[285] and that, in particular, the President must have the authority to demand

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282. See, e.g., Grundstein, supra note 11.

283. Cf. Choper, discussed supra note 194.

284. See supra text accompanying notes 171-98.

285. One need not force a choice between the active and caretaker views of the Presidency, E. Corwin, supra text accompanying note 125, to observe that both imply *some* relationship with the chief executive consistent with his position as chief executive. However much the authority to decide might be put in the agency itself, a capacity to place it there does not imply the further step—deeply destructive of the constitutional scheme—of placing it there subject to the political supervision of others than the President.

written reports of the agency prior to its action on matters within its competence, with the strong implication that consultation if not obedience will ensue. Central to the overall judgments of the Constitution, and reflected in these textual passages, is the elementary judgment that we were to have a unitary, politically responsible head of government, possessed of sufficient independent authority to serve as an enduring counterweight to the political muscle of Congress. Arrangements destructive of such a role—whether creating a "multiple executive," defeating the possibility of presidential political responsibility for the work of government, or threatening the President's continuing capacity to resist the Congress—are for this reason suspect.

This Part argues that these constraints at a minimum require that Congress observe a principle of parity in its treatment of the possibility of political control of agency action by itself and by the President. Fairness and separation-of-*functions* considerations may often support exclusion of an agency or at least certain types of agency action from the domain of politics generally. However, Congress cannot expect to reserve political oversight for itself without recognizing corresponding oversight responsibilities in the President. Yet parity *is* a minimum; the President by virtue of his office as chief executive may be able to claim relationships beyond the constraints of parity. Recognition by the courts of a constitutionally based claim of executive privilege—that is, of private communication with agencies directly responsible for law-administration—is the most obvious example of such a claim. A more controversial claim would be for a requirement that Congress recognize presidential authority to resolve or mediate at least some types of internal policy disputes—for example, those placing separate agencies in direct confrontation with each other—or requiring judgments beyond a particular agency's ordinary responsibility and expertise.

The extent to which the President must have ultimate decisional control over all executive actions is also a function of the constitutional history. The rejection of the Sherman position, envisioning a multi-headed executive dominated by Congress,[286] provides a reference point at one end of the spectrum. Its rejection underscores the decision to make the President an effective, unitary executive. Within the range of permissible structures, the proper degree of presidential involvement was left undetermined. Nonetheless, his powers vis-a-vis government in general and Congress in particular were to be sufficient to give some assurance of maintaining a continuing tension over ultimate political authority between himself and Congress—no one branch was to become dominant. Rather than choose between the competing views of President as executor and President as overseer of execution, I want to argue that even the lesser of these views, when understood in a way that supports these structural imperatives, would imply the need for a substantial presidential relationship with any agency performing a significant governmental duty exercised pursuant to public law.

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286. See supra notes 97-112 and accompanying text.

Thus, Congress's authority to create the government's structure must be constrained in a manner that will preserve essential conditions of the President's intended political responsibility for the day-to-day, law-implementing activities of government. Even the most modest notion of what constitutes executive power suggests that the President must retain substantial lines of communication and guidance. To deny the President that authority would be to deprive him and the public of that responsibility, and effectively to permit the Congress, again, to establish multiple centers of law administration primarily under its control.[287] Similarly, the execution of not a single law but many inevitably raises questions of priority, conflict, and coordination that rarely are addressed in any of the acts concerned; particular departments, with their narrow responsibilities, may be incapable of appreciating the interplay.[288] Attending to these conflicts seems an inevitable aspect of a chief executive's function. That a legislature creates a statute and makes its application mandatory, or perhaps dependent upon stated circumstances, does not mean that the legislature will bestow the resources necessary to achieve that end, that it ever "intended" full enforcement, or that it has carefully thought through the relationship of the new mandate to those that have preceded it and those that will follow. In addition to resolving these conflicts and setting priorities among statutes, is the practical requirement of coordinating law-administration with political program and molding both to changing circumstances. The day-to-day course of national affairs generates new issues to which a coherent response must be made and for the resolution of which the public will hold the President politically responsible.

As we saw in the preceding Part, the Court has found that the inquiries suggested by the checks-and-balances notion often lead to imprecise results. Yet the difficulties at the margin of saying whether given arrangements threaten "core functions" that are themselves imprecise—whether one is speaking of the President's functions, the Court's, or the states'[289]—are not sufficient justification for refusing the inquiry. Although the stakes may be higher, the task thus facing a court does not differ in principle from the paradigmatic judicial task in reviewing acts of administrative discretion of determining whether that discretion has been abused.[290] The very existence of discretion marks a zone within which the court is not permitted to substitute judgment, but must respect the higher authority of the agency acting to

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287. See Sierra Club v. Costle, 657 F.2d 298, 405-06 nn.520-26 (D.C. Cir. 1981).

288. Roads to Reform, supra note 55, at 70-72. One need not work for long in a prosecutor's office, a quintessentially "executive" place, to appreciate how legislators, reacting episodically to public demands for protective law, people the landscape with laws in far greater number than can reasonably be enforced, with laws that conflict with each other or encroach upon one another, and with laws that, although stated in mandatory form, clearly require priority ordering and reconciliation.

289. See supra text accompaying notes 171-98, 238-56.

290. In administrative law terms, the review function is to be thought of in terms of § 706(2)(A) review for *abuse* of discretion rather than § 701(a)(2) exclusion of review of action "committed to agency discretion by law." 5 U.S.C. §§ 701(a)(2), 706(2)(A) (1982).

determine the matter before it. Yet maintaining that discretion within a framework of law also implies that the court will on occasion be able to determine that the agency's discretion has been abused. The court can make that determination easily where straightforward violations of governing law can be identified, and with more difficulty when it can only point to a diffuse combination of factors operating in a particular context as the basis for its judgment.[291] Undoubtedly Congress has been given enormous discretion in shaping the instruments of government within the constitutional scheme; yet maintaining the Constitution as an instrument of law does not permit us to characterize this discretion as being without ascertainable constraint. Professor Choper asserts that courts should treat all these structural questions as "political," and hence decline review.[292] "Political question" may in fact be an appropriate sobriquet for that range of discretion Congress undoubtedly has, the area within which it is free to express its judgment.[293] To deny judicial function in assessing the limits of that discretion, however, would connote not merely judicial modesty but also a denial of the role of law and, ultimately, a denial of the vision of law as perpetuating the constitutional order.[294]

A. *Constraints Arising Out of the Constitution*

Whether or not an agency is to be equated with the President in some constitutional sense, the constitutional text directly requires three forms of relationship between the President and the head of that agency: the President is to appoint the agency head with the advice and consent of the Senate;[295] the President may require the agency head to give an opinion, in writing, "upon any Subject relating to the Duties of [the] . . . Office[]"[296]; and, most diffusely, the relationship must otherwise be such as to permit the President effectively to "take care that the laws be faithfully executed."[297] Examination of these required relationships shows their link to the preserving of tension among the named branches; the link to that necessary condition, in turn, permits a more confident analysis of these requirements.

1. *The Appointments Power. — Buckley*[298] reflects the first of these relationships, which appears to be well understood and—as that case reflects—readily susceptible of enforcement. Congress has not entirely given up the effort to create institutions over which it or its delegates, rather than the

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291. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 413-14 (1971).

292. See supra note 194.

293. See Henkin, Is There a "Political Question" Doctrine?, 85 Yale L.J. 597 (1976).

294. See Monaghan, supra note 194, at 302-06.

295. U.S. Const. art. II, § 2, cl.2. The "Advice and Consent of the Senate" is waivable by Congress if one understands the agency heads as "inferior Officers" whose appointment "Congress may by Law vest in the President alone."

296. U.S. Const. art. II, § 2, cl.1.

297. U.S. Const. art. II, § 3. See generally supra text accompanying notes 85-93, 97-112.

298. Buckley v. Valeo, 424 U.S. 1 (1976).

President, enjoys or shares appointment authority. In its most recent effort, the creation in late 1983 of a new form for the United States Civil Rights Commission (the Commission), Congress sought to use the possibility left open by *Buckley* of congressional appointments to agencies not performing "a significant governmental duty."[299] Until 1983, the Commission had been composed of six members appointed by the President with senatorial confirmation to terms of indefinite length, under requirements of bipartisan affiliation[300] such as have generally characterized "independent regulatory commissions." When President Reagan proved unable to persuade the Senate to confirm nominations he had made to replace some of its sitting members, he purported to remove those members from office without replacing them (and also without asserting cause). The ensuing controversy[301] was terminated by compromise legislation[302] reconstituting the Commission as a body of eight members serving six-year terms—four appointed by the President without requirement of confirmation but subject to bipartisanship requirements, and two appointed by each of the chief officers of the houses of Congress, on recommendation of the party leadership in each house.[303] Potential *Buckley* problems were recognized but answered, it was thought, by denying the

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299. Id. at 141. Another recent example involving congressional appointments, the Cost Accounting Standards Board, is discussed briefly below. See infra text accompanying notes 341-44.

300. That is, no more than half the members of the Commission could belong to any one political party. Civil Rights Act of 1957, 42 U.S.C. § 1975(b) (1976) (amended 1983).

301. Two of the three commissioners ostensibly removed in this way brought suit, based on *Humphrey's Executor*, to enjoin interference with their continued performance of duty. Berry v. Reagan, 32 Empl. Prac. Dec. (CCH) ¶ 33,898 (D.D.C. Nov. 14, 1983), dismissed as moot, 32 Empl. Prac. Dec. (CCH) ¶ 33,925 (D.C. Cir. Nov. 30, 1983). The district court judge granted a preliminary injunction on finding in the legislative history sufficient indications that the Commission had been intended to be independent and its commissioners, therefore, removable only for cause. The court regarded the problem of the commissioners' apparently indefinite terms as answered by the temporary character of the commission; as the commission was itself authorized for only a few years at a time, requiring periodic reauthorization, the terms of the commissioners could be regarded as fixed by the term of the Commission. Cf. Wiener v. United States, 357 U.S. 349 (1958) (similar reasoning with respect to independent War Claims Commission). The preliminary injunction was continued in effect during an appeal, and the district court opinion was then vacated as moot when the authority of the existing Commission expired and the substitute arrangements discussed in the text were enacted. Berry v. Reagan, No. 83-2184 (D.C. Cir. 1984).

Compare Kalaris v. Donovan, 697 F.2d 376 (D.C. Cir.), cert. denied, 103 S. Ct. 3088 (1983), in which members of the Department of Labor's Benefits Review Board (the Review Board) were found not to have such "for cause" terms and thus could be removed by the Secretary of Labor without cause having to be stated. The members were departmental, not presidential, appointees, and the Review Board's permanency precluded arguments that its duration marked the effective fixed term. Id. at 395-96. The court did not have to consider whether the unexplained removals of the Review Board members resulted from efforts to influence particular on-the-record proceedings before them, and acknowledged that such efforts could raise due process claims for particular litigants. Id. at 399 n.91.

302. United States Commission on Civil Rights Act of 1983, Pub. L. No. 98-183, 1984 U.S. Code Cong. & Ad. News (97 Stat.) 1301.

303. Id. § 2(b).

Commission any law-administering function. Its only authorities were to conduct investigations and to make reports[304]—activities as much within the authority of Congress as the President, and thus not presenting the issues that had driven the *Buckley* result.

Putting aside any questions whether in fact the *Buckley* dicta support this arrangement,[305] the first appointments to the Civil Rights Commission under the new design highlight the weaknesses of a system that substitutes divided, unchecked powers for the checks-and-balances approach. Part of the asserted political compromise that led to the new arrangements was an understanding that the President and relevant congressional officials were going to use their appointment authority to install particular nominees, including two of those the President had purported to fire.[306] Other appointments were made,[307] however, and it immediately became evident that the unchecked authority to appoint conferred by the new scheme offered far less opportunity for political struggle than had the prior arrangements.

The prior arrangements, one might have thought, set terms fixed by the possibility that the President might nominate *and the Senate confirm* replacements; in effect, that is the termination point for the commissioners of many current independent regulatory commissions, who may serve past the end of their designated terms if a successor has not yet been confirmed.[308] The President's effort under the previous statute to obtain confirmation of the replacements—appointments the new arrangement permits to be made unchecked—had failed precisely because of the requirement that he propose publicly the action he meant to take and because of the ability of opponents then to bring effective countervailing pressure to bear in another political forum. That the President and Congress may now each select half the membership of the Commission free of any need to secure the approval of the other, in other words, has produced a significantly diminished check on the outcome as a whole.[309] And that the President and Senate may not now together effect a change in the membership of the Commission without "cause" gives those unchecked political appointments, once made, extraordi-

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304. Id. § 5.

305. See supra text accompanying notes 177-82. While investigation and reporting are distinctly auxiliary functions that might be performed by any of the three branches in pursuit of its own functions, the Civil Rights Commission was to perform them as ends in themselves, carrying out statutory delegations. Inevitably the simple fact of such activities and their results can affect the lives of private citizens in important ways. Cf. Hannah v. Larche, 363 U.S. 420 (1960). One might on this basis construct an argument that presidential appointment of the heads of this agency is required, but that argument need not be pursued here.

306. N.Y. Times, Dec. 17, 1983, at 9, col.6.

307. Id.

308. While a person holding such an office may appear subject to greater personal pressure than one holding office for a fixed term of years, the tenure enjoyed is still more definite than that associated with service at the President's pleasure.

309. Compare supra note 183.

nary staying power.[310] In this way, the apparent purposes of the appointments clause have been undercut.

2. *Opinions in Writing.* — In contrast to the appointments power, often enough the occasion for important constitutional litigation, the opinions in writing clause may seem one of the Constitution's more trivial pronouncements.[311] The Supreme Court seems never to have had to decide a question of its application. Given, however, *Buckley*'s perception that all persons heading agencies charged with law-administration are "Officers of the United States" within reach of the appointments power, it would seem to follow that all are the "Heads of Departments," and consequently subject to the requirement that they respond to presidential requests for opinions in writing.[312] Certainly both presidents and independent agencies seem so to have understood the relationship, although the President has not always insisted upon it. Thus, at least two presidents have been publicly advised by the Department of Justice that they would be entitled, as a legal matter, to insist that independent regulatory commissions as well as cabinet departments supply them with analyses of the probable economic impact of proposed rules.[313] Presidents who regarded the United States Civil Rights Commission as independent, in the sense that they could not obstruct its actions or dictate its reports, acted as if they were entitled to a preview of those reports and an opportunity to discuss them; and the Commission, like its more directly regulatory counterparts,[314] willingly responded.[315]

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310. Although the question of Congress's authority to limit presidential removal of government officials, not addressed in the text of the Constitution, has long been associated with the express power of appointment, see supra notes 145–47 and accompanying text, the question seems part of the larger issue of presidential discipline over the agencies' performance—an aspect of his constitutional duty to "take care that the laws be faithfully executed" and of his unshared political responsibility if they are not. See supra note 132.

311. Justice Jackson characterized the clause as "trifling" in his concurrence in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641 & n.9 (1952)—an authority so self-evident that the drafters' decision to express it cast doubt on broad constructions of executive authority. Its only recent application, State v. Carter, 462 F. Supp. 1155 (D. Alaska 1978), produced a holding that the President's constitutional authority to seek the advice of the Secretary of the Interior could not be burdened by the requirements of the National Environmental Policy Act. See also Proto, The Opinion Clause and Presidential Decision-Making, 44 Mo. L. Rev. 185 (1979).

312. Although the text of the opinions in writing clause speaks of "the executive Departments" and the appointments clause merely of "Officers" and "Heads of Departments," it would be captious to regard the clauses as differing in their referents. Resolution of the issues respecting executive power did not occur until the final days of the Convention, under pressures that produced understandably imperfect drafting. See, e.g., supra note 108. See generally supra text accompanying notes 97–113. No indication appears of any thought that different referents were intended. Although the framers appear to have expected that law-administering authority would be delegated to others than the President, the fact remains that no other part of the Constitution speaks directly to the character of their relationship with him.

313. See supra notes 76–78 and accompanying text.

314. See W. Cary, supra note 66, at 18–19, 23–24.

315. See, e.g., Memorandum in Opposition to Appellant's Emergency Motion For Summary Reversal, at 46, Berry v. Reagan, 32 Empl. Prac. Dec. (CCH) ¶ 33,898 (D.D.C. Nov. 14, 1983), dismissed as moot, 32 Empl. Prac. Dec. (CCH) ¶ 33,925 (D.C. Cir. Nov. 30, 1983). President

Regarding the opinions in writing clause as expressive of the President's necessary relationship with those parts of government responsible for administering its laws would have sharp implications for congressional controls. No agency could be made so independent of presidential oversight as to deny that relationship. There could be no obligation of reporting to the Congress only, and thus any congressional notion that "the independent agencies are ours" must fail. Beyond that simple negative, the strong implication of having such a clause—confirmed by what is known of the discussions that preceeded its adoption[316]—is that the communication the President may demand would be one made to him in private and made in time for relevant action or response on his part (that is, prior to the agency's own final decision). These requirements would obtain whether the President were entitled to direct the outcome, only to speak to it, or merely to be informed what is likely to occur. Conversely, public, after-the-fact notification would deny any effective President-agency relationship and would inhibit the President's capacity to mobilize the remainder of government to respond to the measure being taken. These impacts would be heightened were Congress to assert that it or its agents should be given private advice on some issue within the agency's responsibility or be informed in advance of the public announcement of some agency decision.[317]

Suppose, however, that Congress itself abjures any such claim, and that the decision to be taken is one readily understood as requiring action outside any suspicion of political determination—for example, decision in an on-the-record adjudicatory setting. Has the President nonetheless an opinion-in-writing claim to be privately informed on the matter in issue, before public announcement of decision, in spite of the appearance of possible political influence? It is difficult to fashion a *structural* argument that would protect a decisionmaker other than an article III judge from such a claim, for any such argument would deny the presidential role.[318] Yet the appearance that the President was claiming a prerogative to subvert on-the-record adjudication was the very difficulty that seemed to contribute so strongly to the Court's

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Kennedy is said to have complained about not being able to block the release of a CRC report critical of his policies because of the Commission's "independence." Implicit in this account was that he had and used an opportunity to consult with and try to persuade the Commission. Id.

316. See supra text accompanying notes 97-112.

317. The Marine Mammal Protection Act of 1972, 16 U.S.C. § 1379(d)(2) (1982), exempts certain rules promulgated under the Act by the Secretary of the Interior from Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981) (reprinted in 5 U.S.C. § 601 note (1982)), the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (1982), and the Paperwork Reduction Plan Act of 1980, 44 U.S.C. §§ 3501-3520 (Supp. V 1981). The President responded to this direct assault on executive authority by invoking inherent executive power to achieve the control equivalent to that provided under the inapplicable statutes and authority. Statement on Signing H.R. 4084 Into Law, 17 Weekly Comp. Pres. Doc. 1111 (Oct. 9, 1981); see Verkuil, Symposium on Presidential Control of Rulemaking: An Introduction, 56 Tul. L. Rev. 811 (1982).

318. See Kalaris v. Donovan, 697 F.2d 376 (D.C. Cir.), cert. denied, 103 S. Ct. 3088 (1983) (no structural argument to prevent removal without cause from on-the-record decision responsibilities).

denial of the executive function in *Humphrey's Executor*.[319] Some basis upon which to support a congressional judgment defeating such a claim seems essential for judicial acceptance of the resulting adjudications.

An argument to this end might be constructed along other than structural lines, relying on the claims for fairness inherent in the separation-of-functions model. The assertion would be that Congress could determine that one constitutional claim (the President's power to require an opinion in writing) had been trumped by another, the litigant's claim to a decisional process freed from the suspicion of improper influence.[320] The argument would be tenable, however, only if Congress had made clear that its objective was to create an apolitical process. And the argument would be no different if made respecting the judicial officer of the Department of Agriculture than if made about the Securities and Exchange Commission. In either case, Congress would have to pay a considerable price, its own abstention from efforts at political direction or else raise significant problems from a checks-and-balances perspective.[321] This approach allows us to avoid the necessity of having to say that an agency exempt from the opinion in writing mandate is "in" the article III judiciary,[322] and permits Congress to give voice to its judgments about fairness without threatening to unbalance the intended tensions among the government's political branches.

3. *"Take Care that the Laws Be Faithfully Executed".* — As Professor Corwin[323] and others[324] have noted, the Delphic responsibility of the President to "take Care that the Laws be faithfully executed"[325] does not tell us whether the President has authority to direct the affairs of government beyond that which statutes confer. What is important to note, however, is that the uncertainty is not unlimited. Whether this phrase implies that the President is to be a decider or a mere overseer, or something between, it requires that he have significant, ongoing relationships with all agencies responsible for law-administration. The unitary responsibility thus expressed, and sharply intended,[326] does not admit relationships in which the President is permitted so little capacity to engage in oversight that the public could no longer rationally

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319. See supra text accompanying notes 150-53.

320. Compare the Court's reasoning in United States v. Nixon, 418 U.S. 683 (1974), discussed supra text accompanying notes 174-76.

321. See infra text accompanying notes 333-46.

322. As we know, *Crowell*, *Humphrey's Executor* and *Northern Pipeline* notwithstanding, it is not.

323. See supra text accompanying note 125.

324. The argument that the President himself may exercise the discretion statutorily delegated to others, see Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring), seems to render much of the remaining text of article II superfluous, and the President's personal authority unworkably large. See also Ledewitz, supra note 125, at 763-70, 788-93.

325. U.S. Const. art. II, § 3.

326. See supra text accompanying notes 97-101.

believe in that responsibility. The charge to "take care" implies that congressional structuring must in some sense admit of his doing so. An effort, then, to establish an agency over which the President's control went no further than the power to appoint its heads should be found deficient.

The proposition that Congress must allow some scope for presidential oversight of any law-administrator does not preclude its choosing by statute to place the responsibility for decision in a department rather than the President. Thus, primary responsibility, as well as the capacity, for detailed decisionmaking properly lie in the agencies to which rulemaking is assigned. Both agency decisionmaking and presidential oversight of an agency's performance may take into account only those factors that the statutes establishing them permit as relevant.[327] Since the Constitution does not itself resolve the tension between President as administrator and President as political counterweight to Congress,[328] a court would be hard pressed to deny Congress the choice in a particular setting of treating him as administrator.[329] That assignment is itself a part of the law to the faithful execution of which the President must see. If, for example, EPA or OSHA is statutorily forbidden to consider economic cost as an element in a safety decision, that statutory preclusion is part of the law to be executed and consequently a constraint on its execution—for the President, as well as for the responsible agency.[330] Presidential participation, like agency decision, seems possible only within the area of discretion that a particular law establishes. In any event, the President has only those resources Congress chooses to appropriate to him,[331] and these are insufficient for him to make the detailed substantive decisions required by the statutes.

However, the presidential oversight function must in some sense be recognized; even an administrator has power and is not merely a clerk. Significant possibilities for legitimate presidential involvement can be identified and in fact appear to make up the bulk of presidential intervention efforts: seeking and providing information to promote coordination and awareness of national policy issues affecting law execution, requiring analysis or responses on matters suggested by national policy concerns relevant to the agency's charge, or directing that given perspectives be further considered within the framework of relevance established by the agency's organic statutes. All these

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327. See, e.g., American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490 (1981).

328. See supra text accompanying notes 102–13, 125.

329. Perhaps a different question would be raised by congressional measures so thoroughgoing that they seemed to fix the President's character as administrator across the board—thus resolving an intended tension.

330. See American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 509 (1981). An indication that costs *were* considered would be the occasion for a summary reversal on judicial review of the resulting rule. See D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972); Texas Medical Ass'n v. Mathews, 408 F. Supp. 303 (W.D. Tex. 1976); Florida Dep't of Health & Rehabilitative Servs. v. Califano, 449 F. Supp. 274 (N.D. Fla.), aff'd mem., 585 F.2d 150 (6th Cir. 1978), cert. denied, 441 U.S. 931 (1979). Senate Comm. on Government Operations, Study on Federal Regulation, Vol. II: Congressional Oversight of Regulatory Agencies, S. Doc. No. 26, 95th Cong., 1st Sess. (1977).

331. See supra note 118.

actions are consistent with the statutory assignment of decisional responsibility to the agencies, the President's resources and vantage point, and his obligation to "take care" that *all* laws are faithfully executed. None need compromise the ultimate decisional authority of the responsible agency or disregard the factors that Congress may have identified as relevant to its decision by implying a substitution of presidential for agency judgment.[332]

B. *The Requirement that Congress Observe Parity in Political Oversight*

The Constitution and the structural judgments it embodies require, at a minimum, that Congress observe a rule of parity in providing for political oversight of any government agency it creates. Congress cannot favor itself in providing for political oversight of an agency that administers, as well as assists in the formulation of, its laws. A rule that presidents may not, but members of Congress may, seek to bring political influence to bear on the policymaking of any agency directly affronts the framers' purposes,[333] and serves no apparent function beyond aggrandizement of congressional power at the expense of the President's. Members of Congress are as capable as presidents of making excessive telephone calls or passing on private views under the guise of policy guidance, and often have done so; congressional hearings, for example, are used at sensitive stages of policymaking as instruments of coercion as well as of inquiry.[334] Yet Congress's constitutional raison d'etre is not to oversee the execution of laws; it is to enact new laws as required. Political pressure from the Congress or its members, is, if anything, *more* objectionable than similar pressure coming from the White House.[335] At the least, the judgment that policymaking should not be subject to political direction must apply for congressional as well as presidential pressures. To conclude otherwise is to reverse the Convention's central decision about the Presidency.[336]

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332. The distinction between supervision and substitution is one reasonably well understood, if not invariably practiced, by courts as well. In Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971), the Court piously states that it is supervising only: "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."

333. The willingness of the drafters to see Congress begin its annual session as late as the first Monday in December, U.S. Const. art. I, § 4, cl. 2, is itself evidence that an active presidency was expected.

334. American Pub. Gas Ass'n v. Federal Power Comm'n, 567 F.2d 1016, 1069 (D.C. Cir. 1977), cert. denied, 435 U.S. 907 (1978); Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977); D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir.), cert. denied, 405 U.S. 1030 (1972).

335. The President, unlike Congress, has independent authority deriving from the constitutional text and his position as chief executive to bring his (political) viewpoint to agency decisionmaking. See supra text accompanying notes 295–332.

336. See supra text accompanying notes 97–101. Support for the general idea that Congress and the Executive have a mutual duty to acknowledge and reconcile each other's important constitutional obligations can be found in United States v. American Tel. & Tel. Co., 567 F.2d 121, 127–31 (D.C. Cir. 1977); see also United States v. House of Representatives, 556 F. Supp. 150, 152–53 (D.D.C. 1983).

Consider in this light an aspect of the pre-*Chadha* debate over the legislative veto that put the prevailing myths about independent and executive agencies in sharp relief. The White House at one time suggested that the legislative veto was objectionable only if rulemaking authority had been placed "in" the executive branch, and had thus unilaterally invaded the President's article II authority to execute the laws.[337] Under this argument, the legislative veto would not be objectionable if Congress could have kept the delegated rulemaking authority entirely away from the executive branch, say, by placing it in an independent agency. Because rulemaking had thus been made a "legislative act," the argument went, a legislative veto respecting FTC rules was said to be less open to objection than one applying, say, to rules adopted by the Department of Education.

The argument seems precisely backwards, because it fails the parity test. The strongest argument made in support of the legislative veto—the one I have argued ought still to prevail in the context of direct presidential action in the arena of political action[338]—arises in those cases in which the initiative subject to the possibility of veto is actually the President's. The President's involvement assures parity,[339] and thus makes it possible to say that "the possibility of undue legislative encroachment—the focus of the Framers' stress on the veto power—is minimal."[340] If the President cannot himself control the promulgation of the rule because, for example, it is the product of an "independent regulatory commission," then law has been changed through a process redolent of congressional political control and requiring congressional approval, without presidential participation; an engine for avoidance of the veto in the formulation of statutory policy has been created.

The need for parity can be further illustrated by referring to an obscure and lapsed authority of government, the Cost Accounting Standards Board (the Board). This body was established to devise a standard body of accounting principles for use in all negotiated defense contracts.[341] Such contracts constitute over ninety percent of the total number of government contracts, and standard principles were thought likely to result in substantial cost reductions. Because executive branch officials were regarded as subject to political

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337. The current Administration offered a compromise to congressional committees considering a general legislative veto statute: the President would not object to a statute that reached only rules of independent regulatory commissions. See Hearings, supra note 76, at 7.

338. See Strauss, supra note 5, at 806.

339. That is, in this setting the legislative veto scheme most closely approaches practical equivalency to ordinary legislation; unless Congress (by failing to veto) and the President (by permitting a proposal) agree that a new rule is to take effect, the law remains as it was before; the concurrence of all three is required to effect a change. In the regulatory setting, however, other problems remain. See Strauss, supra note 5, at 808–09.

340. Atkins v. United States, 556 F.2d 1028, 1065 (Ct. Cl. 1977) (per curiam), cert. denied, 434 U.S. 1009 (1978).

341. 50 U.S.C. app. § 2168 (1976); see generally Hearings to Consider the Status of the Cost Accounting Standards Board and a Proposal to Transfer Its Authority to the General Accounting Office: Hearings Before the House Comm. on Banking, Housing, and Urban Affairs, 96th Cong., 1st Sess. (1979).

and contractor pressures, and had not in fact succeeded in developing a body of agreed accounting principles, Congress established a five-member board under the chairmanship of a congressional official, the Comptroller of the United States, to develop rules to take effect unless disapproved within a stated brief time by Congress.[342] Once promulgated the rules were administered by the Defense Department. Departure from Board standards resulted in the imposition of a penalty on the contractor, a result indistinguishable from what would have occurred if Congress had adopted the standards by statute. The standards were adopted following procedures resembling ordinary informal rulemaking under the Administrative Procedure Act, but the Board's work was excluded from all provisions for judicial review; once adopted, the standards lay before the Congress for sixty legislative days and took effect unless disapproved by concurrent resolutions.

One might think that these arrangements would fall under the weight of *Buckley*'s reasoning respecting the appointments power, although the Court has left in place a contrary judgment of the Court of Claims.[343] But even if one assumes the appointments provisions might be sustained,[344] serious questions about the manner in which the agency was to conduct its rulemakings remain. The agency is completely severed from presidential control, but remains under close political control by Congress; it enacts rules that govern governmental contractors and the Department of Defense alike, and even the possibility of judicial review of the resulting standards appears to have been excluded. Such a mechanism, if permitted here, would quickly teach Congress how to avoid presidential controls, and would sacrifice the unitary character of the Presidency. In asserting for itself political connections denied the

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342. 50 U.S.C. app. § 2168 (1976). The Comptroller originally opposed placement of this "executive branch function" in his agency, the General Accounting Office, but later expressed satisfaction that the Board had been able to remain free of political pressures that would have distorted an executive order. Hearings to Consider the Status of the Cost Accounting Standards Board and a Proposal to Transfer Its Authority to the General Accounting Office: Hearings Before the House Comm. on Banking, Housing, and Urban Affairs, 96th Cong., 1st Sess. 63–64 (1979).

343. Boeing Co. v. United States, 680 F.2d 132 (Ct. Cl. 1982), cert. denied, 51 U.S.L.W. 3756 (U.S. Apr. 12, 1983). Under the Cost Accounting Standards Act, 50 U.S.C. app. § 2168 (1976), the CASB's standards "shall be used by all relevant Federal agencies and by defense contractors and subcontractors." 50 U.S.C. app. § 2168(g) (1976). The Court of Claims held that regardless of either the constitutionality of the act, or the Defense Department's mistaken assumption that the law compelled it to adopt the standards, the adoption of the standard by the department was valid, whatever the departmental motivation for doing so. *Boeing Co. v United States*, 680 F.2d at 141.

344. It might be argued that by placing appointive authority in the hands of the Comptroller General, Congress sought to use its article II authority to "vest the Appointment of such inferior Officers, as they think proper, . . . in the Heads of Departments." U.S. Const. art. II, § 2, cl. 3. The Comptroller General, although an official of Congress, is appointed by the President with senatorial consent for a term of years made unusually long in an effort to assure independence. The argument that he could be regarded as the "head" of the Cost Accounting Standards Board, a separate statutory agency, is placed in some doubt by the circumstance that his authority on the CASB concerning its one substantive responsibility (the generation of standards) was identical to

Presidency over an organization charged with law-administration, the Congress signalled the gravest of insults to the constitutional scheme.

This proposition about parity is not an especially strong one. In particular, so long as Congress does not treat itself more favorably than it does the President, the parity notion does not preclude a congressional judgment that some agency policymaking should not be subject to political direction by the President. From this perspective, the "independent agency" may simply reflect an ordering of governmental function that Congress would be free to extend to most if not all government.[345] Government officials who are not heads of departments may be placed in the Civil Service, remote from presidential discipline, even though Congress could not insist on having an opportunity to approve their removal. Nonetheless, the acceptance of a requirement of parity in political oversight would establish an outer limit susceptible of both understanding by the Congress and application against it. That congressional understanding, in itself, might be thought likely to influence congressional judgments about the extent to which political controls would be warranted in a given situation.[346] In creating "independent" agencies, Congress would have to give up the notion that "they are ours." Acceptance of this reasoning, by requiring acts of self-denial, should constrain the frequency with which the judgment to create agency independence is in fact made. If one can imagine circumstances in which freeing a governmental body from some or all political controls would be inappropriate, one can equally imagine substantial political hurdles to any such outcome.

C. *The President's Claim to Effective Communication*

One of the requisites of even a minimal oversight relationship, confirmed as we have seen in the opinion in writing clause, is a channel of communication with the agency being overseen, communication which—at least absent special justification—may be conducted in private and maintained as confidential. Absent the capacity to talk effectively, the oversight relationship and the intended political responsibility that attends it could hardly be said to exist. This is not the place for a general essay on executive privilege, but some

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that of his fellow board members. The vote of each counts equally; no other commission or board treats members as "inferior officers" subject to the chairman's appointive authority.

345. As already noted, supra note 11, defense and foreign affairs functions are special; the measure of congressional control over domestic law-execution is far larger. Its breadth is illustrated by the plurality reservation in Nixon v. Fitzgerald, 457 U.S. 731 (1982), discussed supra text accompanying notes 221–32, of the question of an express congressional provision for presidential tort liability.

346. To Mark Rotenberg I owe the observation that the characteristic differences in these political controls will render complex any assessment of the balance between them. Congressional oversight and appropriations hearings have an institutional character associated with legislation, as presidential controls are an outgrowth of executive discretion. The differences ought not to be surprising and reflect the vitality "separation of powers" does have as applied to the named actors of the Constitution. That apples and oranges are not strictly commensurable, however, does not negate a proposition that if one is on the plate in abundance, so must be the other.

broad features should be noted in preparation for a limited discussion of congressional prerogatives of control.

1. *Executive Privilege as a Claim Applicable to All Law-Administrators.* — The claim to executive privilege, often enough disputed in particular applications, is nonetheless generally recognized. *United States v. Nixon*[347] acknowledged its constitutional dimension, even while holding that in specific instances it might be overcome. A similar proposition underlies long-standing judicial assertions—again, susceptible of being overcome—that the decision processes of law-administrators are not to be inquired into on judicial review,[348] and that the fifth exemption to the Freedom of Information Act,[349] which in effect embodies the more general notions of executive privilege, should be read as accepting that privilege. "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decision-making process."[350] Congress's enactment of that exemption—as its general acknowledgment of a presidential claim to privacy of communication with officers of government that may be overcome only on its demonstration of a specific need for legislative purposes[351]—signals its own acceptance of the general principle.

Perhaps it will be thought that the more general form of executive privilege—that which protects the decisionmaking process as distinct from national secrets of defense or foreign relations[352]—is limited in its provenance

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347. 418 U.S. 683 (1974), discussed supra text accompanying notes 174–76.

348. United States v. Morgan, 313 U.S. 409 (1941), requires a strong showing of bad faith or improper behavior to go behind administrative findings made. See Camp v. Pitts, 411 U.S. 138 (1973).

349. 5 U.S.C. § 552(b)(5) (1982); see also NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 137 & n.2 (1975) (exempting "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency").

350. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150–51 (1975) (quoting *United States v. Nixon*, 418 U.S. at 705).

351. Whether Congress is obliged to accept particular claims of executive privilege is, of course, an entirely different matter; as in *United States v. Nixon*, the President is unlikely to be left as the final judge of the matter. Nonetheless, as in the recent imbroglio over privilege claims leading to the resignation of Anne Burford Gorsuch, President Reagan's Administrator for the Environmental Protection Agency, see N.Y. Times, Mar. 10, 1983, at B12, col. 1, these issues tend to be compromised in political give-and-take—both sides perhaps realizing that there is much to be lost from the definitive judicial resolution that ultimately might otherwise be required. The fact of that play in the joints, again, is a central indicator of the health of the constitutional scheme: if the outcomes were or could be one-sidedly foreordained, the implication would be an incapacity on the part of the President to check the Congress or vice versa.

Congressional need must in any event be demonstrated to obtain judicial enforcement. See McGrain v. Daugherty, 273 U.S. 135, 177 (1927); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 732 (D.C. Cir. 1974); Fein, Fighting Off Congress: A Bill of Rights for the Independent Agency, 8 District Law. 37 (Nov./Dec. 1983).

352. The scope of executive privilege parallels the range of executive function. As a general matter, claims that information might compromise military or foreign relations interests of the nation have greater weight, and are less easily overcome, than claims that making public some

to the body actually deciding. That is, an agency to which Congress has delegated a decisional function might be entitled to protection of its own decisionmaking processes, but communications from the outside—specifically from the President—would be within the ambit of a proper claim of privilege only if the President were himself entitled to decide the matter and hence internal to the decision process. The basis on which a functional argument of that sort could be made for decisions of protected objectivity has already been indicated;[353] as a general matter, however, the argument encounters the difficulty that the constitutional basis for the claim of executive privilege inheres in the Presidency itself—indeed, a requirement that the President himself authorize any claim of executive privilege formally made to Congress or the courts is generally accepted.[354]

As with the legislative veto and the independent regulatory commissions, a curious position taken by the White House (in this case during the Carter Administration) may serve to illustrate the problem of limiting privilege only to "executive" personnel.[355] Congress was considering legislation to regularize the procedures for asserting executive privilege and, as it usually does, the Office of Management and Budget sought comments from all agencies, including the independents, on the proposal. The bill in question required a presidential assertion of privilege, and made no provision for claims by or on behalf of the independents. The NRC's responsibilities for nuclear materials safeguards and export licensing had resulted in its having possession of a substantial body of sensitive foreign relations and intelligence information, information subject to the stronger form of executive privilege claim, and it seemed appropriate that it be brought within the umbrella of the procedures being established. A comment recommending such an amendment was proposed. The view from the Department of Justice, however, was that because the NRC was independent it could not hope to have the privilege available to it, and therefore the comment should not be made.

Viewed as a political judgment about what positions the administration could afford to take with the Congress, this advice is no different than the decision not to impose the cost-benefit analysis regimes of Executive Orders 12,044 and 12,291 upon the independent commissions.[356] As a legal analysis, however, it is extraordinary. The information in question was no less sensitive

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internal dialogue about law-administration will impair the President's capacity to secure candid advice from his associates. This difference is well reflected in the wording and interpretation of exemptions 1 and 5 of the Freedom of Information Act, 5 U.S.C. §§ 552(b)(1), (5) (1982). See W. Gellhorn, C. Byse & P. Strauss, supra note 2, at 592–93; supra note 11. We are here concerned with the latter form of claim.

353. See supra text accompanying notes 316–18.

354. Failure to recognize that his argument is inconsistent with the Constitution's vesting executive authority in a single President is the principal flaw in the otherwise perceptive discussion appearing in Fein, supra note 351.

355. I learned of this incident, as a number of others, during a period of service as General Counsel to the Nuclear Regulatory Commission.

356. See supra notes 76–78 and accompanying text.

nationally in the NRC's hands than it had been in the hands of the Department of State; it concerned issues of high controversy, respecting which congressional demands were readily anticipable. To deny the possibility of a claim of executive privilege seems also to deny any obligation to the President on the agency's part to hold the matter in confidence. The implication, again, is that Congress has succeeded in fractionating government, producing law-administrators not related to the President in a way that permits recognizing in him the (politically enforceable) obligation of taking care that the laws be faithfully executed, and creating oversight relationships for itself with law-administrators in which the political resistance expected and generally forthcoming from the Presidency would be missing. If executive privilege is the President's, and it is in the Presidency that it has its constitutional source, then privilege is a relationship that must extend throughout all law-administration.

2. *Congressional Regulation of Executive Privilege.* — As *United States v. Nixon* underlines, the fact of executive privilege does not in itself establish the President's right to hold communications to him (or within the executive branch) confidential. Claims to acquire the information subject to the privilege or to deny confidentiality to consultations may equally be based on the Constitution, and in particular cases may be stronger than the privilege claim. The *Nixon* Court indicated that balancing judgments were required, finding there that a special need urged on behalf of criminal defendants overcame what was presented as a blanket, generalized claim of privilege made on the President's behalf.[357] It was argued above, along similar lines, that a presidential claim of constitutional prerogative to communicate in private with a decisionmaker could be overcome by a congressional judgment that a given decision must be made "on the record" to assure its objectivity.[358]

Congress might have other reasons, apart from motives of power aggrandizement, to limit presidential communications to the agencies to which it had delegated decisional responsibilities, or to require any communications to be made publicly. While ostensibly the purpose is to communicate presidential views, such communications might be a means for injecting the views of politically influential private parties (the conduit problem). Communications are more often made in the name of the President than by the President himself, and Congress might believe that having staff persons making them presented unacceptable political risks or diffusion of authority (the staff abuse problem). Even outside the context of on-the-record proceedings, these risks, on the whole, could be thought to outweigh the gains to be had from informal and confidential lines of communication within the administration. This problem arises most acutely in the context of informal rulemaking, where it has already had a fair amount of focussed attention.[359] Those analyses suggest both that wide scope exists for congressional judgment on the problem and—

357. See supra text accompanying notes 174–76.

358. See supra text accompanying notes 316–22.

359. See, e.g., Bruff, supra note 47; Nathanson, supra note 207; Verkuil, supra note 55.

what might be regarded as the parity-driven consequences of a judgment favoring controls—that it would be difficult to adopt more formal standards without making rulemaking far more cumbersome. Are there limits on Congress's authority to make and enforce such judgments?

a. *The Conduit Problem.* — The allegation that private presidential (and congressional) communication had permitted back door influence by special interest groups was a principal objection of the parties in *Sierra Club v. Costle*,[360] a well-regarded D.C. Circuit decision reviewing the highly significant EPA rulemaking on sulfur emissions by coal-fired electric utilities.[361] Environmental groups feared that politically more powerful coal interests were having their views passed directly along, in private, as if they were the views of the President, or at least with the command that they receive respectful attention. National coordination can be understood as a rationale for presidential participation; serving as a conduit for the views of special interest groups in particular cases presents greater difficulties.[362] In *Sierra Club*, the court was able to rely on advice the Attorney General had given White House officials that their ability to consult with agency officials on rulemakings might depend on their undertaking not to serve a pass-along function,[363] and that they should keep and make public records of materials they received from private sources to show their adherence to that undertaking. Because that advice appeared to have been followed, the court found the consultations not legally objectionable.[364]

While it recognized the constitutional stature of the claim of both "the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy,"[365] the D.C. Circuit in *Sierra Club* also appeared to recognize the scope for judicial and legislative regulation of that power. It hinted that courts might inquire, using the discovery weapon, whether "conduit communications" had occurred. In the context of the Attorney General's advice and its apparent acceptance, however, it declined to authorize that step "simply on the unsubstantiated hypothesis that some such communications may be unearthed thereby."[366] A presumption of

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360. 657 F.2d 298 (D.C. Cir. 1981).

361. That rulemaking was also the subject of an extraordinary case study demonstrating (and decrying) the penetration of politics into the outcome. B. Ackerman & W. Hassler, Clean Coal/Dirty Air (1981).

362. See also, e.g., In re Permanent Surface Mining Regulation Litigation, 617 F.2d 807, 809 (D.C. Cir. 1980) (per curiam) (appeal from denial of preliminary injunction); Bruff, supra note 47, at 466 (National Highway Safety Administration).

363. 657 F.2d at 405 n.520.

364. Id. at 407–08; see also 44 Fed. Reg. 1355 (1979); Dep't of Justice Memorandum to Cecil D. Andreus, Jan. 17, 1979, reprinted in Legal Times of Wash., Jan. 29, 1979, at 32, col. 1.

365. 657 F.2d at 405.

366. Id. at 405 n.520. It might be noted that the Reagan Administration has taken a less formal view, only advising officials to make sure persons who make contact with them have placed in agency files any factual data they mean to present, and making no effort to preserve a paper trail. See, e.g., Hearings, supra note 76, at 47 (Testimony of James Miller, then Director of the President's regulatory reform effort and now Chairman of the FTC):

regularity would first have to be overcome, in light both of general hesitation to put agency motivation on trial[367] and of the "extraordinary caution" courts should employ when article II considerations are present.[368] And while the court seemed to indicate that a statutory requirement of disclosure would be enforced,[369] it also anticipated that such a statute would have to respect the need for parity. Congress could "convert informal rulemaking into a rarified technocratic process, unaffected by political considerations,"[370] but at the cost of confining congressional as well as presidential power.

Thus, Congress's broad authority to adopt legislation to structure the behavior of the President and agencies cannot be considered independently of the same constitutional concerns as motivated the *Sierra Club* court to decline to intervene. The argument for controlling intra-executive contacts depends on viewing rulemaking as an apolitical process, like a trial, in which decision turns on the outcome of a public contest over facts, rather than on intuition and judgment based on experience in the community. That vision is tenable, but has several shortcomings. First, it represents a sharp departure from current understanding, and implies an equal constraint for Congress. Second, it may not reach past the conduit issue, or is at least far weaker respecting expressions of official views. Third, and most important, significant difficulties would arise if Congress sought to go beyond requiring contacts to be made public, to a prohibition of presidential contacts. A requirement of openness would satisfy procedural if not structural concerns: it would supply a full record for judicial review, and full appreciation in the community of the data on which the agency has relied; it would also provide a means for checking

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> As you can see, the basic principle is that any factual information given to OMB and the task force should also be transferred to the agencies to be included in their rulemaking files. Furthermore, any time we procure facts or perform analyses based on such facts which impact on our consultations with agencies, we also transmit such information for inclusion in the record.

See also id. at 102 (OMB has no intention of maintaining a log of contacts); General Accounting Office, Report to the Chairman, Senate Comm. on Governmental Affairs, Improved Quality, Adequate Resources, and Consistent Oversight Needed if Regulatory Analysis is to Help Control Cost of Regulations iv, 52–54 (Nov. 2, 1982) (criticizing OMB's ex parte contacts and lack of written comments); M. Eads, The Crusade that Backfired ch. 6 (forthcoming); Hearings, supra note 76, at 17 (June 11, 1981 memorandum from David Stockman entitled "Certain Communications Pursuant to E.O. 12291, Federal Regulation").

367. *Sierra Club v. Costle*, 657 F.2d at 405 n.520; see also Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S 402, 420 (1971); Morgan v. United States, 304 U.S. 1 (1938).

368. *Sierra Club v. Costle*, 657 F.2d at 407. That is, recognizing the President's proper constitutional role, the court also recognized that permitting easy litigative intrusion would necessarily impair his exercise of that role.

369. See, e.g., 657 F.2d at 405–07:

> We assume, therefore, that unless expressly forbidden by Congress, such intra-executive contacts may take place . . . . But in the absence of any further Congressional requirements, we hold that it was not unlawful in this case for EPA not to docket a face-to-face policy session involving the President and EPA officials during the post-comment period . . . .

370. Id. at 408.

that the pass-along function was not being served while substantially respecting the President's claim to consultation under the "opinions in writing" clause. It would be hard to reconcile a prohibition of presidential contact either with that provision, or with the general purpose to make of the President a unitary chief executive.

Might not the President insist that policy advice at least, as distinct from factual assertions, remain confidential? Both written and oral opinions from the agencies, and any responses the President may make, have the character of communications about which executive privilege claims could be made, even though the claims would not invariably be respected.[371] Even apart from the risk of purposeful Congressional disruption of the balance of powers within government, any disclosure requirement must balance gains for judicial review or public acceptance against possible losses in the candor and flexibility of the government's decisional processes. Without attempting to resolve here the *United States v. Nixon*[372] balance, I would note that a sweeping and general congressional judgment about the benefits of openness for public acceptance of administrative acts does not present as precise a claim as a prosecutor's need in connection with a particular criminal proceeding. It neither embodies explicit constitutional values corresponding to the criminal defendants' assertions in that case nor reflects a particularized need to override the executive's claim to privilege. On the President's side, arguments of varying strength can be imagined: the argument against a requirement that outside contacts be disclosed—the conduit function—is evidently weaker than that against disclosing all contacts, even those from within; required exposure of factual submissions, less objectionable than required publicity for advice. On the congressional side of the ledger, one notes that statutory requirements of publicity have a greater tendency to defeat the intended tensions among the branches by greatly reducing presidential power across a broad spectrum of activity than does an issue-specific judicial determination that a presumptive privilege has been defeated. Certainly, given the President's constitutionally based claim for confidential consultation with law-administrators, Congress could not expect to require openness for presidential communication only. If it required all presidential communications to be open without equally requiring that of congressional communications, the suspicion would be inescapable that an assault on the Presidency, rather than an assurance of fair or acceptable procedure, was at the root of the measure; and accordingly, it ought not survive.[373]

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371. See Bruff, supra note 47, at 505; Verkuil, supra note 55, at 958–59.

372. 418 U.S. 683 (1974).

373. A similar issue, respecting which even stronger doubts might be raised, is suggested by a proposal discussed in connection with recent regulatory reform legislation to prohibit any officer of the United States from requiring independent commissions to submit legislative proposals (or testimony or comments) for executive branch coordination prior to their submission to Congress. The President may not only require opinions in writing on any subject; he is also to recommend the legislation he judges necessary and expedient. The proposed constraint significantly hampers

Could Congress require the President to participate only in the ordinary course, requiring that any comments or advice be filed not only openly but also within the time frame allotted for public participation?[374] Again the values beyond interbranch warfare to be served by such a requirement, such as the facilitation of judicial review, require at least that the same constraints be placed on congressional interventions.[375] The President's responsibility to coordinate the activities of all government, however, sets him apart from private and congressional actors. The responsibility cannot be well exercised unless he, as well as the responsible agency, is in a position to assess the various responses made in the rulemaking and even the agency's preliminary reaction to those responses. Congressional imposition of strict time requirements, then, could require a burden of justification beyond that to be faced in supporting a requirement of openness.

b. *The Staff Abuse Problem.* — In addition to the conduit problem are the difficulties introduced by the fact that not all views attributed to the President, even views emanating from the White House, are in fact his. Junior staff members may be anxious to satisfy imagined desires of the President, knowing that he does not have the time to be consulted on all issues. Less creditably, they may be eager to demonstrate their power to the outside world. Of course the officials at the other end of the telephone line know that "the President wants" is not always meant literally; yet the cost of testing the waters can be high. Aware of these potentials for misunderstanding, if not abuse, might Congress provide that presidential prerogatives of participation must be exercised personally?

We saw earlier that one result of *Nixon v. Fitzgerald* was a sharp distinction at the level of quasi-constitutional prerogative between the President and even close "elbow-aides."[376] If a similar distinction were employed in this context, it would permit the restriction suggested—in the process, effectively denying the President the capacity to perform his functions by precluding him

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his ability to do so by effectively depriving him of the possibilities of consultation and coordination. A requirement that agency proposals be revealed with the President's package, like the equivalent requirements now common respecting budget requests, would not raise these issues; nor would a provision requiring the agency to wait only a reasonable time before making its submission. Either of these measures would also restrict the President's political authority with the agencies concerned; the difference lies in their preservation of his leadership and initiative.

374. Dean Verkuil discusses this issue, Verkuil, supra note 55, at 985, and recommends:

> There should be no requirement that these written contracts be submitted in accordance with the timeframe established for public comment, but they should be placed in the record before the rule is finally promulgated. Limiting contacts to the public comment period would reduce the value of public comments to the agency and to the executive branch. Post-comment contacts are important precisely because they are informed by the comment period itself.

Id. at 987–88 (footnoted omitted).

375. Acceptance of that proposition could well make use of this option more sparing—limited, for example, to rulemaking conducted on the record, where the judgment that apolitical approaches are required is strong.

376. See supra text accompanying notes 221–36.

from delegation. This result is troubling. Even the most sensitive issues of national security must be brought to the point of presidential decision by staff, who assemble data and views, and then winnow and shape them for the President, often after energetic and even oppressive consultation with the responsible agencies and departments. Presidential interventions in agency proceedings will almost always be performed by someone other than the President, acting in his name. The Constitution embraced the President's political accountability as an officer whose performance might be measured by the electorate—a concept consistent with delegation, so long as he may fairly be held to account for the delegates' performance. Indeed, anticipated delegation is the point of the cryptic references to "Departments." And the near-impeachment of Richard Nixon dramatically confirmed the reality of that responsibility.[377]

Such a constraint on presidential action would not meet the test of parity unless congressmen equally constrained their own staffs. The political cost to Congress of taking such a step, given the apparent importance of "casework" and oversight for legislators' priorities,[378] would almost certainly preclude it *if* the parity notion applied. Yet the Court's reasoning in the *Fitzgerald* cases[379] suggests it does not. The presidential aides in *Harlow* had relied for their claim of absolute privilege on *Gravel v. United States*,[380] a case involving assertions by a Senator and his aides of privilege under the speech-or-debate clause of the Constitution.[381] The *Gravel* Court had said in dictum[382] that the clause "applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself."[383] In the *Fitzgerald* cases, only the Chief Justice accepted the evident parallel to *Gravel*, and he noted it in terms too sharp to pretend hjs eight colleagues had not rejected it. One may say the Court erred, or that its judgment was affected by the particular executive conduct alleged in the *Fitzgerald* cases, or that the difference between qualified and absolute privilege is not so substantial as to impair the President's capacities to maintain his office and to remain an effective political competitor to Congress. Yet if Congress can legislate that it may, but the President may not, employ staff to

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377. Dean Verkuil suggests a hierarchical approach, distinguishing interventions by the President himself from interventions by senior White House officials, and the latter, from interventions by staff aides. Verkuil, supra note 55, at 987–88; see also Roads to Reform, supra note 55, at 155–57 (dissenting remarks of former Secretary of Transportation William T. Coleman, Jr.). The distinction is an attractive one but its effect, again, is essentially to deny the possibility of delegation.

378. R. Arnold, supra note 72, at 26–27; M. Fiorina, Retrospective Voting in American National Elections 204–10 (1981); Fiorina & Noll, supra note 72, at 256.

379. See supra text accompanying notes 221–37.

380. 408 U.S. 606 (1972).

381. U.S. Const. art. I, § 6, cl. 1.

382. It found the clause not properly invoked in the circumstances of the case. 408 U.S. at 622.

383. Id. at.618.

carry out oversight roles, the President's capacities both as chief executive and as political rival would be significantly undercut.

D. *The President's Constitutional Claim to Direct Agency Judgment*

The discussion to this point has largely assumed the proposition sometimes thought to have been settled by *Kendall v. United States*[384] that Congress can if it wishes place administrative duties wholly in law-administrators, not subject to direction by the President. But *Kendall* resolves that issue only for settings in which administrators have no discretion.[385] Granted that the agencies and the President are each bounded by law in their exercise of discretion, what directory authority does the President have *within* these boundaries?[386] As in the inquiry into executive privilege, it may be useful to consider the issue in two aspects: first, whether in the face of congressional silence, presidential authority to direct or at least shape the exercise of law-administering discretion may be inferred; second, if so, whether any limits on congressional ability to override that direction by statute may be found. As in the case of executive privilege, it is not possible to be more than suggestive about a subject on which many have written.

1. *Presidential Direction of the Exercise of Administrative Discretion as a Claim Applicable to All Law-Administrators.* — Issues attendant to the President's claim to direct the exercise of administrative discretion are well posed by the increasing level of White House involvement in major agency rulemaking through the imposition of requirements to engage in economic analysis of the likely impact of proposed rulemaking, subject to possible White House review.[387] President Carter's Executive Order No. 12,044, an initiative broadly supported by the legal community,[388] first imposed this requirement in detail. The order created presidential review mechanisms essentially procedural in character; while further analysis or reports could be requested and the White House might call forceful attention to deficiencies thought to exist in agency drafts, the Order suggested no effort to direct how the rulemaking agency must exercise its judgment as to outcome, once a satisfactory analysis was in hand.[389] President Reagan's Executive Order No. 12,291, issued soon after he took office, took the further step of imposing a

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384. 37 U.S. (12 Pet.) 524 (1838), discussed supra text accompanying notes 127–30.

385. Id. at 609–14.

386. The concern is hardly a new one. See R. Cushman, supra note 140, at 680–88; E. Redford, supra note 167, at 12–33; Byse, Comments on a Structural Reform Proposal: Presidential Directives to Independent Agencies, 29 Ad. L. Rev. 157 (1977); Cutler & Johnson, Regulation and the Political Process, 84 Yale L.J. 1395, 1409–14 (1975).

387. See supra notes 76–78 and accompanying text.

388. See, e.g., Roads to Reform, supra note 55, at 79–88 (recommendations for increased presidential participation in rulemaking).

389. It is of course difficult—and was understood to be difficult—to enact a conclusion shown to be excessive, inefficient, or ineffective by an analysis that will be part of a rulemaking record; nonetheless, there was no mistaking whose judgment was to be exercised in that regard.

standard of judgment to be exercised on the basis of these analyses, "to the extent permitted by law": agencies were to adopt rules only if they were both cost-beneficial and benefit-maximizing.[390] Although not formally applicable to the independent regulatory commissions, both executive orders were widely followed by them; both Presidents made clear that they had excepted the independents to avoid stirring up a political fuss, not because either believed he lacked authority to apply the order to the independents.[391]

The stated rationale for these orders was not that the President might wish to substitute his judgment for the agency's on particular issues delegated to it, but that they would permit him to bring to bear balancing and coordination perspectives inseparable from the notion of a single chief executive. Acting on their own, agencies are most unlikely to achieve effective balance. Although the EPA, for example, could "take account of" the concerns of the NRC in adopting rules respecting radioactive wastes and the NRC, in turn, could consider the perspectives of the EPA, each would act from its own perspective. Uniformity of outcome would be unlikely even though both agencies would assert that they were taking account of the other's need and would be making genuine efforts to do so. Nor would either have authority to enforce its conclusion in the other agency. Such problems arise daily and may involve a significant number of agencies, each with its own perspective on a given regulatory issue or national problem. Interagency study groups proliferate, and each must have a chair. Memoranda of understanding are entered, and each agency must have an impetus to accommodate and some reason to expect enforcement of the result. Only the President can supply these services. Even where the courts might be called on to assist in resolution, their processes could take years that simply are not available to those responsible for implementing statutes today.

The power to balance competing goals—and the concomitant power to influence at least to some degree the agencies' exercise of discretion—can only be the President's; leaving the balancing functions in the agencies would create multiheaded government, government with neither the capacity to come to a definitive resolution nor the ability to see that any resolution is honored in all agencies to which it may apply. This outcome does not vary with whether or not the agencies are denominated independent. Once one has acknowledged that any discretion conferred must be exercised within the legal bounds set for it, failure to recognize the President's claim to shape its exercise would deny central premises of constitutional structure as sharply as would a denial of Congress's claim to set the legal bounds.

There are other practical reasons for granting the President the power to shape administrative discretion. Individual agencies almost necessarily lack the political accountability and the intellectual and fiscal resources necessary to achieve such balancing and coordination. Relying on them to do so would

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390. Exec. Order No. 12,291, § 2, 46 Fed. Reg. 13,193 (1981), reprinted in 5 U.S.C. § 601 note (1982).

391. See supra notes 76–78 and accompanying text.

produce more costly and less responsible government, in which interagency disputes would be more likely to arise and less amenable to abiding resolution. For example, the NRC, in order to carry out its responsibilities in the licensing of nuclear exports,[392] could simply accept the State Department's advice on the diplomatic aspects of proposed exports and the intelligence agencies' advice on the possible consequences of exportation for the proliferation of nuclear weapons. By statute, however, the NRC is required to reach independent judgments,[393] and that has required it to develop its own miniature Department of State and intelligence-evaluation apparatus. Whether these offices are more expert than the agencies whose judgments they review is surely open to doubt; to say that the judgment of the officials in their charge is less likely to be influenced by extraneous factors may be another way of saying that they will not see or be responsible for all the implications of the judgments they are to make. What is certain is that these officials add to the bulk of government, to the time required to make decisions, and add to the volume of disputes government must resolve in order to act, as well as serving to diffuse governmental responsibility. In order to carry out the responsibilities placed upon them, they must seek additional information, question the judgments of those who supply that information, and in some instances disagree with these judgments. The result may, on balance, be improved decision; Congress, in establishing this mechanism, obviously thought the existing decisionmakers were too complaisant. The point here is to call attention to the costs of time, manpower, and added disputatiousness that must be paid to achieve those "improvements."

One response to arguments such as these is often couched in terms of the high political content of White House direction. Thus, urges former Secretary of Transportation William T. Coleman, Jr.,

> I believe this analysis [in support of adopting formal procedures for presidential override of agency judgment] . . . overestimates the objectivity of the President's staff . . . . Many members of the White House staff also undertake single-mission objectives or bring with them, or learn on the job, program biases. . . . Even staff generalists often adopt specific issue orientations and are willing to sacrifice . . . conflicting . . . objectives in pursuit of whatever presidential priority has been assigned to them. Even more "ominous" is the so-called White House political advisor, whose role is never clearly defined in public but whose bias may be simply the position that will most ensure reelection of the President. . . . Such an advisor—immune from public scrutiny and congressional accountability

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392. Nuclear Non-Proliferation Act of 1978, 42 U.S.C. § 2155 (Supp. V 1981). From 1975 until 1978 this authority was final, free of presidential direction; the law was changed in 1978 to permit the President to override the Commission's failure to issue the proposed license on a timely basis if he "determines that withholding the proposed export would be seriously prejudicial to the achievement of United States non-proliferation objectives, or would otherwise jeopardize the common defense and security." 42 U.S.C. § 2155(b)(2) (Supp. V 1981). The President's judgment, in turn, might be overriden by congressional action of a sort undermined by the decision in *Chadha*. Id.; see W. Gellhorn, C. Byse & P. Strauss, supra note 2, at 142 n.4, 642 n.1.

393. 42 U.S.C. § 2155(a)(2) (Supp. V 1981).

> . . . and removed from the advice of experts in the bureaucracy—is not in a position to make a meaningful balancing choice among competing national goals.[394]

A second response is that the White House lacks the resources to make the detailed judgments inherent in administration. For example, in technologically complex rulemakings, like those at the EPA, many of the most important decisions are incorporated into the assumptions of the technological model used. The White House does not have the expertise necessary to comment on those rules and "[w]ithout highly capable technical assistance to both resurface and reanalyze those assumptions, the review that is conducted . . . may end up being inconsequential and superficial but will have imposed a blizzard of additional paperwork by all concerned."[395]

While justified, these concerns underestimate the need for coordination and review and the inability of any body but the President to fulfill that need. "Each agency has a natural devotion to its primary purpose . . . no matter how many statutes . . . say that it shall 'consider' other interests as well. Someone in Government, and in the short run that someone can only be the President, must have power to make the agencies work together . . . ."[396] These claims made for presidential direction do not necessitate complete displacement of agency judgments or an assertion of White House expertise. Coordination and substantive suggestions—albeit backed up with the influence of the Presidency—are not incompatible with the agency remaining ultimately responsible for the decision. The OMB supervision of the impact-analysis process under Executive Order No. 12,291, for example, recognizes (as it must) that the authority to issue the rules subject to the impact analysis process remained in the agency head,[397] subject to whatever political discipline

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394. Roads to Reform, supra note 55, at 155, 157 (separate statement of William T. Coleman, Jr., dissenting in part from the commission's recommendations) (footnote omitted).

395. Hearings, supra note 76, at 28 (testimony of former EPA General Counsel Bernstein) (criticizing Exec. Order No. 12,291).

396. Roads to Reform, supra note 55, at 163 (separate statement of Judge Henry J. Friendly, concurring in part with the commission's recommendations). In his 1962 Oliver Wendel Holmes Lecture at Harvard, Judge Friendly had taken a position similar to that of Secretary Coleman. Compare H. Friendly, The Federal Administrative Agencies: The Need For Better Definition Of Standards 152-55 (1962) with Roads to Reform, supra note 55, at 155, 157 (separate statement of William T. Coleman, Jr., dissenting in part from the commission's recommendations). In Roads to Reform Judge Friendly explained that those lectures had been

> devoted solely to the independent agencies. . . . If they made a mistake in the award of a particular broadcast license, or even in its policies with respect to such licenses, the nation would survive until Congress took remedial action . . . .
>
> The federal bureaucracy has burgeoned to an extent not remotely contemplated seventeen years ago. . . . Moreover, whereas in the early 1960's the focus was on agency decisions taking the form of orders after trial-type hearings, today's emphasis . . . [is] with regulations avowedly of a legislative character.

Roads to Reform, supra note 55, at 163 (separate statement of Judge Henry J. Friendly, concurring in part with the commission's recommendations).

397. Exec. Order No. 12,291, § 3(f)(3), 46 Fed. Reg. 13,193 (1981), reprinted in 5 U.S.C. § 601 note (1982).

the President might bring to bear.[398] Similarly, *Sierra Club v. Costle*[399] accepted the possibility that the White House had been able to influence the agency's choice among several alternatives, each supportable on the basis of the materials in the rulemaking, through private conversations it held could remain private.[400] What had not happened was a direct transfer of decision; if Administrator Costle had decided not to accept any advice he received and promulgated the rule as he wished it to be, the White House's sole recourse would have been to punish him in some way, paying whatever political cost was inherent in that action. Within the constraint of recognizing the domain of law, the proposition that there exists a single executive, responsible to the people through election and to the law through his oath faithfully to execute all laws, locates the coordination and dispute resolution function in the Presidency.

2. *Congressional Regulation of Presidential Direction of the Exercise of Administrative Discretion.* — Given that the President's political accountability was foreseen as both a principal check upon him and a source of his authority in political struggles with Congress, the risk that political considerations might enter into the President's oversight of administrative discretion seems a limited rationale for congressional control of that oversight. At the least, for the reasons already indicated, one would think the rationale unavailable wherever Congress had not been equally careful of its own political involvement.

Just as with executive privilege, the key is to identify those congressional statutes that might unbalance the distribution of authority at the apex of government by crippling existing informal controls; there is no a priori need for statutory authorization of presidential direction. Although the recent proposals for presidential override of some important agency policy decisions[401] appear to be a dramatic innovation, the President's informal influence over the daily operation of government is already pervasive. In fact, these proposals would restrain rather than confer executive authority; the resolution of interagency dispute and coordination of agency activity in conformity with centrally determined executive policy are already daily activities. The activities are informal because informality makes for more efficient deployment of the President's limited resources; formalities mean time, people, and added disputes to be resolved. Such activities are not highly visible, because of the danger that, if they were, Congress would encumber them in ways restricting the effectiveness of the President's coordinative apparatus. The White House does not have to be explicit with an agency about results; it has enough power

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398. Cf. United States v. Nixon, 418 U.S. 683, 694–97 (1974) (President's authority over Special Prosecutor limited by Department of Justice regulations granting him "unique authority and tenure").

399. 657 F.2d 298 (D.C. Cir. 1981).

400. Id. at 408.

401. See Roads to Reform, supra note 55, at 79–83; Cutler, The Case for Presidential Intervention in Regulatory Rulemaking by the Executive Branch, 56 Tul. L. Rev. 830 (1982).

to act much more indirectly using the points of contact already described: the opportunities to persuade and cajole; the loyalties that may arise from appointment; and the probable shared sense of respect and of national mission.[402]

In sum, Congress's ability to limit presidential directory power is limited not only by the general need to maintain a tension between the named branches, but by the need for the President to be able effectively to coordinate all agency decisionmaking. This need is reflected in the President's presently wide but informal directory power and Congress's acquiescence to it.

Conclusion

The basic conclusion was asserted at the outset: given the realities of contemporary government and the inescapable constraints of constitutional text and context, we can achieve the worthy ends of those who drafted our Constitution only if we give up the notion that it embodies a neat division of all government into three separate branches, each endowed with a unique portion of governmental power and employing no other. That apportionment was made, but it was made only as to those actors occupying the very apex of government—Congress, President, and Supreme Court. The remainder of government was left undefined, in the expectation that congressional judgments about appropriate structure would serve so long as they observed the two prescriptive judgments embodied in the Constitution: that the work of law-administration be under the supervision of a unitary, politically accountable chief executive; and that the structures chosen permit, even encourage, the continuation of rivalries and tensions among the three named heads of government, in order that no one body become irreversibly dominant and thus threaten to deprive the people themselves of their voice and control.

The first judgment leaves Congress free in particular cases to choose among a variety of relationships the President might have with those who actually do the work of law-administration; whatever relationship is chosen,

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402. This directory power is related to, but not derivative from or coincidental with, his removal power. Thus, the propositions established respecting congressional control of presidential oversight are limited ones about the President's removal authority. There are some overlaps, of course, between the powers. A court might agree, for example, that a commission's refusal to perform a requested economic analysis of the impact of a proposed rule, to publish an agenda of its intended rulemaking activities for the coming period, to await the results of OMB review of agency comments on a rule, or to attend a meeting called to discuss them gave rise to "cause" for removal of one or more commissioners from office. The President also possesses in most cases the further authority to rotate the chairmanship among the sitting commissioners as a means of enforcing his displeasure with an incumbent regardless of cause. But he does not often use it. Neither does he often discharge secretaries of executive departments, whose response to his directives is invariably less than perfect, who often in their own political necessities must resist a course the President would have them take, and who are the ones empowered to sign any adopted rule. The secretaries, too, possess a measure of practical and legal independence. Thus, his removal power, like the directory power, does not vary whether the President is dealing with executive or independent agencies.

however, must be sufficient both to warrant characterization of the President's role as unitary and to justify holding him accountable for the results of administration. From such reflections of the first judgment as appear in the constitutional text, one can derive a few necessary dimensions of that relationship: the appointment power, a structure within which effective and confidential (absent special reasons) consultations may occur and, in the ordinary case, some degree of participation in the decisionmaking process.

The second judgment suggests constraints on the rationales Congress may employ for making law-administration remote from the President. In some circumstances, most commonly those in which we think fairness to litigants requires careful observance of separation of functions within an agency, a congressional decision to insulate agency judgment from the President will in fact connote a decision to exclude *all* politics, legislative as well as executive. This rationale seems generally persuasive, and while even such exclusions might be questioned in some circumstances, the very process of observing parity of political treatment will restrain Congress from precipitous removal of agencies from presidential control. What the second judgment strongly suggests, in any event, is that such parity must be observed. Congressional removal of an agency from political relationships with the President while such relations were maintained with the Congress would signal conditions in which the intended competition and tensions among the constitutionally named heads of government would tend to be defeated.

When the two judgments are taken together, it becomes clear that parity is only a minimum: the President has an independent claim to control the execution of government to balance Congress's independent claim to structure it. Communication, coordination, even direction are as much the characteristic modes by which an executive exercises oversight as are hearings and the other tools of statute and budget working for a legislature. Balance between President and Congress in the work of law-administration can only be maintained by assuring settings in which these characteristic relationships may be effective.

With so large a subject and so rich a history, I do not pretend to have done more than scratch the surface of possibilities. Nonetheless, the inquiry—and the reunderstanding it connotes—seems important. The formalistic view of the place of agencies creates assumptions and beliefs that would change if all agencies were viewed as essentially under the control of all three named bodies. For example, the *political* differences between the Federal Aviation Administration (in the Department of Transportation) and the Civil Aeronautics Board (an independent commission) seem to derive in part from the CAB's belief that Congress may consider the CAB entitled to be more independent of presidential direction than the FAA, which operates in a framework of expectation that it is bound by his directives. Even if the President believes he has directory authority over the CAB, exercising that authority nonetheless will require the playing of political chips in his dealings with Congress; the stakes in that game, which include the possibility of added congressional controls over the executive departments, may be too high to

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justify the play. Reunderstanding the issues in checks-and-balances terms—eliminating the illusion that agency structure depended on placement rather than relationship—could alter the expectations which underlie this political by-play, and in that way work for continuation of the balance between President and Congress that lies at the heart of the constitutional scheme.

Yet one ought not to expect, or even wish, these issues soon to be resolved. The expectation would be misplaced, because even bringing such questions to court requires a combination of political will and circumstances. Whether and in what circumstances simple disobedience to a presidential directive in rulemaking constitutes "cause" for dismissal, for example, can be tested only following the dismissal from office of a commissioner who is then motivated to fight his dismissal through three layers of courts and the existence of circumstances persuading the Court to grant certiorari—a combination more easily frustrated than attained. The wish would be misplaced because, as must already be evident, the imprecision of the relationship between President and Congress is at the heart of the mechanism by which the balance of the constitutional structure is maintained. It is not hard to *say* that the central issues are the unitary direction of law-administration, political responsibility for the whole within the constraints of law, and a tension between Congress and President in which neither is able to become dominant. Determining when the presidential capacities necessary to maintain that tension have been threatened will rarely be other than a difficult act of judgment.

WAS THERE A BABY IN THE BATHWATER? A COMMENT ON THE SUPREME COURT'S LEGISLATIVE VETO DECISION*

PETER L. STRAUSS**

Examining the Supreme Court's recent decisions in the legislative veto case, Professor Strauss stresses the importance of a distinction no Justice observed between use of the veto in matters affecting direct, continuing, political, executive-congressional relations, and use of the veto in a regulatory context. Only the latter, he argues, had to be reached by the Court; and only the latter presents the constitutional difficulties that troubled the Court. The utility of the veto in the political context makes the opinions' sweep regrettable.

The Supreme Court's decisions in the legislative veto cases[1] attracted headlines and public commentary rarely experienced by the Court. Written following what was evidently a difficult internal process,[2] the Chief Justice's majority opinion in the principal case, *Immigration and Naturalization Service v. Chadha*,[3] seems intended to sweep all of the 200-plus legislative veto provisions from the statute books, in addition to the one provision necessarily before the Court in the case. That impression is confirmed by subsequent summary [redacted] legislative vetoes affecting regulatory agency rulemaking,[4] as well as by

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1 [redacted]

3 103 S. Ct. 2764 (1983).

4 Process Gas Consumers Group v. Consumer Energy Council of America, 103 S. Ct. 3556 (1983), *aff'g* Consumer Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982).

the disapproval evident in three separate opinions in *Chadha*.[5] The immediate and pained response of Congress[6] suggested as well the understanding that it had been deprived, in all contexts, of a valued legislative tool.

This comment looks closely at the opinions in the *Chadha* case, so far as they concerned the legislative veto issues, to assess their reasoning and the warrant for so embracive an approach. It concludes that both opinions suggesting an overall approach to the issues, the majority opinion and Justice White's dissent, fail in their analysis by approaching the legislative veto as if the issues it presented were always the same, and as if Congress were far more limited in its function and in its relationship with those who execute the nation's laws than in fact it is.

Legislative vetoes have been used in a variety of settings, though perhaps less universally than the press excitement over the *Chadha* decision would lead one to believe.[7] According to figures supplied by the Congressional Research Service, Congress had exercised a total of 230 legislative vetoes between 1930 and 1982: 111 of these terminated proposed suspensions of deportation for 229 individual aliens under the immigration and naturalization laws (the remainder of the 5701 suspensions proposed took effect); 65 were exercised under the Budget

United States Senate v. FTC, 103 S. Ct. 3556 (1983), *aff'g* Consumers Union v. FTC, 691 F.2d 575 (D.C. Cir. 1982) (en banc).

5. Justice Powell, concurring on a rationale specific to the case, and Justices White and Rehnquist in dissent, underscored the breadth already apparent in the majority opinion by the attention they gave it. *See* 103 S. Ct. at 2788-92 (1983) (Powell, J., dissenting); 103 S. Ct. at 2792-2816 (1983) (White, J., dissenting); 103 S. Ct. at 2816-17 (1983) (Rehnquist, J., dissenting).

6. [redacted]

7. Although the approximately 200 current legislative veto provisions attest Congress' recent regard for the technique, they affect only a small proportion of the authority Congress has delegated to government agencies. Legislative proposals on the brink of enactment during the past few Congresses would have extended the veto to all agency rulemaking, and were widely and accurately regarded as portending a major expansion in use of the device.

Control and Impoundment Act, disapproving a minute proportion of the alterations regularly made by the President in the budget and appropriations legislation Congress enacts yearly; 24 disapproved a few of the many reorganizations the President proposed in the internal organization of the federal government. Of the 30 remaining legislative vetoes exercised, some concerned foreign relations, international commerce or defense, issues also dominated by presidential initiative and high political interest; only the remainder dealt with the regulatory matters that may have loomed most important in the Court's consideration.[8]

Faced with uses of the legislative veto that allowed the President and Congress to resolve directly constitutional and policy differences on issues of high political and small legal moment, uses that accommodate a necessarily continuing dialogue between Congress and the President on matters internal to government (its budget and structure), uses for deciding questions of individual status such as deportability, and uses for oversight of agency conduct such as public rulemaking directly affecting obligations of the public, the Court might have been expected to distinguish among these uses or, at least, to decide in a way that reserved consideration of those uses not presented in *Chadha*. The Court did not do so; [redacted] s[redacted] in which the veto has been used.

Such an argument may seem like just another assertion of the law professor's preference for neatness and modesty in judicial action or, worse yet, an arid exercise of 20-20 hindsight, unaccommodating to the political realities of reaching decision on a pressured, busy Court. I believe there is more. The importance of measures like the reorganization acts does not lie in whether Congress should reserve a veto, however infrequently such a veto is exercised, but in whether, in the absence of the veto power, Congress would permit such an efficient mechanism for the President's construction of lines of coordination and control for those whose performance of duty he is constitutionally obliged to oversee, rather than insist on the use of ordinary legislative processes. [redacted] [redacted] empower the President as much as Congress. Use of the veto as an instrument of the continuing political dialogue between President and Congress, on matters having high and legitimate political interest to

8 Smith & Struve, *Aftershocks of the Fall of the Legislative Veto*, 69 A.B.A. J. 1258, 1258 (1983).

both, and calling for flexibility for government generally, does not present the same problems as its use to control, in random and arbitrary fashion, those matters customarily regarded as the domain of administrative law. That none of the disputants before the Court may have found it in their interest to argue for such distinctions and that the Court itself did not suggest them, only illustrates once more the problems presented by the Court's limited capacity to entertain and decide issues of national importance, and the resulting temptation to make doctrine governing the future, rather than decision of the pending case the centerpiece of the Court's effort.

I. The Setting

Jagdish Chadha is an East Indian. Brought up in Kenya, but retaining his British Commonwealth passport, he came to the United States on a student visa, and then stayed beyond its expiration. For that reason he was deportable, but Kenya would not receive him back (he having declined an opportunity to elect Kenyan citizenship) and other Indians of Kenyan birth holding Commonwealth passports had encountered difficulty in being admitted to Great Britain. An immigration judge of the Department of Justice's Immigration and Naturalization Service—a civil servant strongly protected against political interference in his judgment[9]—found that these and other factors established Mr. Chadha's claim to a compassionate suspension of deportation under section 244 of the Immigration and Nationality Act.[10] That section defines the factors that must be present to support such a

9. Although neither statutory administrative law judges nor judges are bound (in terms) by the Administrative Procedure Act, 5 U.S.C. §§ 551-559, §§ 701-706 (1976), *cf.* Marcello v. Bonds, 349 U.S. 302, 309-10 (1955) (the particular provisions of the Immigration Act supersede the more general provisions of the Administrative Procedure Act on which they were modelled), immigration judges serve under statutes and well-established rules and administrative arrangements which provide equivalent safeguards against political oversight; their decisions are required to be taken "only upon a record." 8 U.S.C. § 1252(b) (1982); 1A C. Gordon & H. Rosenfield, Immigration Law and Procedure § 5.7 (1982); 2 *Id.* § 8.12(b) (1983).

10. 8 U.S.C. § 1254 (1982). The section provides:

> the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence. . . .—
> (1) [when the alien is deportable for reasons not listed in (2) and has been physically present in the United States for seven years] and *proves* that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or
> (2) [when the alien is deportable for reasons relating to criminal or subversive activity and has been physically present in the United States for ten years since the commission of such acts] and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to

finding, but under that section the immigration judge's conclusion that they are present does not end matters.[11] Reflecting the prior practice of granting all such relief through private bills, the statute provides that any finding favoring suspension must be transmitted to Congress, and takes effect only if neither House repudiates it by resolution during the following two sessions.[12] In Mr. Chadha's case, the House of Representatives voted such a resolution at the last moment, without printed text, debate, or significant explanation. The ostensible purpose of the resolution was to restore the effectiveness of the order of deportation previously entered against him and five other immigrants. After surmounting a number of procedural obstacles not important to this tale, Mr. Chadha's claim to a constitutional right not to be deported in this manner reached the Supreme Court. The principal argument there concerned the validity of the "legislative veto," which might best be described as the condition Congress had attached in conferring on immigration judges the authority to suspend deportations—that the suspension would not become final if, during a limited time, it was disapproved by a simple resolution of either house.[13]

Seven Justices, in two opinions, agreed that the legislative veto was unconstitutional. Chief Justice Burger, for himself and five others, wrote a sweeping indictment of legislative vetoes; Justice Powell concurred, although he would have decided the case on narrower grounds applicable principally to the immigration statute. Justice White, in dissent, vigorously objected to the breadth of the majority's approach, and concluded that section 244 met constitutional standards. Finally, Justice Rehnquist dissented on the nonconstitutional ground that the Court could not appropriately sever the provisions authorizing suspension of deportation from the legislative veto aspect of the statutory scheme; accordingly, even if Mr. Chadha were right about the legislative veto, the relief provisions must also fall and Mr. Chadha thus could not gain from the outcome.

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his spouse, parent or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. § 1254(a) (1982).

11. A finding that they are absent is subject to judicial review. *See* 8 U.S.C. § 1252 (1982).

12. 8 U.S.C. § 1254(c) (1982).

13. As in so many legal matters, how one characterizes the legislative scheme under discussion tends to ordain the results reached. The Chief Justice's majority opinion treats the immigration law judge's action and the House resolution as distinct legal acts — *as if* the suspension were a final act, then reversed by the resolution. Justice White's dissent takes a more integrated view: the suspension is conditional, and cannot be regarded apart from the possibility of legislative oversight. Neither characterization is obviously "right"; in a process that prides itself on rationality, the reasoning ought to display consciousness of this fact, and to include an effort to explain the outcome on other grounds.

II. The Majority Opinion

The Chief Justice's opinion for the majority turns on a characterization of the House resolution as a "legislative action" subject to the formal requirements of article I of the Constitution. The formal requirements, set out in some detail in the text of the opinion,[14] are not controversial: legislation is to be enacted by the House and Senate acting in concert; and "every" such exercise of their legislative powers must culminate in the presentment of the enacted matter to the President for his possible veto.[15] No one doubts that these requirements must be met before Congress can adopt some new statement of affirmative principle as law, binding upon the citizenry or government. The action at issue in this case, however, was at least arguably different: a standardless, contentless expression of disapproval of executive action, taken under circumstances that permitted neither the possibility of expressing more than a simple negative nor any impact beyond the resolution's fact-specific effect on Mr. Chadha's existing deportation order. The problem for the Court was whether the formalities of legislation properly apply to such an action.

Although noting that "[n]ot every action taken by either House is subject to the bicameralism and presentment requirements,"[16] the Chief Justice essentially overcomes this problem by assertion. The question, he says, is whether the action "is properly to be regarded as legislative in its character and effect."[17] That question, in turn, apparently depends on the identity of the actor and whether the actor meant its actions to have force. Because, under the statute, the House action operates to defeat the executive's conditional authority to suspend Mr. Chadha's deportation, it "had the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative

14. 103 S. Ct. at 2780-84. The framers were much less careful in defining the manner in which the President or the Supreme Court would exercise the power vested in them, a difference readily taken as an indication of the extent to which they feared legislative hegemony. *Cf.* G. Wills, Explaining America 128-29 (1981) (the structure of the Constitution, placing the legislature before the executive and judiciary, reflects a hierarchy consistent with legislative supremacy).

15. *See* U.S. Const. art. I, §§ 1, 7. Justice White concurred in the lengthy portion of the majority opinion that describes, in general terms, the history and power-dispersing purposes of these formal requirements of presentment and bicameralism. *See* 103 S. Ct. at 2792 (White, J., dissenting). These purposes include: providing the President with a means of self-defense against a runaway Congress (and through the President, providing the people with a protection against the tyranny to be expected if any one branch of government should achieve hegemony); providing checks against the enactment of improvident or ill-considered measures; and providing for a legislative process that would produce distilled visions of the national good. 103 S. Ct. at 2782-84.

16. *Id.* at 2784.

17. *Id.* (citing S. Rep. No. 1335, 54th Cong., 2d Sess. 8 (1897)).

branch;"[18] that purpose and effect, according to the majority of the Court, in itself establishes the action's legislative character.

This "altering . . . legal rights" inquiry presents numerous difficulties. It is no measure of legislative activity in the functional sense. Judicial activity also "alter[s] . . . legal rights, duties and relations of persons . . . outside the . . . branch." Executive activity also has this effect, at least if rulemaking and administrative adjudication by the executive departments may still be authorized. An exercise of the authority of government is not, ipso facto, an exercise of the particular slice of that authority central to the acting branch; although Article III courts act judicially in a formal sense when they adopt rules of procedure or naturalize a citizen (that is, they are judges acting), they are not thereby adjudicating a case or controversy, performing the central judicial function employing prototypical judicial procedures. The functional requirements are central for Congress as well. Even when it acts bicamerally and with presentment, Congress will not be permitted to act in ways that alter legal rights if a court finds Congress' actions *not* to be legislative in character.[19] Indeed, the House has unquestioned authority to act in some ways that alter legal rights and duties of persons outside the branch, without resorting to bicameral action or requiring presentation to the President. In both the investigation of possible future legislation and the exercise of oversight functions, the House has authority to command the presence of witnesses, official and unofficial, and to attach consequences to their failure to cooperate.[20] Where stat-

18. *Id.* at 2784.

19. *See* United States v. Brown, 381 U.S. 437, 441-46 (1965) (framers of the Constitution adopted the bills of attainder clause to prevent the legislature from overstepping the bounds of its authority by performing the functions of other departments); Barenblatt v. United States, 360 U.S. 109, 111-12 (1959) ("Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government."); United States v. Lovett, 328 U.S. 303, 315 (1946) ("[L]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."); *cf.* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 471 ("[The bill of attainder clause does not] limit Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all."); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1308-12 (1970) (discussing scope of Congress' investigative authority).

20. To be sure, judicial enforcement is customarily provided, but only as a matter of convenience rather than constitutional necessity. *See* Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227-28 (1821). In any event, the judicial inquiry is not *de novo*; in contrast to the enforcement of subpoenas for executive agencies, a court enforcing a congressional finding of contempt reviews a determination that an offense has already been committed. *See* Barenblatt v. United States, 360 U.S. 109, 116 (1959); McGrain v. Daugherty, 273 U.S. 135, 161 (1927); 2 U.S.C. § 192 (1982). The result of judicial enforcement is a penalty, not a further opportunity to comply; thus, the legal obligation is mature when Congress acts.

utes have previously so authorized, the request of a committee, although less than the full House, imposes a legal obligation on agencies to conduct investigations,[21] or to cooperate with an investigation by congressional functionaries,[22] a mechanism not readily distinguished from the legislative veto on the formal grounds the Court chose. None of these investigatory powers are addressed in the Constitution. In this respect, the argument that "when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action,"[23] is insufficient.[24] Finally, and most importantly, to characterize what the House did in Mr. Chadha's case as "altering . . . legal rights" begs the question. Under the statutory scheme as Congress enacted it, Mr. Chadha's technical right to remain in the country could not be conferred by the INS alone; it is conferred only if the INS acts *and then only if neither house of Congress acts*. To say that he has acquired a right which the House is now purporting to take away is to assert a conclusion, not to support it by reasoning.

[redacted]

The Court recognizes the possible inconsistency when

21. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935).

22. 31 U.S.C. §§ 712(4), 716(a) (1976 & Supp. V 1981).

23. *Chadha*, 103 S. Ct. at 2786.

24. The cases supporting congressional investigatory power describe it as a necessary and inevitable adjunct of the legislative process, *see, e.g.*, McGrain v. Daugherty, 273 U.S. 135, 174 (1927); the legislative veto, as an oversight technique, may not seem so central. Yet, under the Constitution, Congress is made the principal judge of what is "necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8. Absent other factors, that empowerment would seem to extend to the legislative veto as well as to the issues of investigation. My purpose here is not to suggest that those other factors do not exist; in many cases they do. But the issue does not seem capable of being settled by simple textual analysis.

25. *See infra* notes 49-59 and accompanying text.

26. *See, e.g.*, J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."); Field v. Clark, 143 U.S. 649, 691 (1892) ("in the judgment of the legislative branch of the government, it is often desirable, if not essential for the protection of the interests of our people, against the unfriendly or discriminating regulations established by foreign governments, in the interests of their people, to invest the President with large discretion in matters

it worries in a lengthy footnote that its reasoning might be seen as casting some doubt on rulemaking or other forms of agency action.[27] Although, "[t]o be sure [illegible] rulemaking [illegible] may resemble [illegible]"[28]—indeed, the end product of rulemaking resembles lawmaking far more than did the House Resolution here—the Court concludes that no such inconsistency is presented. Why? In part the Court again appears to rely on either simple assertion, or some equivalence between the identity of the House and the character of its action, when it quotes Justice Black's troubling opinion in *Youngstown Sheet & Tube Co. v. Sawyer*[29]: " 'The President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.' "[30] Of course, the President and the agencies *are* lawmakers, in any conventional sense of the term, when they engage in rulemaking pursuant to constitutional or statutory authorization.[31] However one might label what the Department of Justice and the House did in considering the cancellation of Mr. Chadha's deportation for compassionate reasons, the action of each seems to have been of the same nature and to have had precisely the same kind of legal effect on Mr. Chadha's rights. Depending on the characterization employed, one could say either that the Department effected a suspension of an individual deportation order which the House cancelled, or that, between the two, the conditions for cancellation of a deportation order were not met. The Court does not adequately explain why one actor is regarded as behaving "legislatively," and the other is not. The Court seems to make the *Youngstown* passage mean that the "President does not act legislatively because he is the chief executive; the House does, because it is part of Congress. What the President does is ipso facto executive; what Congress does, legislative."

Whether an action is "legislative in character and effect" might have been thought a function of its characteristics, rather than the identity of the actor. This approach would have led the Court to consider the arguable differences between "legislative" and "adjudicative" ac-

arising out of the execution of statutes relating to trade and commerce with other nations"). The brig Aurora, 11 U.S. (7 Cranch) 382, 388-89 (1813) (Congress may exercise its power unilaterally).

27. *Chadha*, 103 S. Ct. at 2785 n.16.

28. *Id.*

29. 343 U.S. 579 (1952).

30. *Id.* at 587, *quoted in Chadha*, 103 S. Ct. at 2785 n.16.

31. Note the striking insistence on the accuracy of that characterization in Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1979), where the Court insists on clear statutory authorization for what administrative lawyers describe as "legislative rulemaking," that is, rulemaking with statute-like effect, *just because* of its clearly legislative character.

tion. This question has much bedeviled administrative law theorists.[32] Furthermore, it seems to underlie the Court's interpretation of the Constitution's prohibitions of inappropriate legislative action—the bills of attainder and ex post facto clauses.[33] From these familiar perspectives, one generally describes "legislation" in terms of its future effect, its application to an indeterminate class, its character as a statement of positive law intended to govern future proceedings, and the contemplation that there will be such proceedings for its application, requiring the application of judgment. "Adjudication," in contrast, is characterized by its impact on events already transpired, its immediate application to named parties before the tribunal, and the subordinate (in relative terms) character of the lawmaking function. The distinction is, to be sure, imperfect; legislatures have long granted boons to particular individuals, and the restrictions on their inflicting particularized harms for past (mis)conduct are uncertain of application.[34] Whether the prospective, lawmaking function of courts is merely an accident of their authority to decide or rather a fundamental aspect of their function is, increasingly, a matter in dispute.[35] Yet, had the Court taken this tack, it would have found it difficult to describe the House Resolution that affected Mr. Chadha as properly "legislative." The Resolution applies only to named persons, on the basis of determinations made by the House about facts already fixed; it creates no general principle for future application, and the proceeding envisioned is one in which only ministerial tasks are to be performed. Indeed, the majority noted, but declined to decide, a question whether an order to deport Mr. Chadha enacted by both houses and signed by the President—thus fulfilling all the formal requisites of legislation—would have been proper, for just this reason.[36]

32. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:2 (2d ed. 1979).

33. U.S. CONST. art. I § 9; *see supra* note 19.

34. *Compare* New Orleans v. Dukes, 427 U.S. 297, 306 (1976)(city ordinance grandfathering two established pushcart vendors over all competitors upheld against equal protection challenge) *with* United States v. Brown, 381 U.S. 437, 461 (1965) (disqualification of identified group from union office is bill of attainder); *see also* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 468-84 (1977).

35. *Compare* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S FEDERAL COURTS AND FEDERAL JURISDICTION 81 (2d ed. 1973) *with* Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979).

36. *Chadha*, 103 S. Ct. at 2776 n.8, 2785 n.17. This was the basis of Justice Powell's concurrence. That Congress grants relief to individuals through private bills hardly establishes the appropriateness of its determining whether an individual now in line for some administrative relief ought to be denied that relief in light of his conduct or situation; the bills of attainder clause might prohibit this mode of action. *But cf.* Artukovic v. INS, 693 F.2d 894, 897 (9th Cir. 1982) (statute forbidding further stays of deportation for alleged Nazi war criminals is neither bill of attainder nor ex post facto legislation; deportation is not punishment and grounds for it may be retroac-

The Court also gives a reason with some functional bite for its want of concern with rulemaking: the Department's actions are authorized, and consequently limited, by a statute; that fact, with the attendant processes of judicial review, makes the bicameral and presentment processes unnecessary as a check.[37] But this, too, may prove too much. The House's action was also authorized and limited by a statute, could occur only within its terms, and no doubt was subject to judicial correction if these terms were exceeded.[38] That the House's judgment *within those bounds* did not have to be explained and was not open to review suggests other bases on which the statutory mechanism could be questioned. In addition to the attainder questions already suggested, the Court has strongly hinted that the absence of judicial control or other participatory procedures to protect one whose interests are at risk raises constitutional questions, especially when individual liberty in its most elementary sense is at stake.[39] Yet it is hard to understand how these difficulties turn the House's exercise of its very limited options into a "legislative" act. One might as well note, as the Court did,[40] that the judgment suspending Mr. Chadha's deportation order was equally free of the possibility of review (unless in Congress, pursuant to the act), even if entered in an entirely unauthorized manner.[41] But the Court did not for that reason find it to be legislative.[42]

tively established; significant procedural protections are required, however, in administrative process for deciding whether an individual is in the described group).

37. *See Chadha*, 103 S. Ct. at 2785 n.16.

38. If, for example, the House had sought to act after the statutory time had expired, or to attach a condition to Mr. Chadha's right to remain in the country, it seems clear that habeas corpus would have relieved him of any deportation order and established his right to permanent residence.

39. *See Chadha*, 103 S. Ct. at 2785 n.16; Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858, 2870 n.23 (1982); *cf.* Landon v. Plasencia, 103 S. Ct. 321, 329 (1983) (resident alien temporarily outside the United States entitled to due process protections).

40. *Chadha*, 103 S. Ct. at 2787 n.21. Curiously, the Court seemed to take reassurance from the fact that the most lawless of acts by the INS suspending an otherwise valid deportation order would not be subject to correction in any forum.

41. For example, the agency might act in response to a bribe, or, less dramatically, it might act without considering one of the required factors or consider an irrelevant one.

42. Doubts expressed by the majority and Justice White as to whether Congress *could* constitutionally have provided for review, seem misplaced, or at best the product of the particular statutory arrangements chosen in this case. It is, of course, commonplace that a disappointed intervenor might be able to seek such review (e.g., an environmental organization seeking review of a decision to authorize construction of a power plant) and where a government agency participating in the administrative hearing is not identical with the agency that is making the decision, appeals by the interested agency are not constitutionally problematic. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 693 (1974); Secretary of Agriculture v. United States, 347 U.S. 645, 647 (1954); United States v. FMC, 694 F.2d 793, 799-810 (D.C. Cir. 1982). Thus, the Secretary of Labor is authorized to seek review of adverse determinations on policy issues by the Occupational Safety and Health Review Commission, an independent agency within his Department. 29 U.S.C.

Perhaps nowhere in the opinion is the essentially assertive character of the majority's analysis clearer than in its final footnote.[43] The footnote seeks to address Justice White's argument in dissent—namely that, viewed as a whole, the legislative scheme, involving the House, Senate, and Department of Justice, satisfies all the functional values of bicameralism and presentment because suspension of the deportation order cannot occur without the concurrence, in effect, of all three entities; and that the ability of one house to block suspension by passing a resolution of disapproval under the current legislation is not different in any realistic way from the ability of one house to block suspension under the prior arrangements by refusing to enact a private bill. The Court's response is to state that the private bill approach provides "an opportunity for deliberation and debate. To allow Congress to evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence cannot be squared with Art. I."[44] Because the recommendation for suspension is presented to both houses, it is difficult to see how the opportunity for "deliberation and debate" is any less present than it previously was; if anything, inertia favors the private person seeking relief from deportation under the present regime, instead of under a regime in which success depends upon having both houses enact a proffered bill. In terms of enactment "by mere silence," this mechanism is not readily distinguishable from the mechanism, approved by the Court in *Chadha*,[45] by which such measures as the Federal Rules of Civil Procedure are adopted; the Rules lay before both houses of Congress for a period, and become law unless, within a stated period, a blocking statute is enacted.[46] Indeed, every rulemaking authorization provides means which "in effect enact Executive proposals into law by mere silence," and the Court plainly meant to protect those authorizations from question. Those rules become "law" in a

§§ 656, 661 (1976). The issue appears to be one strictly of jural identity, readily manipulated by statute, not a constitutional prohibition on government officers seeking judicial review of decisions favorable to private claims. Indeed, one way of stressing the independence of immigration law judges within the Department of Justice would have been to make their judgments judicially reviewable at the Attorney General's behest. It is certainly imaginable that the Attorney General would disagree with some policy or even factual determination made by such a judge, and the applicant's assurance of objectivity in the proceedings is precisely that the Attorney General is afforded no internal, bureaucratic controls over the determination. The result is a situation no different from what obtains when the government is disappointed in the outcome of a trial. Although government appeals from judgments of acquittal in criminal trials may be constitutionally objectionable, this is for reasons of fairness, rather than concern for whether there could exist a "case or controversy."

43. *Chadha*, 103 S. Ct. at 2787 n.22.

44. *Id.*

45. 103 S. Ct. at 2776 n.9.

46. 28 U.S.C. § 2072 (1976).

sense much more closely statutory than the result of the House's action in Mr. Chadha's case. The latter creates no deposit on the law, gives no binding instructions to those who must continue to administer the law; it governs the individual's case alone. Although that, in itself, may be the source of objection, it makes speaking of the House's action as "legislative" curious indeed.

Perhaps one should take seriously the notion that whatever is done by the House or Senate is definitionally legislative, not because of the characteristics of what is done but because of the identity of the body acting. The same propositions would then apply to the President and the Supreme Court; their actions would, of necessity, be "executive" or "judicial," respectively. Some suggestion that the Court intends that approach is found in a repeated "presumption" that a governmental body is acting within its intended sphere.[47] What follows, however, is that there is then no magic in the word "legislative" to aid in determining whether the House and/or Senate are acting constitutionally. Because the House and Senate often act outside the structure of presentment and bicameralism, and in fact use it only when enacting laws, one must have reasons not supplied by the label "legislative" for insisting upon that structure, or for otherwise finding constitutional fault with the legislative scheme. That observation triggers the kind of functional inquiry that Justices White and Powell undertook, but the majority appeared to eschew.[48]

III. Justice Powell's Concurrence

Justice Powell, in his solitary concurrence, sought a less sweeping means of resolving the case, finding Congress to have "assumed a judicial function in violation of the principle of separation of powers" when it undertook to review determinations that particular persons are eligible for suspension of deportation orders. His opinion draws both on the history of concerns that led to adoption of the bills of attainder clause and the nature of the decision made, "that six specific persons did not comply with certain statutory criteria,"[49] in reaching the con-

47. *Chadha*, 103 S. Ct. at 2784.

48. Such an inquiry also seems present in the Court of Appeals for the District of Columbia Circuit's thoughtful opinion in Consumer Energy Council v. FERC, 673 F.2d 425 (D.C. Cir. 1982), which was subsequently affirmed by the Supreme Court. 103 S. Ct. 3556 (1983). In *Consumer Energy*, the court understood the particular veto as necessarily altering the scope of discretion delegated to an agency, finding this more objectionable because unexplained. 673 F.2d at 465. That characterization has force only if discretion must be structured—that is, where the delegation doctrine would require "law to apply," and not in the predominantly political setting that characterized early use of the veto. *See infra* notes 78-93 and accompanying text.

49. *Chadha*, 103 S. Ct. at 2791.

clusion that the House had here assumed a function of the kind ordinarily entrusted to courts or other adjudicatory bodies. To be sure, as both the majority and Justice White noted, courts do not ordinarily review agency decisions *favoring* citizens against government, at least absent a conflict with the claims of other individuals. Putting aside the question whether such a function could be conferred on federal courts consistent with the case or controversy requirement,[50] however, the determinations to be made are nonetheless characteristically judicial. They involve the determination of historical facts concerning particular individuals and the application of preexisting policy to those facts. Such determinations are, as Justice Powell noted, "generally . . . entrusted to an impartial tribunal" in our model of government;[51] the absence of the ordinary accoutrements of a hearing in the process that led to the House resolution underscored the objectionable nature of the procedure. The Immigration and Naturalization Service, although enjoying broad discretion in the details of the procedures it employed, could not make a determination adverse to the interests of a resident alien free of the constraints of the due process clause applicable to "adjudications," as they might be judicially interpreted.[52] That the House could adopt this measure without being subject to checks—whether internal constraints, procedural safeguards, or the possibility of effective external review—demonstrated that the dangers feared by the Framers had matured.[53]

Perhaps the greatest difficulty with Justice Powell's view lies in Congress' traditional practice of making individual determinations through the mechanism of the private bill, whether for the satisfaction of damage claims against the United States, or the granting of admission to residence or citizenship. These acts, too, are functionally judicial, in the sense that they apply to particular, named persons, rely on determinations of individual, often historical facts, establish no general principle for future application, and foresee no subsequent proceedings in which their application must be determined. Justice Powell's response is to look to the reasons for the restriction: "when the Congress grants particular individuals relief or benefits under its spending power, the danger of oppressive action that the separation of powers was designed to avoid is not implicated."[54] It is the denying character-

50. *See supra* note 42 and accompanying text.

51. *Chadha*, 103 S. Ct. at 2791 n.8.

52. P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *supra* note 35, at 350-53; *cf.* Landon v. Plasencia, 103 S. Ct. 321, 330 (1982); Artukovic v. INS, 693 F.2d 894, 897 (9th Cir. 1982).

53. Justice Powell joined the summary affirmance in United States Senate v. FTC, 103 S. Ct. 3556 (1983), without opinion.

54. *Chadha*, 103 S. Ct. at 2792 n.9.

istic of the House Resolution in *Chadha* that brings those restrictions into play. This response is not wholly satisfactory: the line between benefit and burden is elusive at the margins; the fact that a benefit has been conferred may raise questions sounding in equal protection. This is particularly true where (as often enough occurs in connection with economic legislation) the conferring of a benefit on one individual or group cannot easily be separated from the disadvantaging of another;[55] and the deportation context, rightly or wrongly, has long been viewed as involving regulation rather than punishment.[56] Yet Justice Powell's distinction corresponds well with core notions of the legislative function. Congress has in fact regularly rid itself of private bill functions, including this one. Particularly in light of established practice, the bills of attainder and ex post facto clauses stand as testimony to the importance of the distinction.

Justice Powell's argument about appropriate legislative function ought not to be confused with the separation of powers issues most commonly raised in recent litigation. In recent cases the issue considered has been "the extent to which [the challenged legislative arrangements] prevent [some other branch] from accomplishing its constitutionally assigned functions,"[57] and whether the complainant, real or imaginary, has been a member of the offended branch. Justice Powell does not contend that section 244 infringes judicial power; that is, he does not assert that it is objectionable for what it does to the authority of judges, although the other opinions seem so to regard his claim.[58] His argument, rather, stresses the unfairness to the claimant, Mr. Chadha, of having to submit to the possibility of disability resulting from a negative congressional judgment about the historical facts of

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55. The Supreme Court has occasionally found state economic legislation that favored a closed class unconstitutional on equal protection grounds, *see* Morey v. Doud, 354 U.S. 457, 469 (1957); *cf.* Railway Express Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring), but has regularly sustained against such challenges statutes conferring monopolies or containing grandfather clauses, perhaps the most common form of such legislation. *See Morey*, 354 U.S. at 467 n.12; New Orleans v. Dukes, 427 U.S. 297, 306 (1976) (overruling *Doud* in a grandfather clause context); *see also* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 471 (1977) (bills of attainder clause not to be interpreted as "a variant of equal protection").

56. The court in Artukovic v. INS, 693 F.2d 894, 897 (9th Cir. 1982), rejected on this basis a challenge to a statute terminating the Attorney General's authority to suspend deportation of aliens guilty of Nazi war crimes; the statute evidently applied to past actions of a limited class of individuals, and so might have seemed fairly open to ex post facto/bills of attainder challenge. Congress had provided in that statute, however, that the judicial function of determining whether a given individual was among the described class was to be performed by an administrative officer, employing significant procedural protections; this feature of the statutory scheme seemed of singular importance to, and was enforced by, the court.

57. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977).

58. *See* 103 S. Ct. at 2787 n.21 (Burger, C.J.); 103 S. Ct. at 2810 (White, J., dissenting).

his particular case. Justice Powell thus directly invokes the values of citizen protection against governmental tyranny that underlie both the separation of powers notion generally and the attainder prohibition in particular.[59] Whether the courts' (or the President's) continuing capacity to function is thus impaired—the characteristic focus of recent separation of powers inquiries—has at best secondary importance.

IV. Justice White's Dissent

Justice White's intellectual approach to the legislative veto question, although flawed, seems more consistent with the Court's recent analyses of separation of powers/checks and balances issues than the majority's approach. Before the Chief Justice expressed concern in his opinion about "hydraulic pressures" bursting the boundaries that separate the branches of government,[60] the Court had seemed to be moving away from the idea of "air-tight" categories and toward a Madisonian view, stressing function rather than formality. Under the latter view, the central issues would be the tendency of a challenged device to place a given branch beyond effective control by others[61] or to create an "unnecessary and dangerous concentration of power in one branch," or to interfere with a core function of another branch, to a degree unwarranted by "overriding need" to accomplish some other objective.[62]

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59. *See* Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 Yale L.J. 330, 343-48 (1962) (John Hart Ely's note discussing separation of powers and the bill of attainder clause).

60. *Chadha*, 103 S. Ct. at 2784.

61. *Id.* at 2786.

62. Buckley v. Valeo, 424 U.S. 1, 120-23 (1976). The functional approach suggested by the Court in *Buckley* was not restricted to application in presidential power cases arising out of the Nixon presidency, Nixon v. Administrator of Gen. Servs. 433 U.S. 425, 441-43 (1977); United States v. Nixon, 418 U.S. 683, 707 (1974) ("In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence."), but seemed to be paralleled by analytic developments in other contexts in which the structural constraints of the Constitution were the central issue. Thus, debate over the tenth amendment, revived by the Court's decision in National League of Cities v. Usery, 426 U.S. 833 (1976), resolved into near unanimity as to the statement of relevant inquiry (if not its application): whether a challenged measure threatens the integrity of the states in the constitutional scheme. *See* EEOC v. Wyoming, 103 S. Ct. 1054 (1983); Hodel v. Virginia Surface Mining & Recl. Ass'n., 452 U.S. 264, 283-93 (1981). Allocation of authority between state and nation, like that between executive and legislature, can be understood as a means of protecting individuals from overwhelming government; deciding what is required to preserve that protection for citizens, rather than a cataloguing of activities inherent to the states qua states, has characterized the recent judicial debates. The same may also be suggested for the public debate—not yet captured in litigation—over whether the Constitution constrains Congress' authority to make exceptions to the appellate jurisdiction of the Supreme Court. What would prevent the judicial branch from accomplishing its constitutionally assigned functions is widely accepted as the appropriate inquiry to be made. *See* Hart, *The Power of Congress to Limit the*

That perspective seems to require, as Justice White argues at length, that the impact of the legislative veto here be considered for its tendency to rearrange power. In other words, the statutory scheme must be viewed as a whole.[63]

For Justice White, the legislative veto "has become a central means by which Congress secures the accountability of executive and independent agencies"[64]—"an important if not indispensable political intervention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress' control over lawmaking."[65] In light of the relatively limited use of the device to date, one wonders if he does not overstate the case.[66] His judgment is particularly questionable respecting use of the veto for regulatory oversight; at least until recently, enhancing the accountability of independent regulatory agencies and preserving congressional control over public rulemaking were not significant uses for the legislative veto, in either actual or political terms.

A. *The Political Uses of Legislative Vetoes*

The political uses of legislative vetoes warrant special analysis. Justice White's detailed account of the history of the legislative veto reflects its initial use in reorganization acts, and subsequent expansion to problems of national security and foreign affairs. In these contexts it seems proper to characterize the veto, as he does, as a means by which Congress could "transfer greater authority *to the President* . . . while preserving its own constitutional role."[67] Withdrawals of federal lands,[68] international agreements and tariffs, pay adjustments, war powers, national emergency legislation, and the impoundment issue

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Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 HARV. L. REV. 1362, 1365 (1953). *But cf.* Wechsler, *The Court and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965) ("I see no bars for this view [prohibiting alteration of appellate jurisdiction motivated by hostility to decisions of the Court] and think it antithetical to the plan of the Constitution for the courts—which was quite simply that the Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power.").

63. This is closely related but not identical to the severability question. Although Justice White agreed with Justice Rehnquist that the congressional review provisions were not properly severable from the suspension provisions, one could defensibly reach the opposite view as a matter of statutory interpretation and still conclude that the impact of the veto provision could only be assessed appropriately by considering the scheme as a whole.

64. *Chadha*, 103 S. Ct. at 2793.

65. *Id.* at 2795.

66. *See supra* notes 7-8 and accompanying text.

67. *Chadha*, 103 S. Ct. at 2793 (emphasis added).

68. *See* United States v. Midwest Oil Co., 236 U.S. 459 (1915).

each concern chiefly public measures, primarily related to the internal organization of government and affecting the interests of private persons only indirectly; they reflect areas of direct presidential initiative and responsibility. In these contexts, too, the veto represents an accommodation between the branches, often mutually desired as Justice White demonstrated, on matters of legitimate interest to each. Reorganization acts, measures concerned with budgetary adjustment (impoundment), foreign relations, and war (matters of the character Chief Justice Marshall long ago referred to as "[q]uestions in their nature political"[69]) rarely appear in a form likely to attract or, more importantly, to justify judicial review. They may all be described fairly as a setting for horse-trading between the President and Congress: the authority subject to the veto will be that of the President himself; no alternative means of control is obvious; precise congressional standard-setting or structural arrangements are probably inadvisable; and a sharing of political authority is warranted by Congress' legitimate interests in the subject matter and the consequent desirability of committing Congress to support of the action to be taken. They evoke Justice Jackson's more enduring analysis in *Youngstown Sheet & Tube Co. v. Sawyer*[70] that the power of government is at its peak when the President and Congress work supportively of each other's authority.[71] To the extent Justice White speaks of the legislative veto in terms of Congressional accommodation directly with a powerful President requiring more power—as a means of preserving balance while accomplishing needed delegation to that other potential tyrant—his dissent is persuasive.[72]

69. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

70. 343 U.S. 579, 587 (1952).

71. My colleague Benno Schmidt observes that this alliance between Congress and the President may permit a Congress, spurred perhaps by self-interest in avoiding responsibility for difficult decisions, excessively to evade its responsibility, as occurred in the Gulf of Tonkin Resolution, and in effect to confer *too much* authority on the President. Professor Schmidt's observation is not an easy one to answer. "Delegation" may remain a viable issue, even in the political arena, for issues of the largest moment. *Cf. infra* note 79. For the settings that chiefly concern me, where the President and Congress must deal *continuously* with each other on a series of matters of middling importance, that problem—certainly not one that appeared to concern the Court—is not presented.

72. In a detailed review of the history of political dispute over the legislative veto issue, Justice White seeks to show that Presidents have most frequently objected to veto provisions that empowered mere committees of Congress to act. 103 S. Ct. at 2793 n.5. He does not address these committee vetoes, but strongly hints he would disapprove. Even for measures characterizable as committee vetoes, however, it may be possible to suggest similar differentiations. *See infra* notes 92-102 and accompanying text.

B. *The Regulatory Uses of Legislative Vetoes.*

At other points Justice White's dissent is far less persuasive, notably those bearing on the regulatory context, where it speaks only in terms of Congress' accomplishment of its own "designated role under Article I as the nation's lawmaker,"[73] independent of any relational concerns. The legislative veto did not begin to appear with any frequency in that context until the 1970's. In that setting, Justice White's assertion that the legislative veto should be understood as a check on the President corresponding to the bicameral legislature/presidential veto regime, one of the principle engines of his analysis, is at best questionably relevant. The difficulties arise for two reasons: first, ordinarily the President is not the delegate under these statutes and his authority to direct the proceedings over which the veto is reserved is, at best, controversial; second, even if he were the delegate, reservation of an unconditional congressional negative would not protect Congress' "designated role . . . as the nation's lawmaker." Illuminating these difficulties is the burden of the following paragraphs. To observe them is to suggest a possibility for discrimination among various types of legislative vetoes that neither Justice White nor the majority seemed to wish to entertain.

Thus, one premise of Justice White's argument is that, as the President is the source of the action subject to the veto, the effect of the mechanism is merely to invert the ordinary processes of legislative action; the agreement of all three actors is in any event required, and in that way the essentials of the constitutional scheme are preserved. That premise will not always be true; some proposals subject to legislative vetoes come from the President, but others come from rulemakers not subject to direct presidential control or, as here, administrative judges acting "on the record,"[74] and thus also not subject to presidential direction. In particular, congressional delegations of regulatory authority are most often made *not* to the President, but to some agency or official —whether executive branch or independent regulatory commission.[75]

73 *Chadha*, 103 S. Ct. at 2795-96.

74 *See supra* notes 9-10 and accompanying text.

75 Justice White draws no distinction between independent regulatory commissions and executive branch agencies; indeed, at points he goes out of his way to suggest legislative vetoes are especially important for the former, because they are not subject to presidential supervisory control. His dissents from the Court's summary affirmances in the two regulatory cases, *see supra* note 1, underscore this proposition.

This aspect of his position has its roots in his separate opinion in Buckley v. Valeo, 424 U.S. 1, 284-85 & n.30 (1976). The majority opinion in that case had placed within the reach of the appointments clause in article II of the Constitution any officer of government administering the laws of the United States in relation to its citizens —independent regulatory commissions along

The legal authority to act is then that of the delegate, and even for indisputably executive agencies the President's power of direction appears limited in ways that make it difficult to characterize him as the delegate.[76] It is, then, a question, rather than a matter for easy assertion, whether a provision for legislative veto of proposed agency action merely rearranges the preexisting authority of the three political branches while preserving the checks each is intended to possess against the actions of the others. The more difficult Congress makes it, in its original delegation, for the President to participate and instruct, the greater the reason to suspect that the legislative veto does in fact operate as a device for evasion of the President's participation in governance rather than the simple redressing of an imbalance created by the practical need to delegate.

The second difficulty with the "functional equivalency" argument in the regulatory context is that presidential (or agency) shaping of rules followed by an up-or-down congressional "veto" is not the equivalent of the Article I legislative process. The possibility that any one of the three political arms of government can prevent the enactment of legislation is only part of the constitutional scheme. Of at least equal significance is that, where legislation is to be created, the opportunities for shaping and constructive change are to be focused in two of them, the House and the Senate. Congress does not act as a law*maker* when it leaves to other entities all possibility of shaping and accommodating that go into the drafting of a rule, reserving for itself only the possibility of an unconditional negative;[77] it then serves the same function as the President does respecting the legislation Congress *does* en-

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with what are more traditionally regarded as executive branch agencies—thus resurrecting the question to what extent or in what circumstances the President can be excluded. *See* Nathanson, *Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the "Independent" Agencies*, 75 Nw. U.L. Rev. 1064 (1981); Strauss, *Separation of Powers and the Fourth Branch: The Place of Agencies in Government* (forthcoming). One would think the arguments supporting the veto are much weaker in circumstances in which the proposal subject to it can no longer fairly be characterized as the President's, and indeed the suggestion can be made that Congress has found a way around the President's own participation in the legislative process and the constitutional requirement of a unitary executive.

76. *See* United States v. Nixon, 418 U.S. 683, 695-96 (1974) (departmental regulation freed special prosecutor from direction by President in prosecutorial choices, a quintessentially executive activity); Sierra Club v. Costle, 657 F.2d 298, 407-08 (D.C. Cir. 1981) (discussion of President's involvement in rulemaking). In this case, in particular, Mr. Chadha would doubtless have had a telling complaint if the President had called the Attorney General on the telephone and instructed him to tell the sitting immigration law judge that Chadha's deportation order was not to be suspended, because the President had concluded that the statutory criteria were not met, the governing statute requires that judgment be made "on the record." 8 U.S.C. § 1252(b) (1982); *see supra* note 9.

77. *See* Kurland, *The Impotence of Reticence*, 1968 Duke L.J. 619, 629.

act. The drafters of the Constitution meant the shaping of legislation to be done by Congress; and that adjustment seems important to the overall scheme. Unlike the political contexts in which legislative vetoes were first developed, agency rulemaking results in what are unmistakably laws unmistakably constraining the conduct of persons outside government.

To be sure, the constitutional design has suffered considerable erosion. Even absent the legislative veto, Congress' work has frequently been wanting. We permit Congress to delegate notably open-ended rulemaking authority to agencies, subject only to the now limited constraints of the delegation doctrine: that the authority has been clearly delegated;[78] and that the authority be described with clarity sufficient to permit a court to assess whether it has been exceeded. Even so, and putting aside the question whether the courts are not now, and properly, reinvigorating these controls, use of the legislative veto to control agency rulemaking—the generation of statute-like prescriptions binding upon the citizenry—aggravates the delegation problem rather than ameliorates it. Congress may have been encouraged by the availability of the veto both to employ vague standards of delegation to proxy statute-shapers, and to respond to its proxies' "excesses" with unexplained, ad hoc negatives rather than with the construction of revised statutory prescriptions.[79] For these reasons, the authority of Congress to bestow rulemaking power on agencies (subject to judicial check) need not be found to imply authority to reserve a legislative veto.[80] The latter involves the assertion of a right to act without finality in a manner likely

78. Chrysler Corp. v. Brown, 441 U.S. 281, 317-19 (1979).

79. *Cf.* Consumer Energy Council v. FERC, 673 F.2d 425, 465-70 (D.C. Cir. 1982), *aff'd, sub nom.* Process Gas Consumers Group v. Consumer Energy Council of America, 103 S. Ct. 3556 (1983) ("[T]he effect of a congressional veto is to alter the scope of the agency's discretion. In this case, the practical effect probably was to withdraw the discretion altogether . . . . In other cases, exercise of the legislative veto may enable one house of Congress effectively to dictate that a specific type of rule be promulgated."). Tying the analysis to the delegation issue, as the District of Columbia Circuit suggested but the Court did not, suggests that a different outcome might be appropriate where "delegation" issues would not ordinarily be thought a concern. *Cf.* Curran v. Laird, 420 F.2d 122, 129-31 (D.C. Cir. 1969) (en banc) (no delegation problem existed where legislation providing for a reserve fleet committed management of it to agency discretion) where the court stated:

> That the matter before us for consideration lies in the special zones of the exceptions, rather than the ordinary area of judicial reviewability, is established by several cardinal aspects of the issues. The case involves decisions relating to the conduct of national defense; the President has a key role; the national interest contemplates and requires flexibility in management of defense resources; and the particular issues call for determinations that [] outside sound judicial domain in terms of aptitude, facilities and responsibility. . . . [O]ur decision does not involve personal rights and liberties, does not involve constitutional claims, and does not involve a right expressly granted by statute that qualifies what would otherwise be non-reviewable discretion.

80. *Chadha*, 103 S. Ct. at 2802.

to be harmful, not helpful, to Congress' "designated role."[81] It evokes untempered the fears of arbitrary political action by Congress that so strongly prompted the Framers' efforts to design institutions that would avoid the threat of legislative tyranny.[82] In contrast, a Congress granting to agencies what, from its perspective, is a final authority to make rules may be encouraged by that prospect to more precision in standard-setting. Such precision is desirable both to facilitate judicial review and to protect the citizen against arbitrary action. Additional protection may be derived if the actual rulemaker is obliged to act on ostensibly rational, apolitical grounds, freed to some extent from the directory, political influence of the President or Congress.[83] Room thus exists at least for suspicion that legislative vetoes will produce less careful initial drafting by providing a mechanism whereby difficult issues can be cheaply revisited.[84] The threat of their exercise may also en-

81. To be sure, the "Lockean principle that the grant of legislative power is one 'only to make laws, and not to make legislators' has fallen before the inexorable momentum of the administrative state." Monaghan, Marbury *and Administrative Law*, 83 COLUM. L. REV. 1, 25 (1983). Authority finally conferred may be executed, however, with an assurance and subject to an external check that authority granted in conditional form may not. To put the same argument in a somewhat different way, Congress may be seen more fully to have acted "to make legislators" when the authority it confers is subject to its own informal controls and, perhaps, removed from executive controls.

82. G. WILLS, EXPLAINING AMERICA 213-14, 260-64 (1981); *see* Consumer Energy Council v. FERC, 673 F.2d 425, 464 (D.C. Cir. 1982), *aff'd, sub nom.* Process Gas Consumers Group v. Consumer Energy Council of America, 103 S. Ct. 3556 (1983).

83. The "to some extent" is advertent; judge-like insulation of the rulemaker would be inappropriate. Rulemaking, in my view, properly continues to be performed "off the record," in a technical sense; its very focus on policy-making warrants provision for political oversight in some form, *see* Strauss, *Disqualification of Decisional Officials in Rulemaking*, 80 COLUM. L. REV. 990, 995 (1980), albeit subject to what might be described as Marquis of Queensbury rules. *Cf.* District of Columbia Fed'n of Civic Ass'n's v. Volpe, 459 F.2d 1231, 1246 (D.C. Cir. 1971) (rulemaker's decision would be invalid if based in whole or in part on pressures emanating from certain Congressmen) *cert. denied*, 405 U.S. 1030 (1972). For policy-making intended to influence planning choices (major purchases and other compliance activities by the public at large), the alternative of remitting all control to the random, episodic, party-distorted, and necessarily long delayed world of judicial review is unsustainable. One might note in this respect the constitutional responsibility for oversight inherent in the President's authority to demand "the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the duties of their respective Offices," U.S. CONST. art. II, § 2, cl.1, as well as Congress' yearly, and intended, control over agency priorities through the appropriations process.

84. The legislative veto provision at issue in Consumer Energy Council v. FERC, 673 F.2d 425, 437 (D.C. Cir. 1982), *aff'd sub nom.* Process Gas Consumers Group v. Consumer Energy Council of America, 103 S. Ct. 3556 (1983), is a case in point. The Federal Energy Regulation Commission (FERC) had adopted a rule, with high financial consequences for the energy industry, in compliance with a directive in President Carter's energy legislation. The reservation of a legislative veto substantially resulted from the fact that the legislation had been highly controversial and difficult to pass and because authorization of this particular rulemaking had been especially controversial. When the rule was adopted by FERC and forwarded to Congress for its consideration of the legislative veto issue, no substantial discussion of the compliance of FERC

hance the aggressiveness of political oversight by congressmen or congressional committees. In sum, the existence of a legislative veto in a regulatory statute may look much more like political self-aggrandizement than "a means of defense"[85] against the Imperial Presidency.[86] The record of the exercise of legislative vetoes in the regulatory context, although infrequent, is not reassuring, either as to its impact on Congress' primary function of legislating or as to its use as a means of political accommodation.[87]

[redacted] Each of these devices may effectively defeat presentment of the agency's development of law while maintaining substantial congressional controls. In this way, each might be characterized as an end run around the President's veto power. At least the first two also seem to provide Congress with an effective technique by which to escape any need for statutory precision. Congress remains able to enact vague standards subject to its own subsequent, ad hoc correction. These are troublesome observations, but the result may be to call into question these techniques as well.[88] Short of that, one may remark that, unlike the legislative veto, each device contains significant self-corrective or limiting factors. Lay-before statutes require Congress to surrender substantially greater control than the legislative veto and to that extent encourage initial drafting precision. In creating independent agencies, Congress also relinquishes substantially more control

with the statute, or of the justification for the rule under the statute, occurred. Instead, the House exercised its veto because it was convinced that the original statutory authorization for rulemaking had been in error and that the program FERC was implementing, entirely faithfully so far as anyone was concerned, ought never to have been adopted.

85. *Chadha*, 103 S. Ct. at 2796 (White, J., dissenting).

86. Understandably, Justice White's history of presidential bargaining for legislative vetoes in return for accretions to the President's own power has no application in this context.

87. *See supra* note 84 and accompanying text.

88. [redacted] *ment* (forthcoming).

than it could retain with the legislative veto. Finally, appropriations measures are episodic, politically linked with other matters, and imprecise in their impact. More generally, to uphold any of these devices it need not be conceded that Congress can *validly* exclude the President from political oversight of activities for which Congress maintains its own political connections.

V. Preserving the Political Veto

This consideration of the "functional equivalency" argument suggests a broad distinction between use of the legislative veto as a check on the chief executive, and use of the legislative veto as a check on any agency to which power has been delegated. The New Jersey Supreme Court, in a pair of recent decisions,[89] drew just such a distinction. It struck down a provision for general legislative veto of proposed agency rules, while upholding a specific provision establishing legislative veto procedures for projects proposed by the state's building authority that would require long-term leases by state agencies. In the former setting, the court thought the legislative veto threatened both to impair the balance of power within state government and to diminish the quality of initial legislative efforts.[90] The latter measure concerned essentially political accommodations, with no diminution of gubernatorial control; the legislature's opportunity to disapprove a proposal could be thought of as creating a form of moral obligation to make the future appropriations meet the proposal's terms.[91] In this respect, the New Jersey court evidently believed that the opportunity for a legislative veto was not merely unobjectionable, but in fact served a positive function in the arrangements of state government.

A recent panel opinion in the United States Court of Appeals for the District of Columbia Circuit, *American Federation of Government Employees v. Pierce*,[92] may suggest the difficulties in failing to make such distinctions. The case involved an annual appropriations bill for the Department of Housing and Urban Development which had provided, in part, that none of the funds it made available "may be used prior to January 1, 1983, to plan, design, implement, or administer any reorganization of the Department without the prior approval of the

89. General Assembly v. Byrne, 90 N.J. 376, 379, 448 A.2d 438, 439 (1982); Enourato v. N.J. Building Authority, 90 N.J. 396, 401-02, 448 A.2d 449, 451-52 (1982).

90. *Byrne*, 90 N.J. at 395-96, 448 A.2d at 448-49.

91. *Enourato*, 90 N.J. at 401, 405, 448 A.2d at 451, 453.

92. 697 F.2d 303 (D.C. Cir. 1982).

Committees on Appropriations."[93] Provisos such as these are neither uncommon, nor counted in totaling up the number of legislative veto provisions or the frequency of their exercise. Presumably the Congress enacting such a proviso is not yet prepared to appropriate funds for the stated purpose, and the measure reflects a compromise with an executive seeking added flexibility that Congress is not required to afford. Even without such provisos, it is commonplace for an agency subjected to a line-item budget, and uncertain about its authority or wishing to reallocate its funds, to call the relevant appropriations committee and explain its plan; with committee approval, or perhaps absent objection, the changed expenditures can be made within the limits established by the overall appropriation. The enforcement of budgetary limitations is almost wholly internal to the political branches of government, and a matter of intense and appropriate congressional interest. Judicial controls could be invoked only with great difficulty[94] and the provisions rarely if ever implicate private claims of right. So long as the line-item budget is employed—and it is hard to construct either the argument that Congress *must* enact an aggregate budget for each agency or the belief that, as a political matter, it soon will[95]—it is useful to both sides to have an informal technique for adjustments of expenditure within the overall aggregate appropriation to a given agency.

The District of Columbia Circuit's opinion, rendered prior to *Chadha*, finds the proviso offensive, both as a departure from the bicameral-presentment requirements of "legislative action" and as a "means for Congress to control the executive without going through the full lawmaking process, thus unconstitutionally enhancing congres-

93. Department of Housing and Urban Development—Independent Agencies Appropriation Act, 1983, Pub. L. No. 97-272, 96 Stat. 1160, 1164 (1982).

94. In most circumstances, the interest involved in enforcing a required limitation on expenditures of governmental funds would be a "generalized grievance" about governmental adherence to law insufficient to sustain constitutional standing. In *American Fed'n of Gov't Employees*, 677 F.2d at 305, however, the court held that only a member of the House of Representatives Appropriations Committee had a sufficient personal stake and then only because of its relationship to the Committee's authority.

95. Indeed, it seems likely that Congress will learn to substitute appropriations controls for the legislative veto; the *Chadha* court was quite explicit in reaffirming the continuing power of the purse. Those who drafted the Constitution believed that ultimate control inevitably lay with Congress because it possessed the power of the purse. *See, e.g.*, THE FEDERALIST NO. 78, at 522-23 (A. Hamilton) (J. Cooke ed. 1961); *cf.* G. WILLS, *supra* note 82, at 128, 135 (Congress is given what might be called "shoot-out" power, the weapons for a final showdown with both other branches.). In this respect, those who see in the legislative veto decisions added power for the executive in its relations with Congress seem certain to be disappointed; and that will likely be more, rather than less, the case if the appropriations authority cannot itself be rendered flexible by mechanisms like committee approvals.

sional power at the expense of executive power."[96] Nothing in *Chadha* suggests a need to reconsider this judgment. Yet, if one considers the budgetary process as a whole, neither of these characterizations is, or at least need be,[97] apt. Appropriations measures originate with the President and must be signed by him; his Office of Management and Budget, with but few exceptions, controls both the initial submissions and requested alterations. Housing and Urban Development Secretary Pierce is unlikely to have taken the steps that brought about the lawsuit in *American Federation of Government Employees* without the initial assurance of presidential backing, as he would not have sought committee approval for the otherwise forbidden expenditures without that assurance.[98] The limited duration of appropriations measures and the practical difficulty the President in any event faces in exercising his veto authority over such measures also suggest a presentment issue far less substantial than that involved when an agency is authorized, for an indefinite term and without presidential participation, to adopt rules as binding as statutes on the public at large, rules which are then made the subject of legislative veto procedures.

Similarly, viewing such practices as means for enhancing congressional control over the executive without use of the full legislative pro-

96. *American Fed'n of Gov't Employees*, 697 F.2d at 306.

97. Imagine a situation in which an independent regulatory commission has secured "conditional" authority to spend, albeit with the post-appropriations approval of its appropriations committee, sums which the President did not request. The President has had the chance to approve the condition, as he could have had an unconditional appropriation for this unwanted expenditure; absent the possibility of a line-item veto, either is at best a crude instrument of control.

Perhaps it could be argued in such a case that Congress had evaded the functional equivalent of presentment inherent in the presidential budget process and the presidential Office of Management and Budget's controls over agency budget proposals and requests for funding. Or, at some point, the very thickness of a forest of conditional appropriations might persuade one that Congress had passed over from enhancing executive flexibility at the price of congressional participation, to attempting to seize the reins of control more firmly than the appropriations authority already envisages. The distinction here might not be unlike that that permits the courts to swallow most delegations, but caused them to pause before the sweeping empowerment of the National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195, 196 (1933), *see* Schechter Poultry Corp. v. United States, 295 U.S. 495, 539-42 (1935); or that permits substantial federal regulation of state concerns, but not to the point of extinguishing state control of essential functions. *See supra* note 62.

98. The case arose out of an alleged disobedience of the statutory provision, when the Secretary announced a reduction in force in the Department, effective before January 1, 1983, and apparently signaled that funds *had* been expended to design and implement a departmental reorganization; the only plaintiff found to have standing to sue was a member of the House Appropriations Committee asserting that his statutory claim to approval had been defeated, and he was then met with a determination that that claim was unconstitutional. *See American Fed'n of Gov't Employees*, 697 F.2d at 305-06.

cess,[99] and hence violative of separation of powers, is questionable on these facts and, in addition, apparently insufficient. The full legislative process is used at least annually; although the "one bite at the apple" theory invoked by Justice White in general defense of the legislative veto raises problems when applied to measures of indefinite duration and broad authority, it seems less problematic in the budgetary context. The District of Columbia Circuit panel's characterization of such measures as involving "enhanced control" rather than "enhanced flexibility," "enhanced precision," or "enhanced executive authority" seems at the least to depend on a careful understanding of the particular context in which control will be exercised. It seems doubtful that Congress would be willing to make the questioned appropriation absent some technique for later assuring itself, or its trusted agents, that an appropriation that now seems unjustified has in fact become warranted by intervening events. If that is so, it is hard to treat these measures as if only Congress gains in power and the President necessarily loses. As already noted,[100] the Court's recent separation of powers cases make threat to core function, not marginal enhancement of political clout in a necessarily fluid relationship, central in any event. Even if such measures enhanced Congress' control, it is impossible to make that assessment unless one can show (as was not urged here) a generality of use and impact. As Judges Wald and Mikva suggested in the course of explaining, sua sponte, their unavailing wish to set the case for argument en banc, the government gains in flexibility when arrangements such as these can be made.[101] Indeed it is difficult to understand how these arrangements present the risks of one-branch or even one-house hegemony, of government out of control, that initially produced the allocation of governmental authority that characterizes our Constitution.

99. It might be remarked that use of hearings and other oversight measures are also means for enhancing congressional control over the executive without use of the full legislative process, although in this instance the obligation of the executive to respond is marked by political expediency rather than legal constraints. I do not mean to ignore that difference. Yet one must avoid the attitude, which might be taken from the Court's opinion, that congressional controls over executive agencies are undesirable—that it suffices to leave all control in the hands of the courts. Putting aside that any such proposition is infected with a disqualifying degree of self-interest in the courts, judicial controls are simply incapable of providing timely oversight or invoking political responsibility in the exercise of discretion within the law. *Cf.* Sierra Club. v. Costle, 657 F.2d 298, 410 (D.C. Cir. 1981) ("Cases like this highlight the critical responsibilities Congress has entrusted to the courts in proceedings of such length, complexity and disorder."). The expectation, indeed the purpose of those who drafted the Constitution was to assure that the political branches constantly checked one another; that there may be excesses in the process that threaten to undo the balance the Constitution sought is not to be mistaken for disapproval of the continuing struggle.

100. *See supra* note 62 and accompanying text.

101. *American Fed'n of Gov't Employees*, 697 F.2d at 308-09.

With two exceptions, measures such as these seem precisely parallel to the earliest delegation cases, cases in which Congress set tariff levels and then permitted the President to vary them if he found that specified conditions had been met. Those legislative actions were upheld despite their conditional character. The two exceptions are, first, that Congress did not set forth standards for the congressional committees' exercise of the releasing authority that it granted; and, second, that a part of the legislature, rather than the executive, determined whether or not the conditions had been met. If the lack of adequate standards threatened public interests as, for example, it seems to do for legislative vetoes of agency rulemaking,[102] that would provide a basis for distinction. "Delegation" has continued bite in that context. But an exceptional measure for freeing the executive branch to spend funds within general appropriation limits for purposes not otherwise authorized is hard to characterize as presenting such a threat *to the public*; its internal implications, as already suggested, are at the least a function of context. That a congressional committee, rather than the President or some agency, determines whether the conditions have been satisfied, similarly, seems important for some contexts but unexceptionable in the world of continuing executive-legislative interaction that characterizes the budget process. In such a continuing relationship, limiting one participant to episodic, formal, even clumsy acts is likely to produce rigidity and a covetousness about power that will hamper the effective conduct of government and may weaken the presidency far more than the alternative. The same is true for reorganization acts; in a government premised on the selection of a single executive as its head, it is internally sensible and externally non-threatening for the President to be the prime shaper of the internal structures of government, subject to congressional disapproval.

Obviously, there could be disagreements about particular measures, but the general utility of the New Jersey court's approach seems evident. One wishes the Court had limited itself to the particular measures before it, or that it or Justice White had shown some sensitivity in addressing the variety of settings in which legislative vetoes might be employed. In the three cases it had to decide, the Court reached a sound result: Congress has no business determining that the individual circumstances of a particular alien warrant his deportation; and in the regulatory rulemaking context, especially as it concerns the independent regulatory commissions, the legislative veto does seem to exclude the President rather than mediate a continuing dialogue between the

102. *See supra* notes 78-87 and accompanying text.

President and the Congress. Yet for the cases it did not have to decide, but seemed to, Justice White's premises seem stronger than the majority's.[103]

VI. Conclusion

The argument that a legislative veto can be the functional equivalent of "normal" constitutional processes—or, perhaps more properly, works no threatening rearrangement of initiative and authority—is persuasive for the settings in which the device was earliest and most commonly used:

— where the President himself takes or directs the action subject to the legislative veto;

— where the subject matter principally concerns the internal arrangements of government rather than rules of conduct applicable to the public, and judicial consideration at any stage is unlikely;

— where both the President and Congress have an important interest in the subject matter of the action to be taken, and congressional participation through the veto may prompt less grudging recognition of the President's participation and/or a sense of moral commitment to provide fiscal or other support for the resulting arrangements.

The argument is far less persuasive, however, in the regulatory setting, where, on the other hand:

— the President ordinarily is not a direct participant, and may even be excluded from direct participation;

— judgments affecting individual interests or obligations are to be made, and judicial review of agency action is readily available;

— permitting use of the legislative veto may tempt Congress to believe that it can easily correct the excesses of a careless formula governing the obligations of the public, and correct them without the need to articulate a fresh or limiting principle; and

— the justification offered for use of the veto is framed not in terms of political accommodation between a Congress and President,

103. It is disappointing that, while Justice White deplores the majority's failure to find a middle ground and makes several intriguing suggestions for future development, he himself takes an apparently uncompromising position. Perhaps Justice White's most intriguing suggestion is for a statutory direction to courts to regard legislative resolutions of disapproval as relevant legislative history. *Chadha*, 103 S. Ct. at 2796 n.11. The new Model State Administrative Procedure Act embodies a provision of this character as a substitute for legislative veto; adoption of the legislative resolution deprives the agency action of any presumption of validity, requiring the agency affirmatively to demonstrate its authority for the measure adopted. *See* Model State Administrative Procedure Act §§ 3-203, 3-204 and Commissioner's Comments, 14 U.L.A. 97-101 (Supp. 1983).

both interested in the premises, but only in terms of Congress' performance of its own legislative function.

Neither the majority opinion nor Justice White's dissent seem to leave much room for accommodations of this character. Perhaps the Court's opinion will, over the years, be confined to its facts. In the late 1920's, the Court heard argument and then reargument in a much publicized dispute over the President's right to fire a postmaster without senatorial approval. A divided Court, in lengthy and seemingly categorical opinions, upheld the President's authority on sharply stated separation of powers grounds.[104] Many sensible arrangements of government, most notably, the fixed term of office given some officers, such as regulatory commissioners, seemed to have been called into question. Ten years had not passed before a unanimous Court easily found its way to the conclusion that, that decision notwithstanding, Congress *could* provide protected terms of office for regulatory commissioners.[105] One may hope for a similar outcome here.

Looking back at the majority opinion to see how that might be achieved, one must begin with some pessimism as to whether the opportunity will soon arise. As the popular press reported, and Justices Powell and White decried, the majority seems bent on eliminating the legislative veto device in all its forms. The formal approach the majority took does not readily yield to the functional distinctions here suggested.[106] The strength of the Court's language will discourage challenges. Perhaps more important, the political settings for which use of the legislative veto seems most justified seem also to be the least likely to produce sustainable litigation.[107] Thus, future judicial opportunities to examine these issues seem likely to be infrequent at best.

104. Myers v. United States, 272 U.S. 52 (1926).

105. Humphrey's Ex'r v. United States, 295 U.S. 602, 626-30 (1935). *Humphrey's Ex'r* employed a highly formalistic analysis, highly misleading in my view and since displaced by the reasoning in *Buckley*, 424 U.S. 1, 118-43 (1976). The result, however, was plainly the right one.

106. These distinctions do not, in my view, deny meaning to the requirements of bicameralism and presentment for the enactment of laws. The problem, again, is whether to regard the exercise of a legislative veto as the enactment of law. The burden of the preceding discussion is that, first, there is no necessary reason to do so and, second, that there is good reason not to do so. Some vetoes adequately preserve the President's role while also serving proper congressional interests and, most importantly, equally serving citizens' interests in enjoying a government of adequate strength and flexibility which yet tends to be held in check by the natural and continuing competition for political authority among its parts.

107. Reorganization, the exercise of authorities subject to the War Powers Resolution, 87 Stat. 555, 556-57 (1973) (codified at 50 U.S.C. § 1544 (1976)), impoundment, *see, e.g.*, Congressional Budget and Impoundment Control Act of 1974, 88 Stat. 297, 334-35 (1974) (codified at 31 U.S.C. § 1403 (1976)), and the like will not, in my judgment, often produce justiciable controversies between parties with standing to seek their resolution. *Cf.* American Fed'n of Gov't Employees v. Pierce, 697 F.2d 303, 305 (D.C. Cir. 1982) (Congressman did not have standing as legislator, but did have standing as member of House Appropriations Committee).

> If opportunities for reconsideration do occur, perhaps the most likely verbal hook for the accomplishment of modification is to be found in the majority's stress on "altering legal rights" as the test for determining whether challenged action is "legislative" or not. For the reasons already suggested, that inquiry does not make much sense as a means of determining "legislative" character. If it could be understood in slightly different terms, however, it could provide the basis for a distinction like that suggested above. As framed ("altering the legal rights, duties and relations of persons . . . outside the legislative branch") it seems to extend to the political, largely infra-governmental uses of the legislative veto as well as to those that directly affect citizens. The President is a person, as are the other actors in cabinet departments and government agencies whose "legal rights, duties and relations" might be affected by legislative veto of a proposed reorganization or impoundment. It would take rather little readjustment in language, however, and perhaps none in meaning, to read the test as forbidding legislative vetoes only of those sorts of government action that have as their principal purpose and effect "altering the legal rights, duties and relations of persons" *outside government*. The altered test still could not be viewed as a measure of what is or is not "legislative"; but that is not the issue. The results of such an approach, overall, would be a far more satisfactory rendering of the conjoined purposes of governmental flexibility, role dispersal, and citizen protection that characterize our Constitution.

The CHAIRMAN. Next is Prof. Barbara Hinkson Craig, assistant professor of government at Wesleyan University, and Prof. Robert S. Gilmour, professor of political science, University of Connecticut. And the next one on this panel, is Prof. Chester Newland, professor of public administration, University of Southern California.

If you could submit your manuscripts for inclusion in the record and if each of you could summarize your views about this particular matter. We have a book, "The Legislative Veto: Congressional Control of Regulation," by Barbara Hinkson Craig. We are delighted to see your book. Evidently Ms. Bolling has read it and is familiar with it and I will be familiar with it before we make our report.

[The book written by Barbara Hinkson Craig, "The Legislative Veto: Congressional Control of Regulation," may be found in the committee files.]

I will be glad if you would begin, and Mr. Reporter, all these manuscripts will be received in the record.

STATEMENT OF BARBARA HINKSON CRAIG, ASSISTANT PROFESSOR OF GOVERNMENT, WESLEYAN UNIVERSITY

Ms. CRAIG. Thank you Mr. Chairman, and I wonder if we might ask you for one more favor. Professor Gilmour and I also have written an article that appears in the current issue of the Journal of Policy Analysis and Management that we would also like to submit for the record.

The CHAIRMAN. We would be pleased to. How long is the article?

Ms. CRAIG. It is about 20 pages.

The CHAIRMAN. Ms. Bolling, is that too long to include in the record?

Ms. BOLLING. No, sir.

The CHAIRMAN. Without objection the article to which you refer will be included in the record.

Ms. CRAIG. Thank you. I think that will give a more complete expression of our views on the subject.

Most of the debate about the value and effect of the legislative veto and its replacement has been cast in terms of which constitutional actor—the President or Congress—is going to win most in the battle over control of policy outcomes. Nearly lost in all this discussion is the issue of which national policy is going to win when we add things like legislative vetos over policy areas. The question is not just which branch will win, but which policy will win, and it is this hidden agenda that is often far more important, especially in the regulatory area, in determining who is going to support a legislative veto and who is going to oppose it in these instances.

In our study—and Professor Gilmour and I have been studying the effects of legislative vetoes in their now unconstitutional forms for several years—we found that the effects in the regulatory area varied substantially depending upon over what regulatory policy the veto was applyed on what committees were involved, and on what agencies were involved. In short, legislative veto was one term for many devices used in many situations and the results varied rather markedly. It is safe to conclude that the structures, site, and nature of the policy involved will be very important determinants of the effects of the veto replacements as well.

Before I talk specifically about the policy effects of veto replacements, I would like to make several rather obvious but often ignored points that are important in determining what vetos are going to accomplish in different regulatory areas.

The first is that the amount and kind of attention that will be given to a veto type review will depend on the willingness, on the commitment, and on the policy preferences of the committees and the committee members that will be involved in the review. In other words, committees matter; they also differ, and it should be kept in mind that they change over time.

You can say the same thing about the executive branch agencies and independent agencies that have powers to make rules. They matter, they behave differently, and they change rather markedly over time.

The CHAIRMAN. Ms. Craig, you are a very brilliant lady. You are reading your manuscript. Now, please, you just tell us—your manuscript in full will be in the record.

Ms. CRAIG. The point that I am trying to make is that all of the actors and all the procedures vary so much that we can't predict what the results are going to be. This fact alone argues very strongly against using a generic veto. Congress doesn't know what the results are going to be ahead of time in all these different kinds of regulatory areas, if it applies an across-the-board generic veto provision.

Another thing that I think people tend to believe about the legislative veto which colors the debate—a fact that was remarked upon

by an earlier witness—is that there is a belief that the legislative veto is somehow a tool of deregulation. If we put it in place it will help the goal of deregulation.

In the recent Supreme Court decision in *Motor Vehicle Manufacturing Association* v. *State Farm Mutual*—the airbags case—the Court said that to alter a rule or withdraw a rule, the agency will have to follow full notice and comment procedures. This will include if you amend the Administrative Procedure Act to provide for joint resolutions of approval or disapproval over all rules as the Lott-Grassley bills suggest, sending the rule over to Congress for congressional review. If what the agency is trying to do is to cut back on regulation—in other words, deregulation by modifying the rule—Congress now will have to follow its veto procedure to approve or disapprove that drawing back. If you use the joint resolution of approval, for instance, you will find that the advantages of all the delays of Congress' normal procedure will be in the hands of regulation proponents, not those who favor deregulation. We have offered a more complete analysis of the effects of various forms of the veto replacements over newly proposed or modified regulations in our written testimony. Based on this I think that many of the supporters of the veto who think somehow that it is going to help their deregulation goals, maybe ought to rethink their position in light of this Supreme Court ruling.

The other point I would like to make briefly is that I don't believe that Congress will have any problem recreating the same kinds of effects that resulted from the old, now unconstitutional veto. The joint resolution of approval and disapproval can be used in various combinations to get the same results if they are applied very selectively. Concern about Presidential veto of Congress' veto of the regulation is not very worrisome. In the past when Congress has passed laws to overturn regulations the President has not revetoed those laws. There is really no reason to believe that he would do so now.

Veto replacements can be structured to accomplish the same results as realized by the now unconstitutional varieties. The bigger question is do you want to? That is a question that I think has to be answered regulatory area by regulatory area, because you will not be able to know ahead of time, unless you study each regulatory area very carefully taking into consideration that the actors and issues in Congress and the agency will change over time what the results are going to be of putting this new device in a particular rulemaking area.

In sum, the best advice I would give is to go slowly and very carefully with any attempt to replace vetoes over rulemaking areas. Veto replacements can be fashioned but they might not create exactly the results you might want.

The CHAIRMAN. Thank you.

[Prepared statement of Prof. Barbara H. Craig and Prof. Robert S. Gilmour follows:]

Statement of

Barbara Hinkson Craig
Assistant Professor of Government
Wesleyan University

and

Robert S. Gilmour
Professor of Political Science
The University of Connecticut

before the

Committee on Rules
United States House of Representatives

Washington, D.C.

May 10, 1984

Chairman Pepper and Members of the Committee:

Thank you for the opportunity to appear before the Rules Committee. You have asked us to comment on a number of issues concerning the effects of the various alternatives to replace legislative veto provisions after Chadha. Since there is obviously insufficient time to address our comments to all of the questions raised in your letter, we will direct our remarks today to the effects of major structural alternatives to the veto in different regulatory settings and to the impact of centralized regulatory clearance in the Executive Office of the President. With the Committee's permission, we would like to submit for the record a more complete expression of our research on the effects of the veto, appearing in our article, "After the Congressional Veto: Assessing the Alternatives," in the current issue of the Journal of Policy Analysis and Management.

Most of the debate about the value and effect of the legislative veto and its replacements has been cast in terms of which constitutional actor--President or Congress--wins or loses in the struggle for control over policy decisions. Nearly lost in this effort to assay who will "win most" is the crucial question about the effect of legislative vetoes and their proposed replacements on national policy. The question is not just which branch wins, but which policy wins. This hidden agenda is often a far more important determinant--both in and out of Congress--of who supports and who opposes specific veto proposals.

In our study of existing legislative veto provisions, it became clear that their impact varied substantially, not only with the specific structural variety of veto (committee, one-house, two-house, positive or negative) applied in any given situation but also with the institutional target of review (the President or agency) and with the congressional site of actual review (plenary session and leadership, committee, or subcommittee). In short, "legislative veto" was one term for many devices in many situations. Applied in different forms to a wide range of policy areas, legislative vetoes have had markedly different results. For example, the two-house veto over arms sales, in terms of design, purpose, and results, differs dramatically from the one-house veto over reorganization plans. The committee-level veto over certain NASA construction projects bears little resemblance to the two-house War Powers Resolution veto, and both are very dissimilar to the two-house veto over all regulations of the Department of Education. It is safe to conclude that structure, site, and nature of the policy involved will be important determinants of the effects of veto replacements as well.

Any effort to understand the effects on Congress of a procedural device like the legislative veto or its proposed replacements must take into account the enormous importance of committees and subcommittees in congressional decision-

making. It is no news to anyone here that committees matter; also, they differ and change over time. These observations apply equally to executive branch and independent agencies--they matter, behave differently, and change over time. It should not be surprising then that the same procedural device applied to the relationships between executive or independent agencies and congressional committees in the regulatory setting will have different effects depending upon the identity of the particular agency and its oversight committees and on the timing of its application. To this we must add, as already noted, that structure matters as well. That is, that different designs of constitutional veto replacements will have different effects, even in the same circumstances. Any effort to generalize about these effects is, then, subject to serious qualifications. In spite of these difficulties, we have made an effort to make some predictions about the probable results of the various veto replacement forms based on experience with forms of the legislative veto now found to be unconstitutional.

Effects of Legislative Veto Alternatives

Perhaps the most significant use of the legislative veto in recent years has been to expedite congressional agreement--or at least the appearance of agreement--on important and highly visible policy issues where no genuine consensus exists. For example, the inclusion of a two-house legislative veto over Federal Trade Commission rules played a decisive role in fostering the semblance of congressional agreement on reauthorizing legislation for the Commission in 1980. The Natural Gas Policy Act of 1978 similarly relied on a legislative veto provision to facilitate agreement on the decision to deregulate natural gas. Important, highly visible issues like these are not the sort that get pressed into subcommittee anterooms for resolution by the presence of legislative vetoes or their equivalents. Inevitably, even when legislative vetoes are involved, issues of this

magnitude are returned to Congress where they are debated and fought over quite openly, often played out on the front pages and editorial pages of newspapers across the country. However, they do not return as broad issues like consumer protection or price deregulation but, rather, as narrow, quite explicit regulations where winners' and losers' stakes are well defined and interest group battle lines clearly drawn.

Much of the debate about veto substitutes is now centered on two constitutional alternatives: joint resolutions of approval and joint resolutions of disapproval. Each form has its strengths and weaknesses as equivalents of the various unconstitutional vetoes, and, depending on the circumstances of the situation in which they would be applied, each will have quite different effects on policy outcomes.

A vivid example is offered by the issue of automobile safety. No one is against safe cars, but many are opposed to specific safety devices--especially expensive ones. By couching its delegation of regulatory authority to the Department of Transportation in general terms, Congress was able to enact legislation mandating the goal of safety. By later attaching a legislative veto provision, it was able to leave the delegation intact even though conflict over specific actions of the agency had increased. When a legislative veto provision returns the issue to Congress in the form of a specific regulation, action by Congress is far more problematic. To illustrate the advantages and weaknesses of the veto alternatives, consider an air-bags regulation under each of the following scenarios.

Scenario 1. No rule is currently on the books requiring air-bags, and the National Highway Traffic Safety Administration (NHTSA) has promulgated a final rule requiring air-bags in all new cars starting with model-year 1986:

A. Joint Resolution of Approval. A required joint resolution of approval to enact this rule would

mean that those favoring air-bags would face the extraordinarily difficult task of amassing majority support in both houses, probably within a set time limit. Even with expedited procedures to force the issue onto Congress's schedule, opponents of the rule would have all the advantages of the procedural delaying tactics, including of course the filibuster. Non-action here favors deregulation or non-regulation goals. At the cost of increased congressional conflict, the joint resolution of approval in this scenario would obviously increase legislative control over and responsibility for regulations. In effect, regulations would be legislated. However, if such approval resolutions were made non-amendable, as currently proposed, so that rules had to be accepted or rejected in just the form proposed by an agency, congressional regulatory control would be reduced substantially. Faced with an all-or-nothing choice, Congress could be put in the position of enacting laws generally thought to be less than wise as the alternative to leaving a policy vacuum. Conversely, by rejecting such a regulation through inaction, Congress would indeed leave a policy void with no clearer guide for agency action in the future.

B. Joint Resolution of Disapproval. If a final air-bags rule would go into effect unless Congress passed a joint resolution of disapproval, those favoring air-bags would be in a more advantageous position. Non-action in this case would favor pro-regulation goals. Though non-action would be tantamount to congressional endorsement or at least acceptance, Congress has regularly included disclaimers of this intent in past legislative veto provisions. If it does likewise now, responsibility or accountability could hardly be increased.

Scenario 2. A rule is currently in the Code of Federal Regulations requiring air-bags by model-year 1986. NHTSA now promulgates a new rule eliminating the requirement for air-bags, or perhaps extending the compliance date. After the State Farm Mutual case recently decided by the Supreme Court,* it appears that the removal or alteration of a regulation in the Code demands compliance with the same procedures required for the adoption of a new regulation.

A. Joint Resolution of Approval. A required joint resolution of approval to enact the agency's proposed elimination or alteration of the existing air-bags rule would place air-bags opponents at a decided disadvantage. Failure to obtain majority support in both houses, as well as presidential assent, within the prescribed time limit would mean that air-bags will be required in model-year 1986 cars. Non-action here favors pro-regulation goals. As this scenario demonstrates, support for generic joint resolutions of approval as a means to cut back "burdensome" regulations might well backfire for those who hope to utilize congressional veto devices as tools for deregulation.

B. Joint Resolution of Disapproval. If a new rule eliminating the existing air-bags requirement would take effect unless those favoring the air-bags requirement could successfully pass a joint resolution of disapproval within the time allowed, deregulation forces would hold a clear advantage. Non-action in this case favors deregulation goals.

What should be obvious even from this brief analysis is that the choice of veto replacements will determine policy outcomes depending upon the location and intensity of support and opposition to a regulation and the nature of the

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* Motor Vehicle Manufacturing Association v. State Farm Mutual Automobile Insurance Co., 77 L. Ed. 2d 443 (1983).

specific regulation under review. While the devices themselves may seem neutral, their effects in particular regulatory settings will not be.

It should be added, however, that the application of joint resolutions of approval or disapproval to highly visible and controversial regulatory efforts is unlikely to increase agency workloads significantly or to cause unbearable delays. Such issues have always resulted in protracted regulatory policymaking. In regard to Congress's own workload and capacity to review proposed rules thoroughly, the addition of these devices is considerably more troublesome. Most highly visible and controversial rules would fall under the definition of "major rules" in pending legislation. Applying joint resolutions of approval to the estimated forty to fifty major rules each year, as proposed by Senator Grassley's amendment to S. 1080, for example, would automatically add eighty to one hundred hours to each house's floor schedule as well as command a significant amount of committee time to consider and develop the required reports. In light of the disclaimer found in the final section of the Grassley amendment stating that enactment of an approval resolution "shall not be construed to create any presumption of validity with respect to such a rule," it is difficult to take claims of increased congressional accountability seriously. Why go to all the time and bother if Congress simply dismisses its own review?

When congressional vetoes have been applied generically to agency rulemaking and when the policies involved have not attracted widespread attention, the presence of veto power has almost uniformly enhanced the influence of committee and subcommittee members and their staffs. Particularly where agencies are responsible for the promulgation of numerous grant-in-aid or subsidy regulations, operating as they often do under tight deadlines, the legislative veto confers powerful committee leverage. To avoid drawn-out and often debilitating battles involving hearings and floor votes brought on by a full veto review process,

regulatory agencies have been inclined to follow committee or subcommittee guidance. Application of joint resolutions of disapproval in similar circumstances would almost certainly encourage a similar tendency, relegating low-visibility but nonetheless critical decisions to committee environments without plenary review by either chamber.

Legislative veto reviews at the committee and subcommittee level have frequently provided opportunities for members to negotiate regulatory changes favoring constituent interests. To an extent, universalized regulatory goals were reshaped to serve more parochial ends. Past use of veto review power in similar regulatory settings also resulted in charges of off-the-record, sub-rosa intrusions into rulemaking proceedings. Veto power in such circumstances raised questions about procedural and substantive fairness. These effects and resultant charges are little changed by the fact that the President would now have an opportunity to express himself through the executive veto. There is ample evidence from past reviews of regulations issued by the Department of Housing and Urban Development under threat of a joint resolution of disapproval to support all of these concerns.

Delay and increased workloads are significant problems for administrative agencies that must develop regulations for grant awards within annual budget constraints. This is also a problem for agencies faced with the need to alter regulations regularly in response to changing conditions or to reflect new or altered congressional mandates. Under the joint resolution of disapproval, Congress would not be locked into dealing with every regulation proposed, as it would under approval resolution requirements. Many rules could be ignored altogether; others could be dealt with at the subcommittee or subcommittee staff level only. In light of past experience, it is safe to predict that few minor rules will ever consume floor time or the attention of more than a handful of members in either house.

In sum, the effects of the major structural alternatives to the legislative veto will vary dramatically. A careful assessment of the application of each device to a regulatory area is essential to understanding how policy outcomes will be affected, whether congressional accountability will be increased, and what effects delay and increased workloads will hold for both the agencies and Congress. This alone argues strongly against the adoption of any generic veto device.

Central Clearance and Regulatory Control

As you know, just over three years ago President Reagan unilaterally changed the regulatory process with the stroke of a pen. Enhanced by regulatory review provisions already found in the Paperwork Reduction Act of 1980, the President's Executive Order 12,291 to some extent continued a trend toward centralized regulatory clearance that was begun in the Nixon administration. But President Reagan's Order was also a departure in kind. It substantially altered the process established by the Administrative Procedure Act and subjected proposed agency regulations to cost-benefit analysis. It commissioned the Office of Management and Budget as gatekeeper and central monitor of federal regulations and established the President's Task Force on Regulatory Relief as an appeals body. The scope of the President's Order not only raised questions about its operating mechanics and legality but also, and perhaps more importantly, about its consequences for the process and substance of regulatory policymaking.

Despite its comprehensiveness, the thrust of central regulatory clearance is directed at rules having an annual economic impact of at least $100 million (so-called major rules). It is OMB, however, that determines which rules shall be treated as "major," and in turn, which of those must be subjected to Regulatory Impact Analysis (RIA). Where required, RIAs weighing potential benefits and beneficial effects against costs and adverse effects must be

approved by OMB before a major rule is proposed for public comment. In fact, no notice of proposed rulemaking may be issued by any executive agency or, for that matter, by any independent regulatory commission where clearance is required by the Paperwork Reduction Act, until OMB clearance is complete. In result, the presidency has gained unprecedented control over the development (or non-development) of the substance of agency lawmaking.

As the Committee is no doubt aware, OMB's regular staff for central regulatory clearance is located in the Office of Information and Regulatory Affairs (OIRA). That Office now consists of some eighty-four positions, or about 15 percent of the entire OMB staff.

Over 96 percent of over five thousand regulations reviewed by OIRA during its first two years of operation were non-major by designation, and the great majority of these were processed and returned to the proposing agency by OIRA within a self-imposed ten-day deadline. There were a number of exceptions, and insiders report that a great deal of staff time has been spent on non-major rules since dollar amounts alone can be misleading as to the importance of a rule.

Of all rules submitted to OMB review as required by either Executive Order 12,291 or the Paperwork Reduction Act, less than 10 percent have been rejected or delayed, and most of those were later approved after minor changes were made by the submitting agencies. These statistics do not tell the whole story, however. The very existence of central regulatory clearance in OMB, coupled with a general atmosphere hostile to new regulatory initiatives, reduced the total volume of regulations by over 30 percent during the first year of the Reagan presidency. The volume of proposed and final rules has not only come down since 1980 but stayed down.

Centralized restructuring of administrative lawmaking by presidential order raises a number of legal questions

ranging from fundamental constitutional challenges to technical concerns for proper interpretation of the Administrative Procedure Act. Since administrative lawmaking is ultimately the exercise of a delegated function of the Congress, the constitutional argument turns ultimately on whether or not there has been a presidential breach of the separation of powers doctrine. Traditional legal authority holds that administrative "duty and responsibility grow out of and are subject to the control of law, not to the direction of the President." There is little doubt that such legal duties and responsibilities will be carried out by administrators, but with due regard for cues from their presidential, or for that matter their congressional, overseers. The practical workings of such a process appear to make an outright constitutional challenge quite difficult.

Whether such cues properly match the spirit of the Administrative Procedure Act is less certain. It matters little whether coordination is applied from the presidency or Congress or both. Such efforts run headlong into judicialized notions of "fairness" that are tenaciously held by much of the administrative law community. As the Administrative Procedure Act has been interpreted by the courts, each rulemaking process is increasingly understood as a "case" wherein final rules must be supported by "substantial evidence" on the record. Ex parte contacts with agency rulemakers, from whatever quarter, it is argued (and in one leading case held) are "intolerable."* They create a private record that cannot be reviewed. Yet the most recent judicial expression on presidential coordination recognizes a "basic need of the President and his White House Staff to monitor the consistency of executive agency regulations with Administration policy." Accordingly, intra-executive contacts may take place at any time during rulemaking "unless expressly forbidden by Congress."**

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* Home Box Office, Inc. v. FCC, 567 F. 2d 9 (D.C. Cir. 1977), cert. denied, 434 U.S. 829 (1978).

**Sierra Club v. Costle, 657 F. 2d 298 (D.C. Cir. 1981).

The regulatory problem in 1984 is much the same as it was five years ago when this Committee last addressed it in depth. While there were occasional instances where agencies exceeded their statutory mandates, the problem of the "overzealous bureaucrat" was, and still is, quite likely to be overstated. (If anything, in 1984, citizen complaints are as often heard about the "underzealous bureaucrat.") Then as now the public complained most frequently about the sheer volume, confliction, and duplication of regulations and their burdensome economic effects. And the public still expects, as it did then, that some form of political accountability should be assumed by Congress for the current state of regulatory affairs.

What is changed is that the Executive Office of the President now has a powerful centralized means to review and clear all proposed and existing federal regulations. The Congress does not. Passage of a constitutionally sanitized version of the generic legislative veto may be expedient, and it certainly symbolizes congressional concern. But it does not address the real regulatory problems that remain. Whatever their form--constitutional, unconstitutional, positive or negative--legislative vetoes are essentially devices of negation. They are not forcing mechanisms. Unless they are used as threats at the subcommittee level to include a few elected or unelected congressional participants unofficially in rulemaking decisions, actual vetoes do not change policy; they eliminate it. Compared with institutionalized central clearance of regulations in the presidency, fragmented committee and subcommittee reviews--even when enhanced by the legislative veto--are at a serious disadvantage. Here we are speaking of the interbranch struggle for control over regulatory policy between Congress and the presidency. Congress's disinclination to accept centralized leadership from within is well known, and this may make impossible the establishment of a jurisdictionally powerful select or joint committee on regulatory oversight. Yet without an effective counterbalance to cen-

tral regulatory clearance by OMB, Congress continues to lose in a tilt of lawmaking power toward the presidency. At the very least, presidential clearance powers could be defined and limited by statute rather than left to the self-definition of an executive order.

[The article: "After the Congressional Veto: Assessing the Alternatives", written by Professor Robert S. Gilmour and Professor Barbara H. Craig, follows:]

After the Congressional Veto:
ASSESSING THE ALTERNATIVES

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Abstract *Congressional choice of effective replacements for the recently banned legislative veto will require an accurate understanding of the actual results of the now unconstitutional device. The impact of the veto varied strikingly depending on, among other things, the type and target of the veto and on the principal sites of review in Congress itself. No single mechanism will suffice. Rather a variety of devices are available and under consideration. The underlying question raised by this analysis is which effects of the veto are worth perpetuating in light of past results and stated congressional objectives.*

The U.S. Supreme Court, in its historic *Chadha* decision[1] of June 23, 1983, appeared, in one stroke, to overrule virtually every variety of more than 200 congressional vetoes enacted over the span of 50 years.[2] Statutory provisions requiring the president or his subordinates to submit proposed orders, regulations, and plans to Congress for review and potential veto by majority vote of one or both houses of that body had, in the court's view, impermissibly altered the constitutional process. Once Congress has made the original choice to delegate to the executive, Chief Justice Burger wrote for the majority, it may change the implementation of delegated authority "in only one way; bicameral passage followed by presentment to the President." Lest any doubt remain about the court's meaning, just two weeks later it ruled legislative vetoes unconstitutional in the Natural Gas Policy Act of 1978 and in the Federal Trade Commission Improvements Act of 1980.

"Congressional veto," however, is one phrase for many devices. Applied in different forms to a wide range of policy areas, the congressional veto has produced varied results. If precise replacements are now to be adopted, an assessment of those results is the necessary first step.

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A MULTITUDE OF RESULTS

Although Congress has made increasing use of the veto process during the past decade, debate has persisted over its desirability. Congressional proponents assert that the veto returns lawmaking power to "our democratically elected representatives," who thereupon curb the excesses of "lawless" and "overzealous" bureaucrats or cut short the adventures of an "imperial" president. Furthermore, it is said, the legislative veto "opens up" the administrative process and makes it more democratic.

In actual fact, only a small number of executive actions have been overturned by vetoes of one or both houses. Since the first legislative veto provision was adopted in a 1932 executive reorganization act, Congress has approved only 125 resolutions vetoing presidential or agency actions.[3] Of those more than half (66) have been rejections of presidential spending deferrals. Of the remaining 59 vetoes actually exercised, 24 were disapprovals of presidential reorganization plans. In sum, during 50 years of experience there were no vetoes of presidential initiatives in foreign affairs and only 35 vetoes of agency regulations, projects, or decisions. However, the threat of a veto as well as the application of veto reviews by Congress have had a potent influence on policy decisions.

Careful analysis shows that the effect of the congressional veto depends not only on its form and the policy area involved, but also on the intended target of the veto power and on the effective site of review in Congress. Depending upon the intended target of veto review—specified in law as either presidential or agency action—and the subject matter under review, the critical action in a veto review process could involve any of four principal relationships: the president and congressional leadership, often involving many or most members of Congress in open debate; the president or executive office staff and individual standing committees; independent commissions or executive regulatory agencies and congressional leadership as well as many or most members at large; and regulatory agencies and their oversight committees, subcommittees, and staff.

Compelling Consultation

The primary result of congressional vetoes applied directly to the president and his highest advisors has been to compel leveraged and visible consultation with the Congress. Historically, Congress has not played an important role in foreign policymaking. However, throughout the 1970s, as domestic and foreign policy became increasingly entwined, particularly in reaction to the Vietnam war, Congress began to assert its long-neglected authority. In act after act—nearly a dozen in all—the legislative veto became a primary means by which Congress sought to control the power of the president in foreign affairs. And while no presidential initiative has ever been vetoed under these laws, in some cases, such as those involving arms sales, the final policy decisions have been demonstrably altered. In other cases, the veto has had no discernible impact on either the decision-making process or the outcomes. The War Powers Act veto, for example, has proven an

ineffectual check on presidential actions. A brief analysis of the application of foreign policy veto provisions brings to light some of the reasons for these varied results.

Congressional support for a veto provision over arms sales, for instance, came in response to the exponential growth of foreign military sales and the recognition that these arms transfers had become a major instrument of U.S. policy. To redress what many in Congress saw as a serious deficiency in the decision-making process governing arms sales, a formal procedure was devised to promote congressional participation in the deliberations on arms sales. As modified by subsequent amendment and practice, the law now requires the president to report to Congress sales of $14 million or more for single items and $50 million or more for packages. Congress has 30 days to veto such a sale by concurrent resolution. Nevertheless, the president has statutory power to waive this review period by declaring that "an emergency exists which requires the proposed sale in the national security interest of the United States."[4]

As exercised by Congress, the procedure has not been used to thwart arms sales proposed by the president; rather, the threat of a veto has forced the president on several occasions to make proposals more acceptable by adjusting numbers, eliminating components, or attaching stipulations on use of the weapons. The result has been a consultation and negotiations process between the president and Congress.

There have been only five arms sales proposals since 1974 that have become the subjects of debate because of veto threats. In each case the president has been willing to modify his proposal to make it more acceptable, thereby forestalling every veto so far. For example, in 1976 President Ford cut the number of Maverick and Sidewinder missiles to be sold to Saudi Arabia; and in 1978 President Carter provided various assurances to Congress that Saudi fighter aircraft purchased from the U.S. would have limited offensive capabilities and would be stationed out of striking distance of Israel.

All five veto threats concerned nations in or near the Middle East or the Persian Gulf. Four involved a powerful, vocal, and well-organized domestic constituency. Through its American Israel Public Affairs Committee (AIPAC), whose purpose is to "nurture the U.S. alliance with Israel and to prevent alliances with Arab nations from jeopardizing Israel's security," the Israel lobby has been instrumental in focusing congressional attention on these arms sales proposals.[5]

Although these five sales represent billions of dollars, they constitute only a small proportion of the value and number of arms sales proposals submitted to Congress by presidents since 1974. Moreover, the record does not show that Congress has used the veto as a means to exercise sustained oversight. In those instances when Congress has seriously challenged an arms sale proposal, threatening a resolution of disapproval, it has been able to effect significant changes in the president's plans. However, such com-

promise by the president has not resulted when Congress failed to make a convincing show of force. For example, when President Reagan notified Congress of his proposed sale of 40 F-16 warplanes to Pakistan less than a month after a major battle over the Saudi AWACS sale, no resolutions of disapproval were reported, despite the fact that the sale threatened the delicate balance of power between two traditional enemies.[6] Absent a powerful domestic constituency, as in the Israel protection cases, or the high visibility provided by media focus on the issue, Congress was not moved to involve itself significantly in this arms sale proposal. Predictably, the administration was not inclined to negotiate.

Since pressure from the media and powerful constituencies also has an impact on the president, he will often prefer to include Congress in controversial decision-making. Then any political damage resulting from his proposals will be shared. In forgoing the emergency waiver option in the Saudi AWACS sale,[7] for example, Reagan was forced to expend an enormous amount of political influence in bargaining with Congress. When he succeeded in fending off a legislative veto his political credibility was strengthened.

As with arms sales, War Powers legislation consists of three devices to compel presidential consultation with Congress in decision-making: a requirement that the president consult with Congress before introducing armed forces into hostilities; a requirement that the president make a formal report to Congress within 48 hours of the deployment of troops in hostile areas, and a 60-day time limit extendable by 30 days on presidential action without congressional approval. This last stipulation includes a concurrent-resolution veto enabling Congress to terminate presidential use of the armed forces during that period.

Congress has not used its veto power under the War Powers Resolution to stop the presidential use of armed forces or even to compel consultation. Indeed, there is no evidence that the War Powers veto has had any effect whatsoever. Despite opposition by members of Congress, U.S. military advisors have been in El Salvador since March 1981, and Marines have been in Lebanon since August 1982. No member has tried to force withdrawal through the introduction of a veto resolution. In fact, until recent efforts to limit the use of American troops in Lebanon, no withdrawal effort of any sort has made headway in Congress. When an amendment requiring military advisors to depart El Salvador within 30 days after the bill's enactment was defeated (11 to 19) in the House Foreign Affairs Committee, losing members took the issue to court. Dismissing the case, the judge declared that Congress, "must either take action to express its views that the War Powers Resolution is applicable to the situation and that a report is required, or, if it desires immediate withdrawal of forces, pass a concurrent resolution directing removal of the forces. . . ."[8] In effect, the only major impact of the War Powers Act has been to afford congressional leadership and committee members a vehicle for presenting their views to the media.

Assessment of the effects of veto reviews applied to foreign trade and aid legislation is difficult because Congress has attempted few such actions. Of the several efforts made, none has been successful, and there is little evidence that the attempts themselves have prompted presidential consultation with Congress or modification of ultimate decisions. A veto designed to protect industry from injurious imports went unused for two decades until 1978. Then resolutions to override President Carter's denial of protectionist action died in committee.[9]

Protecting Presidential Plans

The basic legislative model for presidential reorganization of government was established in 1949. It authorized "plans" proposed by the chief executive to take effect, subject to a one-house veto. Although reorganization was always justified in part as an effort to achieve savings, realists recognize that primary benefits are managerial and political.

The alteration of prior organizational arrangements threatens the interests of agencies and their congressional overseers, arousing jurisdictional jealousies. If such feelings find expression through the traditional legislative process, the coherence of an organizational plan is likely to be comprised if not destroyed. Thus, delegation of organizing power to the president, subject to the legislative veto, offered a way of preserving the integrity of a total plan in the interest of worthwhile, if controversial, change. If protest is raised to the plan, the president can, within a stipulated time, appeal directly to the full membership of either house for support of the total package. He can bypass both the leadership and the legislative committee seniors if they are unsympathetic.[10]

The integrity of presidential reorganization plans was not preserved without complications. Presented with a nonamendable plan, Congress was faced with an all-or-nothing choice so that entire programs were sometimes defeated. For example, when Congress turned down a new department of urban affairs in 1962, it was widely regarded as a debilitating blow to President Kennedy, casting a pall over prospects for his entire legislative program. In fact, nearly a fifth of all presidential reorganization plans submitted between 1949 and 1980 were vetoed. Reorganization by presidential plan presents difficulties from a congressional perspective as well. Time limitations constrain investigation of the plan's merits and defects, and coveted agency–committee relationships may be imperiled.

With passage of reorganization acts subsequent to the prototypical 1949 act, there has been "a gradual, yet persistent, erosion of the President's reorganization authority."[11] His flexibility has been curtailed in establishing or abolishing departments or independent agencies, in dealing with more than "one logically consistent subject matter," and in eliminating enforcement functions or agency programs. Agencies such as the Legal Services Corporation and the Synthetic Fuels Corporation have been exempted altogether from presidential organization authority.

The presidential plan approach has also been applied to the development of a national gasoline rationing program. In 1979, just as the gas lines began forming, President Carter submitted to Congress a contingency rationing plan in compliance with the Energy Policy and Conservation Act of 1975. The entire plan fell to a veto widely described as "a severe political setback" to the president.[12] Carter then called upon the legislative branch to develop its own proposals. Instead, Congress passed a law that would make future vetoes of rationing plans unlikely. The Emergency Energy Conservation Act of 1979 altered the previous procedure so that presidential rationing plans could be disapproved only by a joint resolution and within 30 days of submission. Under this authority, a revision of Carter's 1979 plan was adopted on July 30, 1980. Still, activation of the plan is predicated on a 20% shortfall in fuels and is subject to a one-house resolution of disapproval.

Influencing Management

During the 1976 presidential campaign, candidate Carter promised a drastic reorganization of the federal bureaucracy. However, the 1977 Act passed by Congress substantially diminished presidential reorganizing power that had been routinely granted in the past. By permitting the president to amend organization plans after submission to Congress, the 1977 Act in effect precluded passage of a total, coherent plan. With the threat of a legislative veto in the near background, "Congress may now recommend amendments requested by interest groups, and the president may be obliged to submit them as a price for passage. The amendment option itself is now one of the bargaining chips in the negotiations between Congress and the President."[13]

In fact, five of the ten reorganization plans submitted by Carter were amended. Because of other statutory limitations on presidential reorganization by plan, the most significant organizing efforts of the Carter administration—creation of the Departments of Energy and Education and (for the most part) the reorganized civil service system—were accomplished by the ordinary legislative process.

A more telling exercise of congressional veto control over presidential management has occurred in the budget process. Impoundment provisions of the Budget Reform Act of 1974 oblige the president to submit proposals for "rescissions," the reduction or repeal of appropriations items, which will take effect only upon passage of a joint resolution of approval. Proposed rescissions have no effect unless Congress completes affirmative action within a 45-day period. However, if a recommendation to "defer" appropriated expenditures is made, it will take effect automatically unless vetoed by either house.

For the most part, deferrals represent "housekeeping" proposals, short-term economies in ongoing programs, often construction projects with long lead times. Less than 10% of all deferrals from 1975 through 1979 have been refused. Of those refused over 90% involved highway funding,[14] an issue salient for virtually every district.

Facilitating Congressional Decision

Perhaps the most significant use of the legislative veto in recent years has been to expedite congressional agreement—or at least the appearance of agreement—on important and highly visible policy issues where no genuine consensus exists. In the midst of crisis or at the crest of a groundswell of popular sentiment, the legislative veto has offered a flexible means to shortcut the laborious process of data gathering and assessment, and to symbolize congressional decisiveness in the absence of adequate knowledge or resolve. Put in its best light, in addition to assisting Congress in adapting to the "strains" and "challenges of modern government," the veto "provides a means of securing majority support in highly divisive and politicized policy areas without imposing unbearable political costs on individual members or ceding ultimate control."[15] From a less flattering perspective, the veto allows individual voting members to clasp lofty ideals that disguise deep divisions in Congress and to escape responsibility for the specific consequences of the embrace.

The Energy Security Act of 1980 is a prime example of the legislative veto used to delegate policymaking to an agency when Congress itself lacked adequate technical knowledge. Enacted just after the second "oil shock," and during an intense presidential campaign, the act symbolized a national commitment to energy self-sufficiency. Long on policy mandates, procedural restrictions, and administrative details, the legislation is short and vague on substantive standards and specifics. These are left to an administratively cumbersome, off-budget enterprise, the U.S. Synthetic Fuels Corporation. Although responsibility for the substance of alternative energy policy has been delegated to the corporation, its programs, projects, and regulations are contingent upon a greater number and variety of constitutional and unconstitutional veto devices than those in any other statute. Clearly, many critical aspects of synthetic fuel development, such as the cost and location of specific types of projects, as well as the question of congressional commitment to the enterprise, were not resolved but put off to another day.

Similarly there is little doubt that the veto played a decisive role in allowing Congress to reach a semblance of agreement on legislation governing the authority of the Federal Trade Commission (FTC). By accepting a two-house, 90-day legislative veto in May 1980, FTC supporters were able to ensure a compromise allowing the commission to continue its rulemaking in several areas that had been expressly eliminated in either the House or Senate versions of authorization bills. For example, the House bill contained restrictions preventing the FTC from regulating the funeral home industry or from investigating the insurance industry for the purpose of developing regulations. The Senate bill contained a similar restriction on FTC action aimed at the insurance industry; did not forbid regulation of the funeral home industry; but targeted used-car sales as specifically off limits for FTC rulemaking activities. The legislative veto provided Congress a means to avoid the controversial decision on what the FTC should regulate.

When, in the fall of 1981, the FTC issued a final rule regulating the used-car industry, it was decisively vetoed in both houses.

The Natural Gas Policy Act of 1978 offers an example of the way in which the veto was used both to mask political disagreement and to enable legislative action well before relevant economic data could be evaluated. Initially, congressional debate on the subject centered on the fundamental conflict between the need to deregulate prices of natural gas as a means to stimulate new production and the limited ability of consumers to pay significantly higher prices for heat. In order to protect consumers without inhibiting the development of new supplies, an incremental pricing mechanism was proposed that would require industrial consumers to bear the cost of the more expensive new gas until the price of gas was comparable to that of coal and oil. However, incremental pricing at the time was merely a theoretical idea and the legislative veto was a way to circumvent the technological complexities of the concept. It satisfied members who insisted on consumer protection as a prerequisite for supporting the phased decontrol of gas prices, yet it allowed Congress to postpone a thorough delineation of incremental pricing.[16]

The monumental task of calibrating incremental pricing was awarded to the Federal Energy Regulatory Commission (FERC), a body whose proposals were ultimately vetoed by the House of Representatives. Ironically, after having worked for over a year on the rules, FERC commissioners appeared to welcome the outcome.[17] Consumer groups at once challenged the decision and underlying procedure in federal court.

Ensuring Committee Influence

When congressional vetoes have been applied generically to the rulemaking and planning of an agency and when the policies involved have not attracted widespread attention, the presence of the veto power has almost uniformly enhanced the influence of committee and subcommittee members and their staffs. To be sure, even when such veto power did not exist, members and staff have always been able to participate in agency rulemaking and there is little question that their views have been given due deference. Yet Congress has typically been inactive in agency rulemaking. The legislative veto structures this involvement, however, setting definite committee timetables for regulatory review and putting other participants on notice of a new forum. So too with veto reviews of agency plans for programs and projects. Oversight that was once optional and sporadic has been scheduled by statute.

Particularly where agencies are responsible for the promulgation of numerous grant-in-aid or subsidy regulations, operating characteristically under tight deadlines, the legislative veto confers powerful leverage to congressional oversight committees. To avoid protracted, often debilitating, battles involving hearings and floor votes brought on by a full veto review process, regulatory agencies are inclined to follow committee guidance.

Committee–agency consultation and negotiation over the development of regulations is nowhere more evident than between the House Committee on Education and Labor and the Department of Education. Bilateral relations between the two bodies have been institutionalized as a result of a series of vetoes by the Education and Labor committee that sent a powerful message to the Department of Education. Congressional concerns are now incorporated through meetings between a representative of the Department of Education and committee staff after enactment of any major legislation affecting the department. Information gathered in this process is integrated into rulemaking at the earliest stages and is used as a check to ensure that the proposed and final regulations are acceptable to the committee.[18]

Another vivid illustration of committee leverage conferred by the veto is reflected in the action of the committees that oversee the Federal Election Commission (FEC). In the aftermath of the Watergate scandal, the FEC was created in 1974 to develop appropriate regulations governing campaign financing. In one instance, after the FEC had failed to follow Senate committee guidance, the committee recommended disapproval and a veto followed. After subsequent FEC hearings and meetings with House and Senate staff, committee and staff recommendations were adopted in the regulation.[19]

Veto reviews of agency planning have similar effects. The legislative veto provision in the Resource Planning Act of 1974 was used, for example, to further cement ties between the U.S. Forest Service and the House and Senate agricultural committees. In an era of "belt tightening," one veteran staffer observed, "the agencies have increasingly turned to the committees and subcommittees in an attempt to pry more dollars out of OMB" (the Office of Management and Budget).[20] In this instance, closer relations were sought both by the committees and by the agency.[21]

Legislative veto reviews at the committee and subcommittee levels also provide opportunities for members to negotiate regulatory changes favoring constituent interests. Here universalized goals may be shaped to reflect more parochial concerns. Such was the case when the Office of Education liberalized the eligibility rules for the granting of financial aid under a 1972 program. Constituent pressure on oversight committee members had prompted a veto threat of the agency's proposed regulations. Agreement was finally reached because all parties understood that the entire program was in jeopardy.[22]

The Results Summarized

In sum, the impact of legislative vetoes has varied substantially, not only with the institutional target of review (the president or an agency) and with the congressional site of review (plenary session and leadership, committee, or subcommittee), but also with the specific variety of veto applied to any given situation. The structure of the veto device, as with other structural arrangements, is not unimportant. The initiative of a presidential reor-

ganization plan that will take effect unless both houses of Congress vote it down is more powerful than that of a plan that may be defeated by the majority of only one house. A change in rules to make such plans amendable during the committee review period blunts presidential initiative still further and affords greater influence to the reviewing committees.

Congressional willingness to exercise its enacted veto review power is also critically relevant to the impact of legislative veto provisions. Even when a veto effort has failed, a determined congressional veto review can influence policy outcomes, as in the case of several arms sales proposals. When Congress has not demonstrated a strong intention to use its veto power, as in most foreign trade and war powers situations, policies have not been affected. Where agency-level action is the target of a veto threat, however, far less congressional investment is required to produce an effect on policy decisions. Yet, even at this level committee members and staff must exhibit some determination to oversee agency actions if they are to have influence.

In addition, legislative vetoes may be understood to have different effects depending upon the situations in which they are applied. The insertion of legislative vetoes, of whatever sort, as a check on congressional delegations in highly visible policy areas where technical knowledge is inadequate and political divisions run deep yields far different results than the application of vetoes to less highly charged issues. In the one the appearance of decision may be assured and the underlying controversy postponed. In the other subcommittee oversight of and direct involvement in agency decisions may be markedly enhanced. Clearly, no single substitute will now take the place of the legislative vetoes apparently lost to the Supreme Court's review.

ASSESSING THE ALTERNATIVES

The Proposed Substitutes

Proposed substitutes for unconstitutional varieties of the legislative veto are relatively numerous. Although some analysts have suggested such measures as a constitutional amendment to undo the *Chadha* decision, most consideration is being given to legislative alternatives. Among these is the *report-and-wait* device which requires that proposed regulations or executive actions be reported to Congress for a specified period prior to implementation. The interval period offers time for Congress to revoke or alter the proposals through the normal legislative process. Committees may be granted authority to waive or extend the waiting period, a prerogative which could strengthen their negotiating position.

Another alternative to the banned measures is a *joint resolution of disapproval*, which requires a majority vote of both houses and presentment to the president in order to negate executive branch or independent agency proposals. By constitutional design, presidential rejection of this "constitutional veto" would be returned to Congress where two-thirds majorities could carry the measure, nonetheless. This raises the unlikely but cumbersome prospect of a veto of the veto of a veto. However, presidential vetoes of joint resolutions of disapproval would be unlikely and, as additional

protection from presidential rejection, such disapprovals could be attached as amendments to important authorization or appropriation bills.

The *joint resolution of approval* is yet another device that could promote congressional influence in executive and agency policymaking. Executive proposals would require affirmative action by both houses of Congress and presentment to the president before they could be implemented. When applied to the regulatory process, "final rules" promulgated by the agencies could be treated as mere proposals for subsequent congressional action, enhanced, perhaps, by procedures that would command speedy congressional attention.

A *nonbinding two-house resolution* expressing the majority sentiment of Congress could serve to encourage presidential deference to congressional views. Such resolutions are unlikely to be ignored, either by president or press. In order that comity might prevail between the branches, and in view of other policy objectives, presidential accession to congressional will expressed in this manner is more probable than commonly supposed.

With regard to agency activities, certain *informal procedures* based on the established relationships with oversight committees would probably be perpetuated. The congressional practice of requiring agencies to obtain prior approval from their oversight committees for certain actions is widespread. Though sometimes specified in statutes, committee reports, or hearings, these directives are often based on informal "gentlemen's agreements" among the agencies and committees involved. Deference to committee veto power is so ingrained in agency behavior that it is likely to continue, especially where funding is involved and the committees concerned are appropriations subcommittees. Faced with the annual necessity of securing appropriations for the agency from the same subcommittees, an agency is unlikely to abandon a prior approval mechanism regardless of its questionable validity.

In the House of Representatives *rules changes* might be adopted to permit consideration of "no appropriations" riders barring agency spending to enforce a particular regulation under review. A variation of this procedure would permit amendments to limit spending only after an agency's authorizing committee had voted to disapprove an agency action or regulation.

Some analysts have also suggested the creation of *special select committees* to review proposed presidential actions in foreign or military affairs or to coordinate agency regulations. Such committees could facilitate presidential–congressional communications and regulatory oversight divorced from the more isolated and parochial subcommittee jurisdictions.

Finally, Congress always has the option of withholding delegations of legislative power until it is able to do so with precision. It may also extend the use of manifold oversight tools already available and widely used. These include statutory techniques such as removing express areas from agency regulatory authority,

establishing moratoriums on rulemaking activities, or transferring regulatory jurisdictions from one agency to another. They also include nonstatutory techniques such as the initiation of investigations or the assertion of directives in committee reports and hearings.[23]

Compelling Consultation

If in attaching veto provisions to foreign affairs legislation Congress meant to insure its regular involvement in a coherent and deliberative review of foreign policy decisions, then its goal has not been realized. Replacement of these veto devices with similar, constitutionally acceptable alternatives is equally unlikely to achieve such a goal. The legislative vetoes have, however, afforded Congress negotiating power with the executive on specific issues, and Congress can reproduce this leverage in similar situations.

With regard to the two-house arms sales veto, for example, Congress successfully used the device to modify some arms sales decisions while at the same time members avoided other arms sales controversies when they so desired. Furthermore, the veto provided national media opportunities for congressional leaders and individual members. Replacing this veto with either joint resolutions of disapproval or nonbinding concurrent resolutions might appear to weaken congressional ability to achieve even these limited goals. After all, a joint resolution requires the president's signature or a two-thirds override vote to be binding and a nonbinding resolution is just what the name implies—advice, not direction. However, the manner in which Congress actually used its arms sales veto power mitigates these concerns. Congress never exercised the concurrent veto to reject an arms sale and in those instances when the veto was used to initiate negotiations, the president would very likely have made concessions anyway, given the determined attitude of Congress.

A president's willingness to involve Congress in specific arms sales proposals seems to stem as much from his need to gain acceptance for controversial sales as from the threat of a legislative veto. Since there is mutual advantage to the negotiations, Congress is in a strong position to bargain for a gentlemen's agreement obliging the president to debate the issues and to respect a concurrent resolution of disapproval. A relationship built on such cooperation and mutual advantage is far more likely to produce positive results than the adversarial relationship inherent in the design of the veto process.

If, however, Congress is now determined to develop a system of regularized participation in the arms sales program it will need to devise a comprehensive procedure for scheduling arms sales discussions on the congressional agenda and for providing Congress with current and accurate information on the sales under consideration. Moreover, members require such information when arms sales proposals are tentative, not after an American offer has been finalized.[24] Setting the agenda could be achieved through imposition of a joint resolution of approval, but assuring the timely flow of arms sales information is a far more compli-

cated objective. It entails an enormous increase in the workload of Congress and it raises questions about the desirability of such deep congressional involvement in sensitive foreign policy decisions.

In the area of foreign trade and aid, Congress has, over the past decade, gradually resorted to other means than the legislative veto to control presidential authority. These measures have included congressional approval of presidential proposals before they can become effective and formal presidential certification of subject–nation compliance with detailed conditions. For example, any agreements permitting nontariff trade barriers negotiated by the president with foreign nations under provisions of the Trade Act of 1974 require ratification by passage of a statute (no amendments permitted). The Trade Act also requires the president to certify a country's full compliance with freedom-of-emigration requirements as a condition of granting nondiscriminatory treatment and other trade benefits. Similarly, Congress has conditioned the release of foreign aid funds upon specific accomplishments of the nations in question and has placed ceilings on total aid by country and by intended use. Judging from the past usage of the veto provisions in foreign trade and aid cases, a joint resolution of disapproval or a nonbinding concurrent resolution should serve adequately as substitutes. Either would allow Congress to object visibly to presidential actions and either would also enable Congress to choose only those cases in which it wished to be involved.

Congress could resort to a joint resolution of approval if it wanted to be assured of ultimate control over trade and aid decisions. Recently, the House Foreign Affairs Committee chose this route. Moved by the outcries of agricultural interests suffering severe financial burdens as the result of President Carter's grain embargo against the Soviets, the committee ensured that similar future actions could not be taken without positive congressional support. The significant flaw in such an approach is that it reduces presidential flexibility in difficult foreign policy situations. Given the limited variety of nonmilitary options available to a president, as well as the reluctance of Congress to impose burdens on vocal domestic constituencies, the wisdom of any widespread use of this alternative is open to serious question.

Since the veto provision in the War Powers Resolution has never been used by Congress, there seems little reason to replace it. Nevertheless, the Senate has already moved to amend the resolution so that Congress can force immediate withdrawal of troops from hostilities by passage of a joint resolution of disapproval. This substitute will probably not alter Congress' ability to influence troop deployment. In fact, legislators have acted decisively only in response to strong public pressure, and they are very unlikely to move against the commander-in-chief unless spurred to do so by overwhelming popular sentiment. Similarly, a president is unlikely to veto majority bicameral action that is firmly backed by the public. There are, however, sound reasons for Congress to

strengthen its involvement in decisions to use the armed forces. At a minimum Congress could establish a body within its own membership to receive and evaluate the sensitive information necessary to forming judgments about military issues.[25]

Protecting Presidential Plans

The only major presidential planning authority subject to a congressional veto, and still in effect, concerns the imposition of a contingency plan for gasoline rationing. The one-house resolution of disapproval involved here, as elsewhere, is not easily replaced. There is no precise substitute. However, substitution of a joint resolution of approval would protect the prerogatives of each chamber while making difficult the imposition of so drastic a measure as nationwide gasoline rationing. The likelihood of a presidential veto would, of course, be nil.

Any revival of now-lapsed presidential authority to reorganize the executive branch would also require a substitution for the one-house congressional veto check. Legislation concerning presidential reorganization plans could require an affirmative joint resolution of approval for adoption. In this way, the particular concerns of each house would be protected, but the president would find himself in the difficult position of having to bargain for support from both houses in a short time period. A less demanding approach would permit presidential reorganization plans to take effect subject to a joint resolution of disapproval. Congress would ensure its role by requiring annual reauthorization of presidential authority in this regard, by exempting certain agencies from reorganization plans, and by proscribing the creation or dissolution of departments.

Influencing Management

Loss of the one-house veto provision to review and occasionally defeat the president's proposals to defer congressional appropriations has been regarded as a serious setback for legislative control of financial management. The effect of the one-house veto held over presidential deferrals is not only difficult to reproduce, but complete legislation required in response to the dozens of deferral proposals submitted by the chief executive each session is onerous and unduly time consuming. Yet virtually everyone recognizes the need for managerial flexibility to create spending reserves and to withhold disbursements of funds that could not or should not reasonably be spent.

Perhaps the simplest solution is not to replace the deferral veto at all. Delaying expenditures of appropriated funds was an authorized practice for many years—with no veto attached. Until abused during the Nixon administration, the system had worked well. In addition, Congress has recently adopted a useful and constitutional alternative to the deferral veto—the inclusion of deferral disapprovals in regular and supplemental appropriations bills. These bills have, of course, gone to the president for his signature or rejection.[26] However, the problem of extended delays

in financial oversight via complete legislation remains. Perhaps the most expeditious means of accommodating both Congress and the chief executive in this matter is an informal agreement between the parties that a nonbinding, single-house resolution to disapprove deferrals would be honored.

Facilitating Congressional Decision

Some members of Congress have been reluctant to delegate broad powers to agencies when the veto is no longer available to serve as a constraint on agency actions. For example, after a House committee reported the Consumer Product Safety Commission (CPSC) authorization of 1983, including a congressional veto just before the *Chadha* decision, one of the most consistent proponents of the veto suggested: "If that decision had come down prior to marking up this bill, the . . . committee would have looked very closely at the delegations of authority given to the Consumer Products Safety Commission to make a determination as to whether or not you wanted that broad delegation to continue without the legislative veto."[27]

Nonetheless, a functional equivalent to the now unconstitutional varieties can be found in the joint resolution of disapproval. Where appropriate, the threat of a presidential veto may be minimized by attaching an amendment disapproving a specific agency action to "must" legislation or by substituting a nonbinding concurrent resolution combined with the addition of a "no appropriations" rider to pending appropriations legislation. These procedures offer no guarantee that policy will not be settled at the committee or subcommittee level.

A joint resolution of approval, on the other hand, would necessitate plenary action by both chambers. The danger of widespread use of this approach, of course, is that the congressional agenda would be inundated with trivial matters, scheduled by outsiders.

The difficulty of selecting among these alternatives is also illustrated by House floor action on the recent CPSC bill. In the absence of either time or inclination to abandon the symbol of broad-gauge consumer protection in favor of specific statutory targets and standards, the House attached the two veto substitutes to the bill. The selection of which veto device should appear in the final act was left to the conference committee.

No one knows just which consumer products problems (or which issues in other areas of broadly delegated legislative power) will attract regulatory attention in the years ahead. It seems nonetheless certain that initially acceptable symbols will be reduced to narrowly defined and hotly contested issues once regulatory policies become more pointed and the specific costs and impacts of the regulations are known. Difficult choices will remain. If those choices are dependent upon joint resolutions of approval, they will ultimately be made in the voting body of Congress for submission to the president. Regulatory agencies operating under such constraints will be recast, in part, as "study commissions" which will have far greater ability to set the congressional agenda. Such

agencies will also become primary initiators of legislation for which Congress will have ultimate and inescapable responsibility. Congress, for its part, particularly if such joint resolutions are made amendable, will regain some measure of its original role as national legislator.

If, instead, such choices are made contingent upon joint resolutions of disapproval, only highly visible proposals will be likely to involve the full voting membership of Congress. Less visible regulations would probably never get beyond the subcommittee level, if indeed they were acted upon at all. As was pointed out during the recent debate over CPSC veto provisions, "The problem is that the resolution of disapproval which a Member of this body might introduce would be referred to the subcommittee . . . , and there is a strong likelihood that if the [chairman] liked the rule, and did not like the resolution of disapproval, this House would never even have the opportunity of expressing itself on the matter."[28]

Use of congressional veto devices to synthesize legislative majorities where there are known to be deep underlying policy divisions does not avoid the "strains" of decision-making; it merely postpones them, possibly at some considerable cost to Congress. So long as significant controversy remains, it matters little what form of veto mechanism is applied—affirmative or negative, constitutional or unconstitutional. Moreover, the timing of each returning conflict and the terms of renewed debate are determined by the delegated agency, not by Congress. Parties who lose in veto reviews simply take their appeals elsewhere: to the appropriations process; to the courts; to the White House; or to the press.

The substantially weakened FTC used-car rule, for example, could hardly be said to create an onerous burden for dealers. They had merely to list major *known* defects in the used cars they offered for sale. Under terms of the regulation, there was no inspection requirement, and dealers could disclaim liability for any *unknown* defects. In these circumstances, the particular window-sticker lists required could hardly be acclaimed a great victory for car buyers either. Nonetheless, both dealers and consumer advocates acted as if sizable stakes were at issue. After sustaining an overwhelming veto favoring the dealers, consumer groups immediately appealed to the judiciary and to the public. They won at law, and Congress lost decisively in the communications media. Newspapers and television stations headlined a Congress that had "knuckled under" to powerful dealership interests. Long and prominently featured lists correlated campaign contributions of auto dealer political action committees with member votes on the veto. Arguably, it would have been much more straightforward and far less costly for Congress to have set its own targets for FTC regulation in the first place. Shortly thereafter, when the FTC submitted its regulations on funeral homes and children's television advertising, Congress evidenced little interest in a repeat performance. The aftermath of the FTC veto implies the common result that as public interest or, for that matter, generalized

congressional interest in an issue abates, plenary oversight of new regulations reverts to committee.

Ensuring Committee Influence

A report-and-wait strategy can serve much the same function as a veto with regard to oversight of agency rulemaking or planning. Agencies have commonly responded to committee objections by revising their proposals in accord with the wishes of their congressional overseers.[29] Nonetheless, the joint resolution of disapproval is actually the most precise replacement for a congressional veto intended to enhance committee influence over established agencies.

Two examples from the Department of Housing and Urban Development make it clear that a potential joint resolution of disapproval may offer committee leverage over agency rulemaking that is just as powerful as the veto devices now constitutionally prohibited. As the result of an intense lobbying effort by representatives of the masonry industry who were resisting new construction standards, a resolution of disapproval was introduced in the House that triggered a 90-day waiting period as required by the Housing and Community Development Amendments of 1978. This and subsequent maneuvers made it possible for masonry interests to escape imposition of the new standards for two building seasons before the rule could be implemented. About the same time, HUD issued its fair housing rule to comply with equal opportunity requirements. A resolution of disapproval was used to insure an airing of constituent concern that preferences for local residents would not be honored in HUD-subsidized "Section 8" housing. Even though the regulation did nothing to jeopardize the concept of "local preference" in admissions to the program, HUD withdrew the fair housing rule in order to get on with the bulk of its regulatory program. It was not reintroduced.[30]

At first glance the veto may seem to endow committees with power unencumbered by responsibility. While the agencies appear to bear responsibility for the development of policies and programs, congressional committees wield authority over implementation. Ultimately, at least in a legal sense, Congress cannot so easily escape its responsibility. If agencies are deflected from their statutory mandates by committee negotiations, the responsibility for such alterations will be deferred to upon judicial review. The tradeoff for such a process is to render impotent agency decision-making requirements based upon fairness, openness, reasoned decision, and substantial evidence, requirements that have been developed by the judiciary, and by Congress, over a number of years.[31]

Should Congress become dissatisfied with the devolution of regulatory policymaking to the secrecy of the committee anteroom environments, resurrection of a "constitutionalized" veto will not correct the situation. Here the special select committee approach to centralized congressional review of proposed agency regulations holds far greater promise for alerting Congress to regulatory duplication and overlap and to *ultra vires* bureaucratic acts.[32] In

addition, such a select committee, if properly staffed, could offer a counterweight to the centralized and powerful regulatory review program undertaken by the Reagan administration's Task Force on Regulatory Relief and the Office of Management and Budget.[33]

CONCLUSION

The congressional veto, in the various forms and contexts of its application, has had different results both for policymaking and for policy. Curiously, the veto has accomplished few if any of the goals promoted in the slogans of its sponsors. In part it is simply another device for traditional administrative oversight; yet it has also been a powerful means to facilitate some manner of congressional decision and delegation. Functional replacements for the abolished vetoes will likely be varied as well. Being "the first one out of the bag"[34] with a generic substitute for vetoes lost in the *Chadha* decision may be good politics but mistaken policy. Clearly the veto's multiple effects argue against application of a generic veto of any sort. The adoption of a required joint resolution of approval, for example, might be a useful device to postpone congressional decision on the specifics of particular programs. But applied to prolific regulation writers, such as the Department of Education, EPA, and HUD, Congress would be inundated by the required affirmative passage of voluminous and highly detailed legislation. By the same token, generic application of a joint resolution of disapproval not only fails to protect the interests of any one chamber of the Congress upon review but it also encourages the tendency to allow critical decisions to gravitate to committee or subcommittee without plenary review by either chamber. Furthermore, since legislative vetoes applied to presidential war powers and foreign aid yielded insignificant results, constitutional replacements for them are unnecessary. The need to address other congressional concerns—adequate presidential consultation and communication—seems far more pressing.

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NOTES

1. *Immigration and Naturalization Service v. Chadha, et al.* (80-1832, 80-2170, 80-2171 – Dissent). _____U.S._____ (June 23, 1983).
2. For a complete summary of all legislative veto provisions adopted since the first in 1932, see: Norton, Clark F., *Congressional Review, Deferral and Disapproval of Executive Actions: A Summary and an Inventory of Statutory Authority*, Report 76-88G; *1976–1977 Congressional Acts Authorizing Prior Review, Approval or Disapproval of Proposed Executive Actions*, Report 78-117 (Gov.); *Congressional Veto Pro-*

visions and Amendments: 96th Congress, Issue Brief 79044; *Congressional Veto Legislation: 97th Congress*, Issue Brief 11381138 (Washington, DC: Library of Congress, Congressional Research Service, 1976, 1979, 1981, 1983).

3. Figures on resolutions of disapproval overturning presidential or regulatory actions are drawn from Cohen, Richard E., "Life Without the Legislative Veto—Will Congress Ever Learn to Like It?" *National Journal* (July 2, 1983): 1379; and Rothman, Robert, "Congress' Long Conflict with the President Led to the 1974 Impoundment Control Law," *Congressional Quarterly* (July 2, 1983): 1333.
4. Arms Export Control Act, 22 U.S.C. 2776.
5. See *Congressional Quarterly* (August 22, 1981): 1524.
6. "Sale of F-16s to Pakistan Approved in Spite of Questions in Congress," *Congressional Quarterly* (December 5, 1981): 2413.
7. See Whittle, Richard, "President Can Waive Arms Veto," *Congressional Quarterly* (October 17, 1981): 2008.
8. *Crockett, et al. v. Reagan*, 558 F. Supp. 893 (1982): 899. The case was brought by 29 congressmen and senators. Twenty-eight other members of the House and Senate were granted intervener status and filed an *amicus curiae* brief in opposition to the plaintiffs' case.
9. In this case, involving industrial fasteners, the resolution of disapproval could have been reported unfavorably by the Ways and Means Committee, to be decided by the full House. Instead, the Carter administration worked out a compromise with the committee, which resulted in a new investigation of import relief. Subsequently, some relief was granted. What role the veto effort played in this remains unclear. Pregelj, Valdimer N., "Legislative Veto or Positive Approval of Executive Action Under the Trade Act of 1974 and Related Legislation," in Congressional Research Service, *Studies on the Legislative Veto*, pp. 719–720.
10. Mansfield, Harvey C., "Federal Executive Reorganization: Thirty Years of Experience," *Public Administration Review*, *29* (July–August 1969): 341.
11. Fisher, Louis, and Moe, Ronald C., "Presidential Reorganization Authority: Is It Worth The Cost?" *Political Science Quarterly*, *96* (Summer 1981): 314.
12. Quoted in Davis, David H., "Legislative Vetoes in Energy Policy," in Congressional Research Service, *Studies on the Legislative Veto*, p. 108.
13. Fisher and Moe, p. 312.
14. Schick, Allen, *Congress and Money: Budgeting, Spending and Taxing* (Washington, DC: The Urban Institute, 1980), pp. 401–412.
15. Cooper, Joseph, and Hurley, Patricia A., "The Legislative Veto: A Policy Analysis," *Congress and the Presidency*, *10* (Spring 1983): 16–17.
16. Craig, Barbara Hinkson, *The Legislative Veto: Congressional Control of Regulation* (Boulder, CO: Westview Press, 1983), pp. 103–110.
17. See U.S. House of Representatives, Subcommittee on Energy and Power of the Committee on Interstate and Foreign Commerce, *Hearing on the Phase II Incremental Pricing of Natural Gas*, 96th Cong., 2d Sess., April 3 and May 6, 1980.
18. U.S. Department of Education, "Department of Education Regulation Process Memorandum," internal memorandum for Deputy General Counsel for Regulation and Legislation Stewart A. Baker, September 25, 1980, p. 4; see Craig, *The Legislative Veto* . . . , pp. 67–97.
19. For a more complete account of this and related FEC cases, see Bruff, Harold H., and Gellhorn, Ernest, "Congressional Control of Admin-

istrative Regulation: A Study of Legislative Vetoes," *Harvard Law Review, 90* (May 1977): 1403–1409.

20. Interview with U.S. Senate Committee on Agriculture and Forestry staff, Washington, DC, July 13, 1979.
21. In addition to a concerted House and Senate campaign to pass the act, the Forest Service was a consistent lobbyist on behalf of resource planning. Earlier long-range planning efforts had been torpedoed by OMB, but the disarray of the late days of the Nixon administration made possible the passage of the Resource Planning Act with legislative veto intact. Although OMB "violently opposed" the bill and urged newly installed President Gerald Ford to exercise his own veto power, in the particular circumstances of 1974, he declined to do so. Interviews with U.S. Forest Service senior staff, Washington, DC, July 12, 1979.
22. Bruff and Gellhorn, p. 1384.
23. See Kaiser, Frederick M., "Congressional Action to Overturn Agency Rules," *Administrative Law Review, 32* (1980): 667.
24. Congress has already moved in this direction to the extent of requiring the president to provide it with quarterly and annual reports projecting potential arms sales thought "most likely to result in the issuance of a letter of offer" (Pregeli, pp. 721–726).
25. See Craig, Barbara Hinkson, "The Power to Make War: Congress' Search for an Effective Role," *Journal of Policy Analysis and Management, 1* (Fall 1982): 325–328.
26. See Fisher, Louis, "*Chadha's* Impact on the Budget Process," *Congressional Research Service Review* (Fall 1983): 12.
27. Remarks of Representative Elliott Levitas (D-GA), *Congressional Record*, 98th Cong., 2d Sess., 1983, 129, p. H4474.
28. *Ibid.*, p. H 4772.
29. Gilmour, Robert S., "The Congressional Veto: Shifting the Balance of Administrative Control," *Journal of Policy Analysis and Management, 2* (Fall 1982): 13; Harris, Joseph P., *Congressional Control of Administration* (Garden City, NY: Doubleday and Co., 1964), pp. 258–259.
30. Craig, *The Legislative Veto* . . . , pp. 45–66; "The Congressional Veto and Rulemaking," *Public Administration Quarterly, 7* (1983): 24.
31. Gilmour, pp. 20–22.
32. See U.S. House of Representatives, Committee on Rules, *Recommendations on Establishment of Procedures for Congressional Review of Agency Rules*, 96th Cong., 2d Sess., 1980 (Committee Print).
33. See Viscusi, W. Kip, "Presidential Oversight: Controlling the Regulators," *Journal of Policy Analysis and Management, 2*(2) (Winter 1983): 157–173; Gilmour, Robert S., "Presidential Clearance of Regulation," a paper presented at the National Conference of the American Society for Public Administration, New York, April 17, 1983.
34. Statement of Representative Elliott Levitas, quoted in Pressman, Steven, "Congress Considers Choices in Legislative Veto Aftermath," *Congressional Quarterly* (July 2, 1983): 1327.

The CHAIRMAN. Mr. Gilmour.

STATEMENT OF ROBERT S. GILMOUR, PROFESSOR OF POLITICAL SCIENCE, UNIVERSITY OF CONNECTICUT

Mr. GILMOUR. Mr. Chairman, it is a special pleasure for me to appear before this committee today, particularly because, as a former Floridian, Senator Pepper was well known to our household.

The CHAIRMAN. Thank you.

Mr. GILMOUR. The legislative vetoes that have been discussed here, and the statutes now proposed for that matter, seem to me fit into the broader context of what we have long referred to as "the regulatory problem." In fact there seems to be suprisingly little change since the committee looked at regulatory problems some 5 years ago. People still complain about too many regulations, regulatory conflict, and difficulties of the sheer burden of regulations.

There is one major change that has taken place, however. That is one that has already been talked about to some extent earlier today. I'm referring to the imposition of central regulatory review in the Office of Management and Budget. There are precursors, but this administration has markedly changed the process of regulatory oversight by the President. In doing so, it has significantly reduced the level of new regulation. While this is important, it has also put Congress at something of a disadvantage vis-a-vis the Presidency.

Here we are talking about a struggle between the branches. The Presidency has a tool that Congress does not have and has not had. The OMB has 15 percent of its staff now involved in regulatory review. It has been able to give rather serious attention to regulations that have been submitted by executive agencies and, under the Paperwork Reduction Act, by the independent agencies as well. Since 1981, there have been significantly fewer new regulations and that reduced level of regulatory activity continues.

There are legal problems concerning regulatory review in OMB that have already been raised in the law journals. There is a separation-of-powers problem and, perhaps more immediately, an Administrative Procedure Act problem as to the fairness of highly leveraged Presidential involvement with those who would make regulations. This is the so-called ex parte contact problem. There is also the cost-benefit test or cost-effectiveness test imposed on the regulatory process by Executive order.

My own sense of this, in review of the case law in related areas, is that it is likely OMB's review of regulations, the Executive order itself, will be found to be constitutional and legal. That really doesn't change the fact, though, that Congress will continue to be at a disadvantage even if it reintroduces a constitutionalized version of the legislative veto. This may be very expedient, but it doesn't address the real problems of regulation that remain.

Veto in any form is still negative. It takes away policy when an actual veto is voted. It doesn't add policy. It is still decentralized. The veto replacements that are proposed—the generic veto proposed in the Lott and Grassley bills and others—would still rest with the subcommittees. Unless there are large and highly visible

issues, activity would take place at the subcommittee level. There is no centralized congressional review or coordination.

I know Congress has not in the past been very responsive to the idea of any central committee or single congressional authority that would review regulations, but unless that happens there is a tilt toward the Presidency on the matter of regulatory control. That tilt would continue.

It is clear that a very significant regulatory power that has been put into effect by Presidential order. At the very least it seems to me that the power of central review of regulations by OMB ought to be set by statute, not left to the latest in a string of Executive orders issued by the President.

Thank you.

The CHAIRMAN. Thank you very much, Professor.

[Publication titled: "The Congressional Veto: Shifting the Balance of Administrative Control," submitted by Prof. Robert S. Gilmour follows:]

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THE CONGRESSIONAL VETO: SHIFTING THE BALANCE OF ADMINISTRATIVE CONTROL

Robert S. Gilmour

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The Congressional Veto:
SHIFTING THE BALANCE OF ADMINISTRATIVE CONTROL

Robert S. Gilmour

Abstract *During the past decade, hundreds of provisions have been enacted by Congress giving that body some form of control over the projects and regulations of federal agencies. Pressures for more far-reaching measures of this sort, including a proposal to vest Congress with a veto of all regulations promulgated by federal agencies, have intensified debate on both the constitutional merits and administrative wisdom of the congressional veto process. These measures are exerting considerable effect, delaying the decisions of the agencies, reshaping the regulatory process, and increasing the direct congressional role in setting administrative agendas and substantive policies. The result is a transfer of administrative power to the more than 200 standing committees and subcommittees of the Congress—and, significantly, to their staffs. This transfer has served to impede the executive chain of command, to diminish the role of independent regulatory agencies as experts in their respective fields, to devalue judicial review of agency action, and to reduce the accountability of the affected agencies.*

A NEW TREND During the past decade, Congress gradually has enacted a sweeping change in its traditional relationships with executive agencies and independent regulatory commissions. Accompanied by surprisingly little fanfare, Congress has adopted some 555 provisions in 335 federal statutes requiring congressional review of agency plans, projects, and regulatory rule-making. In 1978 alone, Congress enacted 38 provisions in 24 acts, authorizing explicit congressional or committee approval or disapproval of executive branch proposals.[1] In 1980, a single new law, the Energy Security Act, added over 20 new legislative veto provisions in a variety of forms. Variously known as legislative or congressional "veto" provisions, or as "come-into-agreement" and "report-and-wait" requirements, these increasingly common forms of congressional oversight invariably vest Congress with closer legislative scrutiny of agency actions. This piecemeal reform has quietly altered

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relations among the three branches of government and has changed fundamentally the process of regulatory decision-making.

Historically, most congressional veto and report-and-wait limitations were placed on specific plans and projects. More recently, veto provisions in numerous statutes have required all regulations or proposals generated by some specified agency to be routed to Congress or to particular committees for review before being adopted. The Federal Election Campaign Act Amendments and the Education Amendments of 1974, the Presidential Recordings and Materials Preservation Act of the same year, the Energy Policy Act of 1975, the Housing and Community Development Act and the Natural Gas Policy Act of 1978, the Education Act of 1979, and the FTC Improvements Act of 1980 all provide examples of such review provisions. In each of these cases, too, Congress has availed itself of the review provisions. The significant shift in focus of recent acts is not only from individual projects to the regulatory process but also from the presidential and departmental level to the individual agencies. Some observers are now complaining that Congress is attempting to "second guess" administrators by "boring below the waterline" of the executive branch management structure.[2]

During the past several sessions of the Congress, legislative veto riders have been added to innumerable bills, and serious attention has been given to proposals such as House Resolution 1776 that would submit *all* agency "rules" to the congressional veto review. According to its prime sponsor, the bill would vest the exercise of regulatory power in "the elected representatives of the people [not] the unelected bureaucrats."[3] A Circuit Court of Appeals denunciation of the congressional veto as a violation of Article 1 of the Constitution, handed down in January 1982, has had little inhibiting effect.[4] Less than two months after the Court decision, the Senate unanimously voted to extend a two-house veto, without presidential review, over most regulations issued by executive and independent agencies. Notwithstanding pending appeals before the Supreme Court on the veto's constitutionality, Senate proponents of the device successfully argued the need for Congress to reclaim its delegated power, on grounds that bureaucrats often misinterpret the intent of congressional policies.

No end to this debate is yet in sight.[5] Even if the major cases currently under review create a basis for addressing the most important constitutional issues, there is little likelihood that all varieties of the veto will be prohibited. The Court of Appeals decision in January 1982, for example, dealt with a case in which a single-house veto would have been enough to set aside the rule-making action of the Federal Energy Regulatory Commission. Although this variety of the veto failed to pass constitutional muster, the Court commented in passing that "a legislative review mechanism permitting a rule to be repealed by a joint resolution presented to the President would present no constitutional problems." Similarly, the numerous statutory report-and-wait provisions, requiring agencies to submit regulations to Congress for a period of review prior to their effective dates, has troubled

analysts; but none has suggested that this procedure is constitutionally improper.

Apart from the constitutional debate, little attention has been devoted to the impact of the legislative veto on the process of administration, particularly to vetoes levied against proposed agency regulations. Insofar as these effects have been debated by advocates and opponents of the veto in Congress, there has been tacit agreement on at least the general results of the process: delay of administrative action and a restructuring of the regulatory process to permit an increased legislative role in administrative decision-making. The adversaries have disagreed on the expected consequences of these outcomes, especially how they might affect the responsiveness and accountability of federal agencies.

The number of actual veto-sanctioned reviews is still limited, yet experience with this process already reveals striking changes in the characteristic pattern of administrative decision-making. Where veto reviews have been seriously pursued, congressmen and their staffs have become directly involved in the details of regulatory decision-making, substantially altering the agency's control of the process and affording new access by special interest groups. The process of decision-making has been changed from one that emphasized open participation and maintenance of a complete and reviewable record to one of closed-door, off-the-record negotiations between the agencies and individual congressmen, together with their staffs. The responsiveness of the agencies to particular constituencies has undoubtedly increased, but the resulting balance between the public interest and the rights of the regulated has been altered considerably.

THE MECHANICS OF VETO CONTROL

The congressional veto comes in three generic types.[6]

The first is a *negative* procedure allowing a specified period of time, usually 30, 60, or 90 days, for the majority vote of one or both houses—in some cases, even a committee alone—to exercise a veto of a proposed agency project or regulation. The Immigration and Nationality Act's provision for a one-house veto to override an attorney general's decision to suspend deportation of an alien is an example of the negative procedure. It is also precisely the form of veto declared unconstitutional by the Ninth Circuit Court of Appeals,[7] which was sent forward to the Supreme Court on appeal in the 1982 term. A variation of this design frequently offered by one of Congress' leading proponents for the congressional veto provides a so-called "one-and-a-half house veto." Here, in the event one chamber vetoed an agency proposal within 60 days of its presentation, the other house could vote down the action of the first within an additional 30 days, or take no action and allow the veto to stand.

A second form of congressional veto, less common than the first, requires *affirmative* legislative action before an agency proposal can go forward. Typically, the agency must lay its proposed plans or regulations before Congress or before two or more of its

committees for a specified period of time. During this period the designated committees, or Congress itself, must affirmatively resolve to authorize the agency propositions; otherwise, they will not take effect. For example, the Federal Energy Administration is required to develop energy-conserving construction standards that are in turn submitted to Congress for review. Before any such standards can be enforced, a resolution of approval must be voted by both houses of Congress within 90 days after submission.

The final, *deliberative*, form of congressional veto is in effect a "report-and-wait" or "laying-by" procedure in which specified agency proposals are required to be routed to Congress for a statutory review period. In the absence of contradictory legislative action through the ordinary lawmaking process, the agency proposal takes effect at the end of the period. One example of this variety is a veto over the regulations of the Department of Housing and Urban Development, promulgated under authority of the Housing and Community Development Act Amendments of 1978. In this case, a veto requires the resolution of both houses of Congress, as well as presidential consideration. It may be argued that the mere delay of an effective date, during which Congress has the opportunity to rescind or amend the agency proposal through the ordinary process of legislation, is not a veto at all. However, where Congress calls back for legislative review an executive action taken pursuant to authority that the Congress had delegated previously, the process that follows constitutes the functional equivalent of a congressional veto. On objection of a committee, the initiating agencies almost invariably suspend or modify the action in response to the committee's observations.[8]

DELAY AND UNCERTAINTY

Regardless of form, the addition of legislative veto provisions inevitably results in delays and increased uncertainty for those who are affected by agency projects and regulatory decisions, including the agencies themselves. Where delay is the result, proponents of the congressional veto argue that the delay is entirely in keeping with the purpose of the veto to prevent hasty and unwarranted executive action. But administrative proposals are rarely developed in a vacuum and issued on the spur of the moment. A former deputy director of the Office of Management and Budget explains:

> In many cases, it takes agencies 2 or 3 years to promulgate a rule, especially rules involving complex technical issues such as hazardous wastes, carcinogens, environmental pollution. Agency rule-making records can run into tens of thousands of pages. The legislative veto process would occur after the rule-making and before a process of judicial review that may well take additional years.[9]

The rejoinder to observations such as these is that an administrative process taking years to complete could hardly be affected seriously by an additional few months' delay. Experience indicates, however, that delays occasioned by congressional veto

procedures may be substantially greater than those prescribed by the various statutes. For example, rules promulgated by the Federal Elections Commission are subject to review for a period of 30 legislative days, during which either house may veto the rules. On August 1, 1975, the FEC proposed a rule that was vetoed by the House under this procedure on October 22, 1975. In August 1976, the FEC promulgated new rules. Yet Congress adjourned *sine die* before 30 legislative days had transpired, and the regulations could not be implemented until 1977.[10] The Federal Trade Commission's rules governing the use of games of chance in the grocery and gasoline retailing trades were similarly delayed for a year under a calender established by the FTC Improvements Act of 1980. In this instance, ironically, the changes were designed to reduce the industry's burdens of compliance by modifying the public notice and record-keeping requirements of the original rule.

In some cases, administrators could find themselves caught between congressional review delays and contempt citations issued by the courts to enforce timetables specified in the statutes. The Federal Water Pollution Act of 1972 offers such a potential. In other situations, administrators may be caught between veto reviews and funding deadlines. This has caused particular difficulties for agencies that distribute grants-in-aid. At the time the Education Department's regulations were vetoed in 1980, more than 440 grant applications were in preparation or pending which had been prepared under the departmental regulations then under review. The Secretary of Education testified that applicants were faced with the need to make their own hiring decisions and other preparations before the onset of the school year: "If we had amended the regulations and reopened the competition, no orderly planning process would have been possible. In fact, it is very unlikely that we could have made awards before the end of the fiscal year, when funds would have expired."[11]

VETO REVIEW AND AGENCY RULE-MAKING

Whatever their position in the legislative veto debate, participants agree that enactment of the veto will work profound changes in the informal process of agency rule-making, which relies heavily on the solicited comments of interested parties.

As defined by Section 553 of the Administrative Procedure Act (APA), rule-making agencies must notify interested persons and provide them the opportunity to submit written views. No proposed regulation can take effect until after at least a 30-day waiting period, which begins with the appearance of the proposal in the *Federal Register*. In practice, agencies commonly provide a second round of notice and opportunity for comments after the formal requirements have been fulfilled. This addition is largely the result of increasing pressure from appellate courts, which have demanded that the agencies take a "hard look" at the problems facing regulated and protected interests.[12]

Although the period of notice prescribed by law does offer citizens and organizations the chance to express views on proposed regulations, it does not require the agency to take serious note of

the comments submitted. The principal congressional proponent for the veto approach argues, therefore, that "the purpose of the congressional veto is to . . . see that the public is given an input, through (its) elected representatives, in the promulgation of administrative rules and regulations."[13]

The difficulty with the proposition that congressional veto reviews will increase participation of the public lies in the identity of those most likely to come forward within the limited time available. The public most likely to take timely notice of an unfavorable regulatory proposal, to understand its implications, and to articulate its objectives with enough clarity and force to be intelligible to Congress are those interests that can support ongoing lobbyist activities and maintain continuous contacts with legislators and their staffs. These are the groups that receive an additional and critical point of legislative access as the result of congressional veto reviews. For examples, when HUD's oversight committee in the House reviewed the department's thermal insulation standards in early 1979, the committee and individual members were inundated with complaints against the standards from the American Brick Institute and other organized interests of the masonry construction industry. The veto campaign mounted by the industry appeared to a particularly close staff observer as "one of the most intense lobbying efforts" he had witnessed.[14]

One argument that is frequently advanced in favor of the across-the-board application of the veto is that it is needed to curb bureaucratic lawlessness and to ensure that regulations are faithful to statutory intent. However, experience with veto reviews thus far demonstrates that they are largely used by congressmen in response to constituent complaints, and that the typical objectives are to secure changes in or retreats from previously adopted policies. Recently, for example, when HUD attempted to put regulatory teeth in a clear congressional mandate proscribing discrimination in federally funded housing, developers and suburban housing authorities were quick to complain. Under the veto procedure applied to HUD's programs, a resolution of disapproval was introduced almost immediately. Rather than do battle at the risk of losing its entire package of regulations for Section 8 housing, HUD simply withdrew its proposed "equal opportunity" regulations. As to arguments that HUD's proposals ventured beyond the law, counsel for the National Leased Housing Association testified that the association had "filed some very legalistic comments on the regulations" in an effort to demonstrate that the proposed rules exceeded HUD's statutory authority in at least some respects. "The reviewing committee couldn't have been less interested in these points because . . . [t]hey wanted to go into [the equal opportunity] area . . . which probably would not have been caught in a strict statutory authority net."[15] In fact, all of the available case studies of congressional veto efforts describe reviews "primarily based on policy," despite the fact that Congress' self-defined role was limited to reviewing the agencies' "conformity with statutory purpose."[16]

REVISING ADMINISTRATIVE AGENDAS AND WORKLOADS

Under the present administration, rule-making by federal agencies has declined substantially. But if agency performances during the late 1970s offer any future guide, the volume of regulations that could be scheduled automatically for the congressional review is staggering: roughly 10,000 regulations per year, filling some 60,000 pages of the *Federal Register* annually. Virtually no one expects Congress to review all or even a very large percentage of such rules; yet the adoption of a generic veto of all agency-promulgated regulations would widen the agendas of oversight committees to include the possibility of a review of every rule. The introduction of a "resolution of disapproval" by any member would trigger the process in earnest. Accordingly, regulatory agencies would have to worry about the timing of proposed regulations in order to reduce the risk of major delays imposed by the congressional calendar. The problem of timing would be particularly acute in those cases—so far, few in number—in which the Congress must take affirmative action if any regulations are to become effective.

Unsynchronized agency rule-making risks the so-called "pocket veto." This occurs when insufficient review days are allowed between the time of agency submission and the end of session. This is precisely what halted FTC's used-car warranty rule in 1981, when the first session of the 97th Congress adjourned one day short of the required 90-day review period. HUD now openly reports that it is "planning [its] regulatory process around Congressional recesses and adjournments."[17]

Because of the potential volume of reviews required by a generic veto, the increase in the congressional workload has occasioned a good deal of concern. In veto reviews thus far, committee chairmen have designated members of the staff to do the actual monitoring of agency proposals. The chairman of the House Education subcommittee, for example, instructed staff members to undertake a detailed, line-by-line review of all regulations proposed by the Department of Education, pursuant to the veto authority conferred by the 1978 Education Act.[18] That process led directly to three legislative vetoes of Department of Education regulations during the spring of 1980. But a commonly held view among members of the staff in both houses of the Congress is that such procedures could not be applied to all agency regulations without generating substantial problems of workload. The major systematic study of five congressional reviews conducted in the mid-1970s points to the same conclusion.[19] All the signs suggest therefore, that any blanket review power would be used by the Congress selectively, according to the interests and preferences of its members and its staffs.

SUBCOMMITTEE CONTROL OF RULE-MAKING

Advocates of the legislative veto have most clearly realized one prime objective: that of increasing congressional control over agency rule-making. On close analysis, however, this increase in control has taken place primarily at the subcommittee level. As a

rule, the usual process is initiated at the instigation of a subcommittee chairman or in response to an actual or threatened resolution of disapproval. That trigger leads to briefings and meetings between agency representatives and members or staff of the subcommittees. If a resolution of disapproval has actually been offered, hearings may be held by one or more subcommittees; subsequently, the matter is submitted to the full committee for formal vote and possible report to the floor.

The potential sanction of disapproval has given congressmen and staff members real negotiating power. In practice, regulatory agencies, whether they liked it or not, have been obliged to respond to a new set of powerful advisors neither appointed by nor controlled by the executive.[20] Following passage of the General Education Provisions Act of 1974, for example, representatives of the Department of Health, Education, and Welfare were summoned to a series of about 20 meetings with congressional staff from both houses, in order to ensure that the views of the congressional staff would be considered in drafting regulations.[21] More recently one congressman described the "way it really works": "HEW and now the Department of Education, came up here and discussed what regulation was going to do. If, at our staff level, it produced a reaction saying, wait a minute, that is not what the committee intended, it got changed."[22]

Both the oversight subcommittees and the agencies they supervise may share an interest in reaching informal accommodation on the substance of forthcoming regulations to the point of achieving an outright alliance. In any case, failure to reach such agreements will almost surely result in expanding the scope of controversy during the veto review process and in bringing other parties into the process. If this occurs, subcommittees must then share their oversight jurisdictions with others; at the same time, the agency's risks and uncertainties about final outcomes are bound to increase.

The analysts who studied congressional veto review of education regulations issued during the mid-1970s professed to see signs that the Office of Education had formed an alliance with the subcommittees that could help defend against public criticism of its regulatory output.[23] Since creation of the Department of Education in 1979, various participants have described an even closer relationship between education administrators and their subcommittee overseers, both in program planning and in the development of regulatory detail. Not only does this arrangement ensure greater subcommittee and staff control of agency action, but as one observer explains, "for a new department with a divided clientele, such a strong liaison . . . could be advantageous if not essential."[24]

DEVALUING JUDICIAL REVIEW

With the addition of a significant congressional role in the development and promulgation of agency regulations, members of the public who appeal to the courts from some action of the agency are hard put to argue successfully that an agency has exceeded its legislative mandate. From a congressional point of view, this may

be regarded as a positive achievement; a thoroughgoing review process would appear to bring the agencies into such complete accord with congressional intent that the need for appeals to the courts—except on constitutional or procedural grounds—is reduced. The obvious difficulty, however, is that no more than a handful of regulations are likely to be subjected to extensive reviews; and even in these cases, the review may not be designed to increase consistency with the original congressional intent.

Recent congressional proposals for adoption of the generic veto have recognized this problem by including a statement that "Congressional inaction on or rejection of a resolution for reconsideration shall not be deemed an expression of approval of such rule." Despite such disclaimers, there is evidence that courts find it difficult to ignore the legal reality that, where the right of veto exists, Congress has the opportunity to review every regulation for consistency with legislative intent. The Court of Appeals for the District of Columbia recently pointed out that if such a rule is not vetoed, "the courts are presented with a difficult question of how much weight, if any, to give to the implicit congressional finding that the rule represents a proper exercise of statutory discretion."[25]

In several cases over the past decade, federal appellate courts have interpreted congressional inaction as implied congressional approval. In one case a litigant lost ground when it appeared that the proposition sponsored by the litigant had been proposed in a congressional committee, but had been rejected.[26] In another instance, the Supreme Court referred to considerations that "militate against the judgment that Congress intended a result that it expressly declined to enact."[27] In still another case, the Fifth Circuit Court of Appeals upheld a regulation of the Economic Development Administration on a point not explicitly covered by the statute, stating that its conclusion was reinforced by the fact that prior hearings were held before the oversight committee, which allowed the regulations and guidelines to become operative.[28]

Aware that such events may have weight in the courts, congressmen have been tempted to go out of the way to express intent. During the hearings to review HUD's "equal opportunity" regulations, for example, various members were at pains to explain what was and was not congressional intent in Section 8 of the Housing and Community Development Act.[29]

The power of the public record in influencing the court's interpretations has been enhanced by the increased emphasis of the courts on developing a public record. Over the past decade or two, courts have come to insist that agencies create a careful record of their legislative activity and that information contained in that record sould provide the exclusive basis for both agency action and judicial review. The leading decision guiding this procedure holds that where "conflicting private claims to a valuable privilege" are involved, contacts with agencies made outside of the regular proceedings were illegal.[30] In fact, at least one court has held that even *ex parte* contacts from congressmen are forbid-

den.[31] Clearly, the legislative veto not only institutionalizes such contacts but vastly changes the quality and character of the record as well.

THE DECLINE OF ACCOUNTABILITY

When the rule-making procedures of regulatory agencies entail negotiation with Congress, the power of the president and his appointed subordinates over executive agency heads is inescapably diminished. Presidential administrations from Roosevelt to Reagan have all understood this and have uniformly denounced the extension of the legislative veto to regulations as an encroachment on constitutional powers of the president. Power is diverted not simply to the Congress as a collectivity but rather to its committees, subcommittees, and their staffs. When it is the congressional staff members who acquire power actually to participate in executive agency decisions, the dilution of presidential authority is difficult to justify.

Indeed, the primary beneficiaries of the power shift occasioned by legislative veto reviews may not be the congressional committees and subcommittees so much as their professional staffs. In every veto review thus far analyzed, staff members have performed significant, sometimes dominant roles in organizing and conducting negotiating sessions with the agencies, targeting regulations for special attention among the voluminous possibilities presented by the agencies, and narrowing the issues for subsequent member scrutiny and redrafting.[32] The sheer volume of regulations already subject to veto review (along with supporting documentation, tests, and testimony) makes the primacy of staff work all but inevitable. The level of detail and technical complexity inherent in most such rules is certain to intensify this effect as veto coverage is extended. Almost as certainly, the regulatory process devolves as staff-to-staff negotiations.[33]

Centered in the committee and subcommittee setting, the structure of congressional veto review is inimical to the concept of a legislative process based on a polity of pluralism. The concept of such a polity is that broad legislative initiatives will alert and energize many groups to support or oppose those initiatives. Opposing interests organized in alliances and coalitions will square off in legislative struggles in which advantages are exchanged and differences compromised.

In contrast, when Congress exercises a veto, the rule-making work of the agency is wholly rejected, leaving nothing in its place. More commonly, under threat of a veto, the thrust of regulatory policy is subtly refracted in ways that favor selected constituents. These discrete modern subsidies take the form of special exceptions from safety and energy standards and deadlines, relaxations of reporting requirements, exceptions to rules for equal treatment or affirmative action, and so on. In any case, the pluralist process is converted into a process reminiscent of an earlier era of pork barrel politics in the allocation of natural resource benefits and public works.[34]

The distributive form of congressional decision-making has, of course, been roundly criticized as one fostering narrow subsystems of congressional subcommittee, public agency, and private interest group power. These particular "subgovernments" or "networks" of policymaking are repeatedly shown in individual cases to interdict the presidential chain of command or to compromise the independent expertise of nonexecutive regulatory bodies, to reduce the level of intergroup competition for scarce resources, and to translate policymaking into opportunities for constituent service.

The underlying issue in decisions to extend veto reviews or to apply the generic veto to agency rule-making is that of administrative accountability. The function of congressional veto reviews as they are currently conceived is not essentially that of holding administrators accountable for their actions. With the application of the legislative veto, Congress relinquishes its role as independent overseer in exchange for the direct participation of its committees and staff in agency decision-making. Pointed accountability is inevitably lost in the bargain.

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NOTES

1. Norton, Clark F., "1978 Congressional Acts Authorizing Congressional Approval of Proposed Executive Actions." Congressional Research Service, Report No. 79-46 Gov (Washington, DC: U.S. GPO, February 12, 1979).
2. See Seidman, Harold, *Politics, Position and Power*, 3rd ed. (New York: Oxford University Press, 1980), pp. 56–57.
3. Testimony of Congressman Elliott Levitas, U.S. Congress, House of Representatives, Committee on Rules, Subcommittee on the Rules of the House, *Hearings: Regulatory Reform and Congressional Review of Agency Rules; H. R. 1776, "The Administrative Rule Making Reform Act," and Related Measures*, 96th Cong., 1st Sess., Part 1, 1979, pp. 3–18. Hereafter cited as U.S. House, *Hearings: Congressional Review of Agency Rules.*
4. *Consumer Energy Council of America, et al. v. Federal Energy Regulatory Commission (FERC),* ____ F. 2d ____ (D. C. Cir. 1982).
5. See in particular Dixon, Robert G., Jr., "The Congressional Veto and Separation of Powers: The Executive on a Leash?" *North Carolina Law Review, 56* (April 1978): 423–494; Ginnane, Robert W., "The Control of Federal Administration by Congressional Resolutions." *Harvard Law Review, 66* (February 1953): 576–611; Javits, Jacob J., and Klein, Gary J., "Congressional Oversight and the Legislative Veto: A Constitutional Analysis." *New York Law Review, 52* (June 1977): 455–497; Schwartz, Bernard, "The Legislative Veto and the Constitution—A Reexamination." *George Washington Law Review, 46* (March 1978): 351–375; Watson, H. Lee, "Congress Steps Out: A Look at Congressional Control of the Executive." *California Law Review, 63* (1975): 983–1094.
6. The author is indebted to Charles Wesley Harris for the typology that follows. *Resolving the Legislative Veto Issue: A Review of Proposals and Opinions* (Washington, DC: National Institute of Public Management, 1979), pp. 22–24.

7. *Chadha v. Immigration & Naturalization Serv.*, 634 F. 2d 409 (9th Cir. 1980), *consideration of juris, postponed until hearing on merits*, 102 S. Ct. 87 (1981). In this decision the Court carefully confined its holding to application of the legislative veto to the quasijudicial process of agency order-making.
8. Harris, Joseph P., *Congressional Control of Administration* (Garden City, NY: Doubleday & Co., 1964), pp. 258–259.
9. Testimony of John P. White, U. S. House, *Hearings: Congressional Review of Agency Rules*, p. 1145.
10. U.S. Congress, Senate, Committee on Government Operations, *Study on Federal Regulation: Congressional Oversight of Regulatory Agencies*, Vol. II (Committee print), 95th Cong., 1st Sess., 1977, p. 118.
11. Testimony of Shirley M. Hufstedler, U. S. Congress, House, Committee on Education and Labor, Subcommittee on Elementary, Secondary, and Vocational Education, *Oversight Hearing on Congressional Disapproval of Education Regulations*, 96th Cong., 2d Sess., 1980, p. 65. Hearafter cited U.S. House, *Hearing: Oversight of Education Regulations*.
12. *Citizens to Preserve Overton Park v. Volpe*, 401 U. S. 402 (1971); cf. *Environmental Defense v. Ruckelshaus*, 439 F. 2d 584 (D.C. Cir. 1971); *Greater Boston Television Corp. (WHDH) v. FCC*, 444 F. 2d 841 (D.C. Cir. 1970).
13. Testimony of Elliott Levitas, U.S. House, *Hearings: Congressional Review of Agency Rules*, pp. 8–9.
14. Quoted in Craig, Barbara Hinkson, The Congressional Veto and Regulation." *Southern Review of Public Administration*, forthcoming.
15. Testimony of Charles L. Edson, U. S. Congress, Senate, Committee on Governmental Affairs, *Hearing: Congressional Review of Federal Agency Rules and Regulations; S. 1945*, 96th Cong., 2d Sess., 1980, p. 32. Hereafter cited as U.S. Senate, *Hearing: Congressional Review of Agency Regulations*.
16. Bruff, Harold H., and Gellhorn, Ernest, "Congressional Control of Administrative Regulation: A Study of Legislative Vetoes." *Harvard Law Review, 90* (May 1977): 1369–1440; 1419. The five veto procedures studied were the Office of Education's establishment of family contribution schedules for its program of basic grants for postsecondary education; the Department of Health, Education, and Welfare's rules issued under the General Education Provisions Act; the Federal Energy Administration's exemptions from price and allocation controls on petroleum products; the General Services Administration's regulations on access to the Nixon papers and tapes; and Federal Election Commission regulations. See also Craig, Barbara Hinkson, "The Legislative Veto: Its Implications for Administration and the Democratic Process," unpublished Ph.D. dissertation, The University of Connecticut, 1982. Veto review cases analyzed in this study include Department of Housing and Urban Development regulations establishing energy conservation standards and equal opportunity requirements for Section 8 housing; regulatory reviews of the Department of Education and its predecessor, Office of Education; veto of the Federal Energy Regulatory Commission's incremental gas pricing rule; attempted veto of the National Highway Traffic and Safety Administration's passive restraint rule; and the Federal Trade Commission's used car warranty rule.
17. Testimony of Jane McGrew, General Counsel of the Department of Housing and Urban Development, U.S. Senate, *Hearing: Congressional Review of Agency Regulations*, p. 29.

18. Cohen, Richard E., "Legislative Veto Battle Escalates—Should Congress Have the Last Word?" *National Journal* (September 6, 1980): 1476.
19. Bruff and Gelhorn, pp. 1369–1440.
20. Dixon, pp. 432, 445.
21. Bruff and Gellhorn, p. 1386.
22. Testimony of Congressman William D. Ford, U.S. House, *Hearing: Oversight of Education Regulations*, p. 41.
23. Bruff and Gellhorn, p. 1385.
24. Craig, "The Legislative Veto," pp. 133–188.
25. *Consumer Energy Council of America, et al. v. FERC*, _____F. 2d_____ (D.C. Cir. 1982).
26. *National Automatic Laundry and Cleaning Council v. Schultz*, 443 F. 2d 689 (D.C. Cir. 1971).
27. *Gulf Oil Corp. v. Copp*, 419 U. S. 186 (1974).
28. *Fredericks v. Kreps*, 578 F. 2d 555 (5th Cir. *en banc* 1978).
29. U.S. House of Representatives, Committee on Banking, Finance and Urban Affairs, Subcommittee on Housing and Community Development, *Hearing: Disapproving and Invalidating HUD Regulations Concerning Section 8*, 96th Cong., 1st Sess., 1979.
30. *In Home Box Office, Inc. v. FCC*, 567 F. 2d 9 (D. C. Cir. 1977), the U.S. Court of Appeals for the District of Columbia found that "Even the possibility that there is here one administrative record for the public and this court and another for the Commission and those 'in the know' is intolerable. . . . Even if the Commission had disclosed to this court the substance of what was said *ex parte* . . . we would not have the benefit of an adversarial discussion among the parties. . . . Equally important is the inconsistency of secrecy with fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking on the merits which undergirds all of our administrative law."
31. *D.C. Federation of Civil Associations v. Volpe*, 459 F. 2d 1231 (D.C. Cir. 1971).
32. See Bruff and Gellhorn; Craig; and Dixon, *op. cit.*
33. On this point see Malbin, Michael J., *Unelected Representatives: Congressional Staff and the Future of Representative Government* (New York: Basic Books, 1979), p. 247.
34. See McConnell, Grant, *Private Power and American Democracy* (New York: Alfred A. Knopf, 1967), pp. 196–245; Gilmour, Robert S., McCauley, John A., "Environmental Preservation and Politics: The Significance of 'Everglades Jetport'." *Political Science Quarterly*, 92 (Winter 1975–1976): 719–738.

The CHAIRMAN. Professor Newland I have to go down to the floor in just a minute. I am in an embarrassing situation with respect to Ms. Mary Norville and Richard Leighton. Either I will just have to, with my apologies, offer you an alternative. While you are here, let Ms. Bolling hear your testimony, which, of course, will be transcribed regularly by the reporters, which I assure you will be carefully read, or ask you to come back at another time which we will fix, so I can hear you myself. What would be your pleasure?

Mr. LEIGHTON. I would prefer to stay.

The CHAIRMAN. Very well.

Mr. LEIGHTON. And make a few points.

The CHAIRMAN. What about you, Ms. Norville?

Ms. NORVILLE. I would be happy to stay and make my few remarks.

The CHAIRMAN. I deeply apologize to you. I assure you I will read every word each one of you says to Ms. Bolling and you will have a far more attractive listener than you have got now.

Now, Professor, will you please give us your summary of your views?

STATEMENT OF CHESTER A. NEWLAND, PROFESSOR OF PUBLIC ADMINISTRATION, UNIVERSITY OF SOUTHERN CALIFORNIA

Mr. NEWLAND. I will summarize very briefly, thank you.

In contrast to the first three people today, I emphasize the shared powers between Congress and the President as contrasted with separation of powers, and I urge the committee to consider institutional arrangements to encourage that sharing.

I briefly summarize in my statement what I consider an inordinate growth of personalization in the Presidency and deinstitutionalization as in the case cited of deregulation.

The CHAIRMAN. How would that shared power be held and exercised?

Mr. NEWLAND. I suggest one area, executive staffing, as an example, and I invite this committee, along with the others like House Post Office and Civil Service Committee, to review arrangements which have diminished the power of Congress and enhanced rather isolated power of the President. Specifically, problems exist in the areas of Senior Service staffing, political staffing, and new arrangements in OPM.

I can go into any of those in detail, but my principal point is precisely this:

Since the early sixties, we have seen a deinstitutionalization of much of the executive branch. Because of that, along with a growth of a personal form of politics and transitoriness around the Presidency, the essential collaborative relationship between Congress and the executive branch has diminished. We are seeing more and more separation and exercise of unilateral power by the President. If we take actions in areas like executive staffing to encourage more shared power arrangements through institutionalization, our system will function better.

Specifically, I do recommend that political appointees be limited to specific positions as authorized by Congress.

Second, that the Senior Executive service be limited to career appointees only, because that would facilitate liaison with Congress.

Finally, I recommend that the Director of OPM be selected similarly to the appointment of the Comptroller General and that the budgets and proposed legislation from OPM be submitted at the same time to Congress that they go to OMB.

These recommendations are only to illustrate the larger context of the problem of which the legislative veto decision is a part. It is essential to reexamine congressional-Presidential relationships in terms of shared powers and institutional arrangements to sustain that balance.

[Mr. Newland's prepared statement follows:]

Testimony before the
COMMITTEE ON RULES
U. S. HOUSE OF REPRESENTATIVES
May 10, 1984

by

Chester A. Newland
Professor of Public Administration
University of Southern California
and George Mason University

Measured but prompt institutional responses are required to enhance shared governmental responsibility between Congress and the Executive Branch. Consequences of the loss of the legislative veto in INS v. Chadha are crucially important, but the problem of imbalance resulting from Presidential dominance is much broader than that. One dimension of overarching Presidential power which merits priority attention is the recent trend toward deinstitutionalization and narrow partisan politicization of the Executive Branch. In terms of adverse impact on shared power relationships with Congress, agency staffing is the principal dimension of that development. To facilitate interbranch communications and development of essential cooperative arrangements, provisions are needed to institutionalize professionally-expert executive leadership, with sustained Congressional linkages.

While Executive Branch staffing provisions to enhance shared responsibility with Congress is the principal recommendation in these remarks, it is but one aspect of the larger problem of disproportionate emphasis on personal presidential dominance of the national government. Two aspects of that broader problem are briefly noted here first: (1) the heavy emphasis in public administration since the first of this century on a powerful presidency as a formula for good government, and (2) trends since the 1960s, recently accelerated, toward deinstitutionalization of arrangements for executive branch excellence which were prescribed by earlier reformers.

Congressional responses to current problems of unrestrained presidential power--whether to correct staffing deficiencies or other dimensions of the problem--need to take those two underlying developments into account. Then, instead of ad hoc and tactical responses only, appropriate strategic actions may be taken to build long-term institutional frameworks for shared powers, consistent with American governmental traditions and future needs. It is encouraging that that sort of deliberate action is envisioned in the scheduling of these hearings to deal with the consequences of the Chadha decision. Several remedial approaches already taken and others which have been proposed indicate a constructive posture by this Congress in support of the shared powers concept of the American Constitution.

A Strong Executive as Reform Orthodoxy.

Reform Era support of the strong executive as a model for good government was generally based on acceptance of the concept of shared powers, not advocacy of Presidential domination of American government. A strong executive, with focused responsibility, became essential by the first third of this century to facilitate efficiency and economy in implementation of laws. But the beginnings of the modern Administrative State in America were in the Budget and Accounting Act of 1921 as much as in other actions to restructure the Executive Branch to enhance Presidential leadership. The General Accounting Office and the Bureau of the Budget were created simultaneously. In short, the well-known history of the pre-New Deal period demonstrated efforts to institutionalize frameworks for balanced Congressional and Presidential capacities to fulfill shared responsibilities under the Constitution.

New Deal reforms and Executive Branch reorganizations through the 1950s continued to apply the Reform Era model. The search was for ways to deal with staggering new governmental complexities through balanced institutional arrangements for Congressional and Presidential leadership and oversight of the Executive Branch. The legislative veto originated then as one of several approaches to shared responsibility, as constructively recounted in these hearings. Other arrangements for shared exercise of power developed in the first two-thirds of this century have also been lost or seriously eroded in recent years. Their loss has come about less dramatically than that of the legislative veto, however, and until now Congress has often supported expansion of solitary Presidential power by elimination of these institutional supports for collaborative legislative/executive processes.

Three sorts of Executive Branch arrangements for shared power which were basic to Reform Era and later experience particularly merit attention now. First, in creation of the Executive Office of the President (EOP) and through the 1950s, efforts were made to maintain professionally expert, non-partisan competency in the Bureau of the Budget and to maintain collaborative linkages between EOP and Congress. Second, at bureau levels and in central administrative management offices in departments and agencies, high continuity of career executive leadership, with functional linkages to Congress, characterized the Executive Branch. Third, the bipartisan Civil Service Commission and statutory staffing provisions helped to facilitate that continuity of executive personnel and bipartisan collaboration with Congress.

Executive Branch Deinstitutionalization.

Changes in those institutionalized underpinnings for balanced exercise of Congressional and Presidential responsibility for the Executive Branch began in the 1960s, moving to a pattern of personal presidential loyalty. By the 1980s, professionally expert continuity and the orientation to shared responsibilities with Congress had almost wholly vanished from the Executive Office of the President. Those qualities were also greatly diminished in domestic departments and agencies. The civil service apparatus no longer functioned with bipartisan trust to support continuity and collaboration in a government of shared powers.

Narrow partisan politicization became dominant in EOP in the 1970s, as in the transformation of the Bureau of the Budget into the Office of Management and Budget. The Domestic Council of the Nixon Administration (now the Office of Policy Development) was created by law as a Cabinet-centered decision-making body to be staffed by both career experts and noncareer personnel. In fact, that apparatus quickly became an EOP staff-dominated agency composed entirely of partisan presidential loyalists. Although President Ford promptly joined Congressional leadership to restore some balance of collaborative Cabinet government, EOP never recovered from the peculiar personal politicization of the early 1970s. The earlier institutional history of EOP has been largely lost among the amateurs there in recent years.

As inherited by President Reagan in 1981, the EOP apparatus contrasted sharply with provisions which were earlier adopted to reconcile a strong Presidency with an effective Congress. It had become deinstitutionalized, fragmented, and oriented to personalized presidential politics. Under Reagan, those qualities have become greatly intensified in EOP, and they have been extended to much of the Executive Branch.

Now, key OMB offices are politically filled, and transitory incumbents of previously professionally-staffed EOP positions commonly have dual appointments as personal special assistants to the President. Inspectors General, created in 1978 with provisions designed by Congress to facilitate their development as institutionalized offices, were all deliberately fired in the initial days of the Reagan Administration to allow appointments consistent with a discontinuous, personalized, presidential loyalty model. Assistant secretaries and many bureau and division heads have become routinely politicized, few subject to Senate confirmation or much other Congressional oversight.

Discontinuity, amateurism, and a confrontational attitude toward Congress now characterize many top levels of the Executive Branch.

Executive Branch Staffing.

Executive Branch staffing is crucial to the serious decline in the practice of shared powers between the branches of government. Glaring defects are present in three areas: (1) requirements for filling executive-level positions in EOP and in departments and agencies; (2) Senior Executive Service provisions generally; and (3) central personnel administration and leadership.

First, Congress needs to prescribe and require enforcement of staffing of selected executive level positions by career professional experts, with routine legislative/executive linkages. For example, key administrative management functions such as Assistant Secretaries for Administration, agency personnel directors, and OMB staff below the Director need to be staffed to provide continuity, expertise, and responsibility to law. Also, for effective Congressional liaison and citizen confidence, consistent with practices before the 1970s, key bureaus need to be professionally staffed. Such operations as the Social Security Administration, Soil Conservation Service, Park Service, and Geological Survey require expertise, continuity, and sustained Congressional liaison, for example.

To accomplish that, Senior Executive Service (SES) provisions need to be changed. The House Post Office and Civil Service Committee is thoughtfully engaged in considering those needs, but they are also most relevant to the work here to find ways to enhance government of shared powers. The SES now contributes to discontinuity and separation of Executive Branch operations from desirable Congressional liaison. Provisions for mixing political and career executives in one service have created confusion in administration and complexities in oversight. The ratio of career reserved positions (40%) to general positions (60%) which may be staffed by noncareer or career personnel has greatly enlarged presidential power at the expense of earlier institutional arrangements which encouraged continuity and Congressional linkages. SES should be modified to create a service solely of career people. Political positions should be kept separate, specifically authorized by statutory provisions, and limited in number and assignments. Political appointees should only fill statutorily identified positions as personal aides to top political officials and those in which incumbents are deeply involved in determination and advocacy of Administration policies. Modification is also needed of SES provisions authorizing agency heads to direct reassignment of career SES members. Provisions are needed to mitigate arbitrary and capricious reassignments to assure necessary executive expertise, continuity, and collaborative Congressional relationships.

Second, to accomplish staffing of the Executive Branch to enhance conditions for shared Congressional and Presidential authority and responsibility, changes are needed in the federal personnel apparatus. The Civil Service Reform Act of 1978 has resulted in deinstitutionalization of the central structure, fragmenting former Civil Service Commission responsibility into the Merit Systems Protection Board (MSPB), the Federal Labor Relations Authority (FLRA), the Equal Employment Opportunity Commission (EEOC), and the Office of Personnel Management (OPM). For all its faults, the bipartisan Civil Service Commission (CSC) provided more focused brokerage and expert leadership between Congress and the Executive Branch, across party lines, with higher trust levels than does the present contradictory collection of agencies. In contrast with the former CSC, which had three presidential appointees, the U.S. Office of Personnel Management had 36 political appointees in January, 1984, not counting nine other partisan appointees in interchange programs. Career personnel are routinely limited in policy deliberations at OPM now; formerly expert professionals provided principal staffing for personnel policy, with close Congressional liaison. Present OPM leadership is aggressively disdainful of Congress.

Restructuring of the present defective central personnel machinery is needed to facilitate workable linkages between partisan political leadership and nonpartisan civil service in the shared powers context of American government. As a minimum, the OPM Director needs to be appointed by processes similar to those followed in selection of the Comptroller General, with statutory requirements for expertise. Also needed are provisions for concurrent budgetary and legislative submissions to Congress and OMB. Additional changes are needed in OPM, MSPB, and FLRA, but these recommendations are enough to make the relevant point in these important hearings.

In conclusion, that point is this. A great need exists for a measured, institutional response to enhance shared governmental responsibility between Congress and the Executive Branch. In its response to INS v. Chadha, Congress has demonstrated commendable understanding of that.

Crucial institutional arrangements which were developed to facilitate shared powers as government grew large in the decades before the 1970s have been dangerously eroded. With loss of the legislative veto, it is timely for Congress to address this larger problem. The example of urgent need here--Executive Branch staffing--is one of several areas where Congress may act to build long-term institutional frameworks for shared powers, consistent with the American constitutional system and its present and future needs.

The CHAIRMAN. Well, thank you very much. Each of you has given a novel and I think a very distinctive and innovative and very interesting approach to us.

We are in this because of the request of 17 standing committees of the House, which asked the Rules Committee to take the lead in trying to determine what Congress should do in reaction to the *Chadha*, decision. Shall we abandon the exercise of the legislative veto process? Should we modify it? Shall we adopt other substitutes, find some other ways to try to accomplish the same thing?

In other words, we are trying to find out from advice given by such learned people as you just what to do, what shall Congress do. Shall we just lie down and roll over as it were. Shall we look at various possibilities, such as those that you have suggested this afternoon?

On behalf of the committee, I warmly thank all of you for your very excellent contribution and I apologize again to you for your kindness, for missing what you say, but Ms. Bolling will remain here and hear you, and it will be carefully transcribed and I will get to read it later.

Thank you all very much. I appreciate your coming.

Ms. BOLLING. Our next panel is Ms. Mary Jane Norville, legislative representative, National Federation of Independent Business, and Richard Leighton, Esquire, representative for U.S. Chamber of Commerce.

STATEMENT OF MARY JANE NORVILLE, LEGISLATIVE REPRESENTATIVE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Ms. NORVILLE. Thank you. On behalf of the over 560,000 small and independent business owners who are members of NFIB, I am very pleased to be here to testify before this committee. I would like to commend the committee and the chairman for taking action on this issue as it is one which is of great importance to small business people.

We would urge that the full Congress follow the lead of the chairman and the committee in examining the issue, and not only examine, but take some action to really address the problems that we face in light of the *Chadha* decision.

Our members strongly support the enactment of a generic legislative veto and we believe that there are proposals which have been put forward which would satisfy the constitutional concerns raised by *Chadha* and which would give Congress the effective control and oversight, which is necessary, over the Federal agencies.

Let me make a couple of brief points:

One, the reason why legislative veto is so important to small business persons is that they do not have the resources—legal or financial—which others in the public sector have to fight regulations within the agencies. When a small business person faces a problem with a regulatory agency or a problem with regulations, they go to their Representatives in Congress. We feel that in order to fulfill their responsibility, the elected representatives must be able to take action on the small business person's behalf. Without legislative veto, yes, there are ways that Congress can control the

agencies, but we feel that the really strong check of legislative veto is necessary.

There have been many good points raised today. One which I think is most important is the need for Congress to simply write better laws. We agree with that. Congress should be more explicit in its delegation of authority, but that doesn't solve the whole problem. Sometimes it is difficult for Congress to be explicit due to technical reasons or political reasons involved in the various dilemmas that Congress and the Government as a whole face.

And second, even if Congress can be explicit in its delegation of authority in writing statutes, there needs to be a mechanism and a means by which Congress can assure that the agencies will definitely follow the intent that is set out in the statute.

We believe that legislative veto gives the agencies an incentive to work with Congress during the development of the regulation. Any good oversight committee is looking at how an agency is implementing the laws which are under its jurisdiction, and, therefore, they do not face this sort of end of the line look at the regulations with only 45 or 90 days—whatever timeframe is decided on—to decide if they like the regulation or not.

The likelihood is that they have been following the development of the regulation all along. And, with the check of the legislative veto at the end of the line, the agency has a great incentive to be sure that what they come out with is satisfactory to the Congress and does follow the statutory intent. We feel that this restores to Congress its proper control and authority over what is really lawmaking, what has the same force and effect as law.

The NFIB strongly supports the legislative veto proposal which has been put forward in H.R. 3939, introduced by Congressman Lott in the House and which has been introduced by Senator Grassey as an amendment to the regulatory reform bill in the Senate. Our reasons for supporting this particular proposal are set forth in my testimony, and I will not go into detail on that, but will be happy to answer questions.

Ms. BOLLING. Your statement will be placed in the record. Thank you Ms. Norville. I have no questions.

[Ms. Norville's prepared statement follows:]

STATEMENT OF

MARY JANE NORVILLE
LEGISLATIVE REPRESENTATIVE

NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Before: House Committee on Rules

Subject: Legislative Veto

Date: May 10, 1984

Mr. Chairman, NFIB, on behalf of its more than 560,000 small and independent business members, appreciates the opportunity to testify on the impact to the legislative process of the Supreme Court decision of INS v. Chadha. We commend you, Mr. Chairman, for holding such indepth hearings on legislative veto.

Mr. Chairman, the support for legislative veto has been widespread in the public at large, and particularly in the small business community. In September 1978, the NFIB asked its members, "Do you favor or oppose Congressional review of regulations?" Members' responses were 76% in favor, 21% opposed, and 3% undecided. As further evidence of that support, legislative veto was Recommendation No. 41 of the White House Conference on Small Business in 1980, and legislative veto was recommended by a thirty association task force on small business issues in January 1982. President Reagan indicated his support for legislative veto on October 8, 1980, in Youngstown, Ohio, during his campaign for the Presidency.

As we have stated in previous testimony, small business owners believe that a tool such as legislative veto provides an avenue for appeal which does not now exist. Large corporations with their teams of lawyers, statisticians, and computers are able to work

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directly with regulatory agencies or even go to court to challenge unfair or inequitable regulations. The small business owner can neither afford the time nor the resources, being overburdened with work and frequently understaffed. A small business owner cannot afford the legal expertise of an administrative lawyer who would be able to protect him from devastating regulatory mistakes. His only court of appeals is Congress.

The NFIB has supported legislation advocating the reform of regulatory procedures to give Congress the power to reject any rule or regulation that goes beyond the original intent of the law or is unduly burdensome. The establishment of a legislative veto mechanism provides a significant shift in the real power of government away from the bureaucracy and back to the elected Congress. Legislative veto makes it clear that, insofar as public policy and lawmaking are concerned, the agencies are the agents and creatures of Congress, not its masters or even its equals.

Too often in the past, agencies were given a free hand in determining what methods to use in implementing the laws passed by Congress. The NFIB believes very strongly that, just as Congress should not abrogate its legislative rights and responsibilities, neither should it dodge its responsibility to ensure that the intent of a law is carried out in the most effective and least burdensome manner possible.

With legislative veto, the small business owner could take his case directly to his senators or representative. Congress would be able to correct regulatory excesses and scrutinize both the regulatory process in general and an agency's parameters in particular. Thus, small business considers such legislative veto proposals to be among the simplest and most direct methods of introducing accountability to the federal regulatory structures and enhancing Congressional responsiveness to the public's demands for sensible government.

We can see why small business owners view the issue of legislative veto--giving Congress the final say over rules and

regulations promulgated by Federal agencies--as a way to return control over their business directly back to their elected representatives. Agency rules and regulations have the same force and effect as law, and yet, they are put in place by unelected officials who are in no way accountable to the public.

Legislative veto would not be used as a means by which Congress could interfere in the legitimate business of the Executive Branch. Congress could maintain control over what was the legitimate responsibility of the Congress--the making of the laws of this country. Legislative veto assures that the final responsibility and accountability for the actions taken under the delegated authority rests with the elected representatives of the people.

On June 23, 1983, the Supreme Court in INS v. Chadha declared unconstitutional a one-House legislative veto that Congress had reserved to itself to disapprove immigration decisions by the Attorney General. The Supreme Court's ruling was far reaching--it appeared to invalidate every form of legislative veto (one-House, two-House, and committee). The Chadha decision was reinforced on July 6, 1983, when the Court affirmed two lower court holdings that had struck down a two-House veto of a Federal Trade Commission regulation (Consumers Union, Inc. v. FTC) and a one-House veto directed against a Federal Energy Regulatory Commission rule (Consumer Energy Council of America v. FERC).[1]

Except for specific exceptions noted in the Constitution concerning impeachment cases, approval or disapproval of Presidential appointments, and the ratification of treaties negotiated by the President, the Supreme Court held in Chadha that the framers of the Constitution had "narrowly and precisely defined" that all legislative actions must be presented to the President before becoming law. Chief Justice Warren Burger stated in the majority opinion that Article I of the Constitution dictated that "every Order, Resolution, or Vote"--any legislative act--by Congress is subject to

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1 See Consumers Union Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982) (en banc), aff'd, 103 S. Ct. 3556 (1983) and Consumer Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982), aff'd, 103 S. Ct. 3556 (1983).

the President's approval. The Chadha decision explicitly extended that principle to legislative vetoes of federal rulemaking agencies, even though those agencies customarily issue their rules without the President's concurrence.

By denying Congress the use of the legislative veto mechanism, Justice Byron R. White argued that the Supreme Court presented Congress with an unhappy choice--

> either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specifics to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its lawmaking function to the executive branch and independent agencies. To choose the former, leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role.[2]

Justice Byron R. White's dissenting opinion in Chadha labeled legislative veto as "an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress' control over lawmaking."[3] With the legislative veto invalidated, Justice White astutely observed that the independent agencies have "become a veritable fourth branch of the Government, which has deranged our three-branch legal theories"[4] and are not subject to the direct control of either Congress or the Executive Branch.

At the heart of the issue of legislative veto of administrative rules and regulations is the question: Who makes the laws in this country--the elected representatives of the people or the unelected bureaucrats? During a two year period, Congress enacts approximately 500 laws, while the fourth branch of government--our bureaucrats--

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2 INS v. Chadha, No. 80-1832 slip op. at 2 (U.S. June 23, 1983 (White, J., dissenting).

3 Id. at 7.

4 Id. at 19-20.

issue about 10,000 regulations. Clearly, the unelected bureaucrats are running our lives and are unanswerable to us.

In view of Chadha, Congress must draft legislation more carefully and spell out its intent more clearly, but even if Congress is more precise in telling agencies what regulations to write and how these regulations should be structured, there remains the major challenge of ensuring that the regulations are written fairly and carefully. The Administrative Procedure Act (APA) has dictated agency practice for over three decades and has brought a modicum of consistency to the regulatory process. However, as the federal regulatory presence has become more pervasive, it is clear that the APA protections are no longer adequate to ensure that the regulatory process works smoothly and carefully.

Since the June 23 decision invalidating legislative veto, alternative legislative veto proposals have been the subject of considerable debate in Congress. The NFIB has endorsed the alternative approach introduced by Congressman Trent Lott in his bill, H.R. 3939, and by Senator Charles Grassley and a bipartisan majority of the Senate Judiciary Committee as amendment #2655 to the Regulatory Reform Bill, S. 1080. This approach would require that before taking effect, major regulations (those with an annual economic impact of 100 million or more) be affirmatively approved by Congress through the passage of a joint resolution. The joint resolution must pass both Houses of Congress and be signed by the President. Non-major resolutions could also be disapproved by Congress through the passage of a joint resolution.

The NFIB supports the use of a joint resolution of approval for major rules combined with the joint resolution of disapproval for non-major rules as the best alternative to legislative veto in view of Chadha. The approval/disapproval combination for major and non-major rules, according to Representative Elliott H. Levitas, one of Congress' most fervent defenders of legislative veto, will:

> provide for true veto control by the Congress in requiring affirmative action on the most significant regulations

> issued by the agencies, that is, rules with an economic impact of over $100 million per year; but this procedure would not unnecessarily burden the Congress or delay rulemaking which is more routine and less significant[5] (Emphasis added).

This legislative veto alternative would not overburden the Congress, as Congress would only be required to take action on the approximately fifty major rules issued in a year. By the time Congress acted on these rules, the approval would in many cases be a formality, because the approval requirement would serve as an incentive for the agencies to work more closely with Congress and committees of relevant jurisdiction in developing the regulation. The Lott/Grassley approach also contains expedited procedures to move resolutions of approval to the Floor within 45 days and to limit Floor debate to two hours. If a committee does not report the resolution, it is automatically discharged. This is to ensure that both Houses will have an opportunity to vote on whether or not to approve the proposed regulation and prevent it from simply being blocked by committee inaction.

The joint resolution of approval mechanism is considered by the Justice Department to be a constitutionally sound procedure. The effect, however, is the same as the one or two-House veto which Congress has enacted into over 200 statutes. If one House of Congress fails to pass a resolution of approval, the rule is effectively vetoed. But this is accomplished in a way which follows the procedural bounds of the Chadha decision.

The NFIB believes that it is important for major rules to be subject to the approval procedure. Such an approval process assures that Congress will act and have final say on the regulations which have an annual economic impact of $100 million or more. An alternative approach, the disapproval resolution, is, by itself, not strong enough. Only through the approval mechanism can Congress have the tight control necessary over major regulations, and only under the approval approach is Congress assured of having the final say over whether or not a rule or regulation takes effect.

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5 U.S. Congress, House, Committee on Rules, 98th Cong., 1st Sess., Testimony of Rep. Levitas, Nov. 10, 1983, p. 9.

Even if the Congress does successfully pass a resolution of disapproval, the executive agency still has the odds in its favor, since the president can veto the resolution and force Congress to muster a two-thirds vote to sustain its disapproval in order to be successful in halting a rule. The potential need for overriding a presidential veto tilts the balance of control in favor of the Executive Branch, which has the responsibility of presenting the rule. The joint resolution of disapproval provides some measure of control; the NFIB believes that more control is needed for more significant major regulations, and the approval mechanism clearly returns the control and accountability for major regulations back to the Congress where it belongs.

With regard to omnibus regulatory reform legislation, the NFIB does not concur with those who think that Executive Order 12291 is sufficient in and of itself.[6] There is no guarantee that an Administration will set as its priority regulatory reform. Many of the provisions of the various regulatory reforms bills, H.R. 220, H.R. 3939 and S. 1080, including the role of OMB oversight, stringent cost benefit analysis guidelines, regulatory impact analyses, regulatory review prior to approval of a final major rule, and regulatory agendas also appear in some form in Executive Order 12291. Independent regulatory agencies are exempted from the Order, but they were asked to comply on a voluntary basis. Enactment of omnibus regulatory reform legislation would extend provisions of Executive Order 12291 to cover all agencies. This legislation, coupled with a strong, effective, constitutional legislative veto mechanism could give the Congress and the people they represent true control over the agencies.

The NFIB is testifying today because we feel that legislative veto is a congressional check on the regulatory process and would restore to Congress its legitimate oversight and review role. The alternative legislative veto proposals combine a "report and wait" provision, the approval/disapproval mechanism, and the expedited procedures provisions to restore "lawmaking" authority totally to

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6 Exec. Order No. 12291, 45 Fed. Reg. 13193 (1981).

the Congress. Expedited procedures for both discharge from committees of jurisdiction and for Floor consideration would keep the congressional review system from bogging down.

NFIB believes it is important for Congress to act expeditiously on the proposed legislative veto alternatives. The control offered by the legislative veto is vital to the small business owners represented by NFIB. Legislative veto gives them needed recourse through their elected representatives against burdensome and unfair government regulation.

Ms. BOLLING. Mr. Leighton.

STATEMENT OF RICHARD J. LEIGHTON, ESQ., REPRESENTATIVE FOR THE U.S. CHAMBER OF COMMERCE

Mr. LEIGHTON. The chamber of commerce also thanks you very much for the opportunity to present its views on a very important subject. Just so the record is clear, is my statement going to be in in full?

Ms. BOLLING. Yes, it will be included in the record in full.

Mr. LEIGHTON. We have attempted in that statement to answer all of the questions that the chairman pointed out at the beginning of the session. Let me make a couple of points. There is an advantage I suppose to being the wrapup witness. I can incorporate by reference, and I do, all the points, the great arguments that are in support of the points that I make in my statement without having to enumerate them.

There are three or four things I would like to emphasize. First, there is going to be no quick, single fix to the problem created by the *Chadha* decision. We think that there has to be a multifaceted response to that. It is not only a legislative responsibility, we think it has to be an executive responsibility as well.

The statement that we have submitted suggests several things to do. I think the priority ought to be at this point reviewing the various statutes that do have legislative veto provisions in them and determining as best you can whether or not there is a severability problem. I would urge the chairman not to wait for the courts to decide this. I think it is something that Congress can do at least on a preliminary basis right now. You can determine where there are likely to be problems and you can avoid those problems legislatively before they may come up.

Second, don't tie the response on legislative veto to the somewhat different issue of regulatory reform. Part of the problems that you will have difficulty addressing will be caused by inadequate procedural requirements under the outdated Administrative Procedure Act. In some of the provisions in some of the regulatory reform bills, you see attempts to tie the highly controversial legislative

veto vehicles, to them. We would like to see them kept separate, as you appear to be doing here, and let the Admininstrative Procedure Act reforms go their own way, and the legislative veto response go its own way. They are parallel but not necessary overlapping.

Maybe last, I would urge that you be a little more positive in your outlook on this. We, the chamber of commerce, have been long time legislative veto supporters. But in looking at that decision again, I wouldn't hold my breath to see any major change by the Supreme Court in its approach to that decision.

What I would suggest is that you look at the opportunities, or at least view the problem as creating some opportunities, such as sharpening the process of preventing poor regulation. We heard many remarks on that point. Good, clear delegation is the key. We all know that delegation can be better. We might as well start right now. In fact, as you review some of the legislative veto statutes, you may want to look at them for organic revision.

Better communication, too. Not only among legislators and executive branch people, but staff to staff—it is very important to have continuing dialog between legislative and executive staffs. Very often it prevents problems that once they arise, need some sort of extraordinary remedy like legislative veto.

Amending organic statutes would be next along the line. When you get to the situation where there is a legislative veto, this signals that major mistakes already have been made.

There are two or three different types of legislative veto being proposed. Each may have its place. Veto by congressional disapproval might be reserved for relatively routine or minor matters. Veto by full approval should apply to more serious matters. This amounts to nothing but ratification. I think if you viewed *Chadha* a little bit more positively, you might find that there is an opportunity, now that everybody's attention is fixed, to do some work that should have been done years ago.

[Mr. Leighton's prepared statement follows:]

STATEMENT
on
THE IMPACT OF INS v. CHADHA
ON THE ADMINISTRATIVE PROCESS

before the
COMMITTEE ON RULES
of the
HOUSE OF REPRESENTATIVES
for the
CHAMBER OF COMMERCE OF THE UNITED STATES

by
Richard J. Leighton
May 10, 1984

I am Richard J. Leighton of the law firm of Leighton, Lemov, Jacobs and Buckley, Washington, D.C. I am also a voting member of the Administrative Conference of the United States, a member of the Administrative Law Section and the Business Law Section of the American Bar Association. I am appearing on behalf of the Chamber of Commerce of the United States, where I serve as Chairman of the Council on Administrative Law. The Council is composed of administrative law experts from the worlds of business, academia and the legal profession. It recommends regulatory and administrative law policies to the Government and Regulatory Affairs Committee which, in turn, makes recommendations to the Chamber's Board of Directors.

On behalf of the U.S. Chamber, which is composed of over 200,000 firms and companies, I wish to renew our support for the Congressional review concept.

KEEPING CHADHA IN PERSPECTIVE

As a preliminary matter, we are pleased to see that you are treating the Congressional response to the legislative veto decision as a discrete matter.[1/] This is a complex and controversial subject that should not be tied to other regulatory reform proposals whose chance of being enacted would be considerable lessened by additional complexity or controversy.

Chadha is not the end of the world; its significance must be kept in perspective. The decision applies only to one type of Congressional review over the use of its delegated powers. The essence of the Congressional veto concept was an intent to keep federal regulators politically accountable to those who are elected by American voters. The Chamber very much endorses this concept and believes that Congress still has a wide variety of effective alternatives by which it can keep federal agencies in line.[2/]

1/ Immigration and Naturalization Service v. Chadha, 103 S. Ct. 2764 (1983); see also the directly related cases, Process Gas Consumers Group v. Consumers Energy Council of America, Consumers Union of the United States, Inc. v. Federal Trade Commission, sub. nom. U.S. Senate v. Federal Trade Commission and U.S. House of Representatives v. Federal Trade Commission, 103 S. Ct. (1983)

2/ In this statement, "federal agency" includes all levels of organization, from Department down to "Office to so-called independent agencies.

It is likely there is no single "quick fix" that should be chosen to replace the hundreds of Congressional veto provisions that apparently were rendered unconstitutional by Chadha. You may choose not to replace some of these violative provisions with anything. You may choose to replace others with review alternatives that differ from statute to statute. You may choose to withdraw completely some delegated powers. You even may have to reenact some statutes, if the violative Congressional veto provision is not capable of being severed. Identifying these fully unconstitutional statutes - or making sure that there are no such laws - would appear to be a candidate for a high research priority.

In any case, it appears most unlikely that any federal agency will run amok or try to take advantage of the situation while you identify and evaluate your options.

THE NEED FOR CLEAR STATUTORY GUIDANCE, LESS DELEGATION

The specific problem that the Congressional veto was designed to correct is administrative agency abuse of delegated legislative power, resulting in a national policy that is contrary to what the elected Congress would have enacted [illegible] original action. Sometimes, however, Congress may be part of that p[illegible]em.

As the issues get more complex and the consequences of regulation get more serious, the difference lessens between delegation of power and abdication of power. Sweeping grants of power without clear legislative guidelines to federal agencies eventually will produce eccentric national policy that many in Congress will want to change.

Congress anticipated this in some situations, and placed Congressional veto provisions within statutes with broad delegations of power. When reviewing these statutes in light of Chadha, consideration ought to be given to providing more Congressional guidance on how to formulate national policy under the authority of these laws.

For example, one of the perennial problem agencies is the Federal Trade Commission (FTC), especially with regard to its industry-wide rulemaking power that was delegated to protect against violations of Section 5 of the Federal Trade Commission Act. Whether it is because of alleged over-regulation of used car sales, funeral home services or television commercials seen by children, or even under-regulation in other areas, the FTC has been a recurring source of controversy here on Capitol Hill. Yet, it is generally viewed as your agency.

It is Congress that gave the FTC its Section 5 power in these broad terms: "unfair or deceptive acts or practices in or affecting commerce are hereby declared unlawful." That is basically all that you told the Commission. The legislative history is not particularly helpful. You have left it up to the FTC (and the courts) to define what is unfair or deceptive,

and you have given the Commission the most formidable regulatory powers with which to enforce its decision. A majority of the Commission now suggests that Congress should enact a meaningful definition of these key terms, so that the agency will know what Congress intends.

With regard to proposed legislation, perhaps Chadha will provoke a new interest in old solutions to the recognized problem of loosely delegated Congressional power. For example, the American Bar Association has kept active for more than 10 years a resolution on this subject. It calls for the creation of a Congressional unit to review proposed legislation to assure that it adequately sets forth legislative policies and standards for the proper exercise of the powers delegated. It also calls for the use of a Presidentially-designated unit in the Justice Department to give you a report from the viewpoint of the intended delegate.

THE NEED FOR EXECUTIVE BRANCH OVERSIGHT

The President is doubly qualified to play an important role in the formulation of standards, such as Executive Order 12291, by which delegated regulatory power should be implemented. The President is politically accountable to the entire nation. This gives him a mandate that is particularly suitable to coordinating the execution of national regulatory policy, the very thing that was to be the subject of many Congressional vetos.

In addition, the President's constitutional position as Chief Executive of the agencies to which power has been delegated subsumes a power to try to make these laws work and prevent inconsistent implementation among agencies. It is axiomatic: The less guidance that Congress gives regulatory agencies on how to achieve national policy with delegated power, the more need there is for someone - i.e., the President - to do so. The more timid Congress is in determining and asserting its own wishes, the stronger the President must be, if he is to execute the laws.

With regard to national regulatory policy, the Constitution fairly well calls for Congress to be the architect and the President to be the general contractor. If an architect refuses to give his general contractor blueprints, and instead relies on broad commands - "build me a large building that keeps out the cold and is compatible with all my other buildings" - the architect should not be heard to complain about the construction and maintenance methods. This is especially so if the contractor, in turn, defines how large "large" is and uses his own definition to prevent the building from becoming larger than "needed."

IMPORTANT CHARACTERISTICS OF INDEPENDENT AGENCIES, RULEMAKING AND ADJUDICATIONS

The Chadha decision may raise again the question of the proper status of the so-called independent regulatory agencies. This is not the time to discuss the seminal constitutional questions on this subject. However, it is

proper to notice here that the importance of independent agency accountability to Congress and coordination with the Executive Branch is heightened if these agencies are not to be accountable to the President.

Chadha may herald the need for more informal communication between the independent agencies and the White House and between all regulatory bodies and appropriate committees of Congress. For example, increased circulation of various agency regulatory proposals for review and possibly comment at appropriate stages of a rulemaking proceeding might be in order. With regard to informal (notice and comment) rulemaking, there should be no problem with members or committees of Congress having a chance to signal agencies on policy, especially if the agencies use advance notices of proposed rulemaking. This may not be so simple, however, when it comes to other types of agency decisionmaking.

With regard to formal rulemaking, where an agency's decision is required to be made on the basis of evidence and information in a record, steps must be taken to avoid violating existing ex parte requirements. As always, safeguards also must be followed to avoid violating separation of powers principles, as well. We cannot have Congress implementing its own laws.

Chadha involved an agency adjudication, an area much more sensitive than rulemaking. The chief reason for this is the risk of invading not only the domain of the Executive, but the domain of the Judiciary. Not only that, individual rights characteristically are more vulnerable in adjudications.

If we follow the Administrative Procedure Act and consider rulemaking to include ratemaking and generally to be prospective action of wide applicability, this is the area that we would think Congress would show the most interest in maintaining and increasing its review powers. Rulemaking by the so-called independent agencies which are not accountable to the President would thus seem to be of particular interest, if you agree with our viewpoint that political accountability is important. Federal Agency adjudications generally tend to be retrospective in nature (except licensing) and of specific applicability. We would urge cautious, area-by-area consideration with respect to increasing Congressional intervention in this area.

We would also urge caution with regard to any Congressional review proposal that might involve private circulations of agency, or agency staff, draft proposals for regulations or enforcement actions. This not only raises traditional separation of powers and ex parte questions, it likely will raise questions of basic fairness. People having greater access to key members of Congress would at least appear to be at an advantage in such a situation.

OTHER APPROACHES

Chadha makes clear that the legislative power can be used to curtail agency regulation-making, either by cutting back on the powers delegated or by

use of a true legislative (as opposed to Congressional) veto through the enactment of a law.

The most frequent vehicle now being discussed to accomplish these purposes is the joint resolution, either for approval or disapproval. We emphasize, however, that this is only one of the possible responses to ill-advised regulation that might be appropriate in a given situation. As usual, there are trade-offs associated with every type of response.

Delay is a universal concern with respect to legislative responses to agency regulation. Most of the proposals that we have seen involve expediting Congressional procedures to assure timely legislative action on a pending regulatory matter. What this might do to your other floor priorities is best known to you. We understand that you are thinking of having separate hearings on the effects of these proposals on House operations.

However, it is clear that the presence of any Congressional review mechanism will slow down all affected agencies, especially those that have not been careful and rational in their regulatory actions. On balance, we believe that this is good.

In other cases, especially where the effects of agency decisions could be considered to have major national consequences, Congress could make proceedings subject to enactment of a joint resolution of approval.

With respect to agency decisionmaking where timeliness is considered especially important, or where the effects of regulation might not appear to be of major consequence, a resolution of disapproval might be preferable. That is, such particular agencies or proceedings would be made subject to a requirement that the action in question would not become final or effective for a given period of time during which a joint resolution of disapproval could be enacted. If a resolution is not enacted within that period, the agency action becomes final, subject to judicial review, of course. The Chamber suggests close consideration of the concept.

With respect to either approach, experience teaches that, as regulatory action increases, Congressional attention also will have to increase. The wider the scope of proceedings subject to this type of review, the more you will be urged to vote one way or another or to act or not to act. One legitimate issue is how much additional work can Congress reasonably be expected to perform. That is why the Chamber asks you to keep in mind that you may very well find areas in which it is more appropriate to withdraw delegations of regulatory power rather than monitor and react to an agency's use of the power.

Another question that must be considered is the effect of a joint resolution of approval approach on the balance of power over independent agencies. Without a joint resolution of approval requirement, the President does not have veto power over the regulatory decisions of these agencies.

With respect to either type of joint resolution, but especially a resolution of approval, it is likely that judicial review will be affected, even if the enacting legislation states that judicial reviews are not to be affected. It is hard to imagine a court overturning a decision that has been ratified by both houses of Congress and the President. That is a law, and any procedural irregularities that took place during the administrative process likely will be considered as having been absolved during, or rendered unreviewable by, the legislative process. Also, the mere fact that an attempt was made to enact a joint resolution of disapproval, but failed, would appear to be one of those factors with a potential for affecting a court's judgment, whether or not there was language in the enabling statute that said such factors should be considered.

It should be noted that conditions in any enabling legislation that will set up a Congressional review mechanism likely could not be binding on subsequent Congresses. We have seen proposed provisions prohibiting using a joint resolution to add amendments to a regulatory decision, or prohibiting the issuance of legislative intent language of use to a court. These would not appear sufficient to prevent a Member of Congress or a committee from fashioning any joint resolution they see fit, or even seeking special changes in the procedures by which a particular resolution would be considered.

CONCLUSION

This is an important and complex inquiry that the Rules Committee is making. It goes to the very heart of the Legislative, Executive and Judicial functions. We appreciate the opportunity to give our views and we offer our assistance if we might be of further help.

Thank you.

Ms. BOLLING. Very good, thank you very much.

I believe that the chairman will leave the record open to add additional statements to it.

I think that specifically we will put in the record right now the statement of Congressman Jim Moody, who was going to testify but unfortunately his father died yesterday.

[The statement of Hon. Jim Moody of Wisconsin follows:]

JIM MOODY
8TH DISTRICT
WISCONSIN

COMMITTEES
PUBLIC WORKS AND
TRANSPORTATION

INTERIOR AND INSULAR
AFFAIRS

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TESTIMONY OF CONGRESSMAN JIM MOODY
THE WISCONSIN MODEL OF A LEGISLATIVE VETO
BEFORE THE RULES COMMITTEE

May 10, 1984

Mr. Chairman, I would like to begin by thanking you for the opportunity to come before you and the other members of the Committee to present a legislative veto plan that has worked well in Wisconsin and could potentially be adapted for use at the federal level. It is a tribute to your determination that these hearings are being held despite so many other issues pending before Congress.

As you know, state governments have long been laboratories of experimentation in government. I believe strongly that the Wisconsin oversight system is both constitutional and extremely effective. The Wisconsin Legislature's Joint Committee for Review of Administrative Rules (JCRAR) has considered nearly as many types of solutions over the years as has the U.S. Congress, and has developed the following model for the review of administrative rules and regulations. Just as at the state level, the impact a federal agency can have on the implementation of public policy can be pervasive, and its rulemaking warrants careful scrutiny.

The Wisconsin system is constitutional because it involves the full legislative process and the executive branch as part of the review process. First, the legislature passes a bill which delegates rulemaking authority to an agency. The Governor signs the bill into law and it becomes effective. The agency develops and promulgates the rules and holds public hearings (required under the state Administrative Procedures Act). Upon completion of that procedure, the agency sends the rules in final draft form to the presiding officer of <u>each</u> house, who has seven working days to refer them to an appropriate standing committee.

The standing committee then has thirty days to look at the rule and make a decision or whether or not it wants to hold a hearing and an additional thirty days in which to hold the hearing, for a maximum elapsed time of sixty days. On the basis of the public hearing, it can vote whether or not to object to the rule.

I stress the word "object." Wisconsin does not have a suspension power for standing committees. Instead, they have the ability to object to portions of the rule in whole or in part. That objection then triggers a response from the agency, which can either work with the committee or maintain its position. If the agency works out modifications of the rule, so that the committees in both houses would agree to the modifications, the rule can then take effect. If the objection remains because no modifications have been made by the agency, the JCRAR is required within another thirty days to hold a public hearing on the rule and either sustain the objection or overturn it.

Should the committee overturn the objection, the rule can then take effect. However, if the JCRAR sustains the objection of the standing committee, the JCRAR must introduce a bill immediately which either rewrites that section of the law or negates the rule in some way, in order to accomplish the original legislative purpose. The bill is then fast-tracked. That means it has to be scheduled within forty days of its introduction in

the Assembly or the Senate. This guarantees that it cannot be pigeonholed by any committee chairman.

The key here is that the burden of proving that the proposal is faulty is upon the legislature, not the agency which is basically responding to a delegation from the legislature. If the bill fails in either house of the legislature, the objection is deemed to have been adversely disposed of, and the rule can take effect. The legislature must pass a bill to uphold its objection and send it to the Executive for signature or veto.

The JCRAR also has what is called "suspension power." That is, it can temporarily suspend the effect of a rule during which time the same fast-tracking of a bill must take place. The whole legislature must make a decision with the Executive to either sign or veto a bill. The committee system (using only full committees in order to avoid too much delay) is used to create and trigger the process in which both houses and the Executive review the rules or, if necessary, change the statute to accomplish the original legislative intent.

I believe that if this system, or one substantially similar to it, is put into effect, it will be able to pass Constitutional muster. Congress will be able to maintain some control over the bureaucracy in the making of public policy to reflect the original legislative intent. If the fast-tracking and objection processes are used, rather than the full-blown veto process, both houses and the President will be involved in the solution. In a recent challenge to their state legislative veto procedure, the Supreme Court of New Hampshire cited the Wisconsin system as being constitutional.

Once again, Mr. Chairman, I thank you and the members of this committee for giving me the opportunity to present this idea, and would urge you to take it into serious consideration along with the other proposals presently before you.

Ms. BOLLING. The statement of Richard B. Smith representing the American Bar Association, all the articles that Professor Gilmour and Barbara Hinkson Craig suggested, and some articles by Prof. Peter Strauss, as well as Bruce Comly French's article on *Chadha* effect to the District of Columbia. These we will add right away.

[The statement and amicus curiae brief submitted by the American Bar Association, and a statement by Bruce Comly French, follows:]

American Bar Association

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May 10, 1984

Honorable Claude Pepper
Chairman
Committee on Rules
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I regret to inform you that, due to a last minute conflict, Richard B. Smith will be unable to testify at this afternoon's hearings before your Committee on various proposals concerning the legislative veto. Mr. Smith has requested that this letter, and a copy of his prepared statement which will be submitted under separate cover, both be included in the formal record of these important hearings.

As you may know, the American Bar Association, as part of its support for legislation to improve the federal regulatory process, has consistently opposed legislation which would authorize one or both houses of Congress to approve or to disapprove regulatory action proposed to be taken by Executive departments or independent agencies. Our position was perhaps most clearly enunciated in the American Bar Association's amicus curiae brief submitted to the U.S. Supreme Court for its consideration in the case of INS v. Chadha, a copy of which I enclose.

Chief Justice Burger's decision for the Court in Chadha struck down the validity of the legislative veto in clear terms. However, the sweeping nature of that opinion has left unanswered many of the questions which have been aired before your Committee including, inter alia, the severability of legislative veto provisions in current law where Congress has not specifically indicated its intent that such provisions not be severable. This point was highlighted by yesterday's decision by a judge of the D.C. Superior Court concerning the validity of criminal laws enacted by the D.C. City Council where those laws are subject to a veto by one house of Congress. This is but one example of similar questions which undoubtedly will continue to be raised before various courts.

Following the Chadha decision the American Bar Association has been concerned that the initial response by Congress too quickly presumed the necessity of legislative action as opposed to congressional reflection. Since the Court's opinion nearly a year ago Congress has continued to enact laws which contained one- or two-house legislative vetos which, on their face, are unconstitutional! Additionally, proposals have been strenuously advocated both before your Committee and other committees of Congress to subject all major rules (e.g. those with an economic impact of $100 million) to a joint resolution of approval and to subject all other proposed regulations to a joint resolution of disapproval. While the use of a joint resolution overcomes the constitutional impediments of the presentment clause and of bicameralism relied upon in the Chadha case, its constitutional validity is nevertheless unclear on different grounds.

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Wholly apart from the question of whether various proposals are in fact constitutional, the underlying issues remain of what is sound government policy and what are the appropriate roles of the Legislative and Executive Branches. If Congress were to adopt a broad statute requiring all Executive Branch and independent agencies to receive, by a joint resolution of approval, authorization to regulate in the manner in which Congress had directed that agency to regulate, Congress might save itself and the general public a lot of time and money simply by abolishing those regulatory functions. This appears, of course, neither feasible nor wise, for it is Congress -- and not the often blamed "unelected, faceless bureaucrats" -- which has directed federal agencies to regulate in a certain manner.

Furthermore, an important element under successive executive orders issued by Presidents Ford, Carter and now Reagan requiring Executive Branch agencies to undertake an analysis of proposed major regulations, would seem a useless endeavor if Congress subsequently required that regulation, already extensively analyzed, to be subjected to a vote of approval in Congress. The ABA along has supported the need to statutorily establish such a regulatory analysis for all major rules, and it is precisely the usefulness of that analysis which obviates any conceivable need for a congressional resolution of approval of proposed major rule.

On behalf of the American Bar Association, I commend your continuing, thoughtful inquiry into the ramifications raised by the Supreme Court's Chadha decision and the various pending proposals in Congress concerning the legislative veto. We look forward to continuing to work with you on this issue of fundamental importance to the relationship between the Legislative and Executive Branches.

Most cordially,

Craig H. Baab

CHB:dc-m
Enclosures

cc: Richard B. Smith, Esq.

Nos. 80-1832, 80-2170, 80-2171

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

IMMIGRATION AND NATURALIZATION SERVICE,
Appellant,

—v.—

JAGDISH RAI CHADHA, *et al.*,
Appellees.

UNITED STATES HOUSE OF REPRESENTATIVES,
Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE, *et al.*,
Respondents.

UNITED STATES SENATE,
Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE, *et al.*,
Respondents.

ON APPEAL FROM AND WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Motion For Leave To File And BRIEF OF AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*

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ON APPEAL FROM AND WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*

The American Bar Association (the "ABA" or the "Association") respectfully moves pursuant to Rule 36.3 of the Rules of this Court for leave to file the annexed brief as *amicus curiae* in support of the position that nullification by one or both houses of Congress of action taken by the Executive in execution of a statute is unconstitutional. Counsel for petitioner United States Senate, appellant and respondent United States of America, and appellee and respondent Jagdish Rai Chadha have consented to the filing of this brief. The consent of counsel for petitioner United States House of Representatives was requested but refused.

This case presents to the Court for the first time the question of the constitutionality of a "legislative veto". *Cf. Buckley v. Valeo,* 424 U.S. 1, 140 n.176 (1976). *See also Clark v. Valeo,* 559 F.2d 642, 647 (D.C. Cir.), *aff'd mem. sub nom. Clark v. Kimmitt,* 431 U.S. 950 (1977). To date, Congress has enacted hundreds of veto provisions, most of them during the last decade. A number of these apply to rulemaking by administrative agencies. Bills are being actively considered by Congress which would apply a legislative veto across the board to all administrative rulemaking.

The American Bar Association, a national organization of lawyers, has a special interest in this matter—not only because of its charter to "uphold and defend the Constitution and maintain representative government" but also because the legislative veto, particularly in its increasingly frequent application to rulemaking subject the Administrative Procedure Act (the "APA"), directly affects the practice of its members before federal administrative agencies. The ABA was actively involved in drafting, and prompting congressional consideration of, the legislation that was ultimately enacted as the APA in 1946. Through one of its standing sections, the Section of Administrative Law, the Association monitors the effectiveness of the APA and has suggested numerous amendments to the act in the interest of improving the administrative process. In 1975 the ABA established a special Commission on Law and the Economy, composed of lawyers and economists and chaired by

John J. McCloy,* to study the impact of governmental regulation upon the national economy. The Commission's conclusions were adopted by the Association's House of Delegates, and its final report was issued in 1979.

One of the important conclusions reached in the Commission's report was that general use of the legislative veto poses a serious threat to effective regulatory administration and fundamental constitutional principles. *See* ABA Commission on Law and the Economy, *Federal Regulation: Roads to Reform* 88-91 (1979). Representatives of the Association have testified before Congress in opposition to bills proposing to establish an across-the-board legislative veto.

The basis of the Court's decision in this case will be of great importance in guiding Congress and the Executive Branch concerning future use of the legislative veto. Even if respondent Chadha chooses to address those constitutional defects of the device that extend beyond its use in agency adjudication of the sort immediately involved, the Court will be assisted, the ABA believes, by the broad perspective, based upon years of study and experience in all aspects of the administrative process, which this *amicus* can provide. While that study and experience are no doubt matched by the Executive, the Solicitor General may not choose to make all the available arguments; he may not point out, for example, that a vice of the legislative veto sometimes consists not in a reduction but rather in an augmentation of executive power.

The ABA believes that the attached brief will be of assistance to the Court in its consideration of the constitutional

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* The other members of the Commission were Richard B. Smith, Vice Chairman; Elliot Bredhoff, William T. Coleman, Jr., Lloyd N. Cutler, Harry T. Edwards, Henry J. Friendly, F. Mark Garlinghouse, C. David Ginsburg, Rhoda H. Karpatkin, Charles Kirbo, William T. Lifland, Paul MacAvoy, John R. Meyer, Ira Millstein, Roswell B. Perkins, H. Chapman Rose, Sherwin P. Simmons, Albert T. Sommers, Michael Sovern, Edmund A. Stephan, Thomas B. Stoel, Jr., Randolph W. Thrower, Phyllis A. Wallace, Francis M. Wheat, and Richard E. Wiley.

issues raised and therefore requests leave to file the annexed brief as *amicus curiae.*

Dated: January 8, 1982

Respectfully submitted,

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IN THE

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ON APPEAL FROM AND WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*

The American Bar Association respectfully submits this brief as *amicus curiae* in support of the position that nullification by one or both houses of Congress of actions taken by the Executive in execution of a statute is unconstitutional.

Interest of Amicus Curiae

The interest of the American Bar Association (the "ABA" or the "Association") is set forth in the preceding Motion for Leave to File this brief.

Introduction

Petitioners have sought to portray this case as involving a unique and distinctive statutory provision which, while falling within a general class called "legislative veto", can only be assessed individually in light of its own peculiar history and purpose. Such an approach, which would eschew any generally applicable basis of decision, ignores the compelling need for guidance by this Court. It would effectively condemn the administrative process to continued impairment by the legislative veto into the indefinite future.

Hundreds of legislative veto provisions have been enacted, most within the last decade. These include one-house vetoes,[1] two-house vetoes,[2] so-called one-and-one-half-house vetoes,[3] what might be called reverse vetoes (*i.e.*, requirements for concurrent resolutions of *approval* before agency action becomes effective),[4] two-house vetoes by two-thirds vote,[5] even

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1 *See, e.g.*, Federal Election Campaign Act Amendments of 1974, § 209(c), 88 Stat. 1287, 2 U.S.C. § 438(c) (1974).

2 *See, e.g.*, Federal Trade Commission Improvements Act of 1980, § 21, 94 Stat. 374, 15 U.S.C. § 57a-1 (1980).

3 *See, e.g.*, Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1207(a), 95 Stat. 718 (1981) (veto by one house invalidates executive action unless other house affirmatively approves).

4 *See, e.g.*, Export-Import Bank Amendments of 1974, § 8, 88 Stat. 2336, 12 U.S.C. § 635e(b) (1975).

5 *See, e.g.*, Trade Agreements Extension Act of 1958, Pub. L. No. 85-686, § 6, 72 Stat. 676 (1958), reduced to a simple majority of each house by Trade Expansion Act of 1962, § 351(a) (2) (B), 76 Stat. 899, 19 U.S.C. § 1981(a) (2) (B) (1962).

vetoes that alternate from one house to the other[6] or change from one-house to two-house[7] depending on the nature of the issue involved.

As to triggering mechanisms, Congress has enacted veto provisions activated automatically whenever the Executive takes certain action,[8] veto provisions triggered only by disagreement regarding the action between the President and an independent agency,[9] or between the President and one of his subordinates,[10] veto provisions activated by congressional committee disapproval,[11] and even negative veto provisions (requirement of resolution of approval) triggered by congressional committee disapproval.[12]

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6 *See, e.g.*, Federal Election Campaign Act Amendments of 1974, § 209(c), 88 Stat. 1287, 2 U.S.C. § 438(c) (1974).

7 *Compare, e.g.*, District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, § 602(c) (1), 87 Stat. 814 (1973) (certain District actions subject to disapproval by both houses acting concurrently), *with id.* at § 602(c) (2) (other District actions subject to disapproval by either house acting alone).

8 See, for example, the legislative veto at issue in the present case.

9 *See, e.g.*, Trade Agreements Extension Act of 1958, Pub. L. No. 85-686, § 6, 72 Stat. 676 (1958). According to the Senate Committee report, "[t]he committee did . . . agree that Congress might well be the adjudicator when the President differs with the Tariff Commission, especially since the original constitutional responsibility and jurisdiction is vested in the Congress." S. Rep. No. 1838, 85th Cong., 2d Sess. 4 (1958).

10 *See, e.g.*, Department of Defense Appropriation Authorization Act of 1975, § 709(c), 88 Stat. 408, 50 U.S.C. app. § 2403-1(c) (1975) (President may approve export application, despite Secretary of Defense's contrary recommendation, unless Congress adopts concurrent resolution of disapproval).

11 *See, e.g.*, Department of Defense Reorganization Act of 1958, Pub. L. No. 85-599, § 3, 72 Stat. 514 (1958).

12 *See, e.g.*, Colorado River Basin Salinity Control Act, § 208(a), 88 Stat. 274, 43 U.S.C. § 1598(a) (1974).

As to subject matter, some legislative veto provisions affect the very content of legislation, by permitting the President to amend it (absent legislative veto),[13] by eliminating entirely the powers that it confers,[14] by eliminating the powers that it confers on a selective[15] or section-by-section basis,[16] or even by altering (as opposed to merely eliminating) statutory provisions.[17] Those more numerous legislative veto provisions that seek to affect executive application of the law rather than the law itself may apply to the exercise of delegated authority that is merely permissive,[18] or delegated authority that is mandatory,[19] or authority that is not delegated at all but is part of the President's inherent Article II powers (although controllable to some degree by Congress).[20]

As to those whose actions are subject to legislative vetoes, they range from the President, to the President's subordinates, to the heads of independent agencies, to federally chartered corporations, and even to this Court itself (*see* page 20 *infra*).

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13 *See, e.g.*, Act of June 30, 1932, ch. 314, § 407, 47 Stat. 414 (1932).

14 *See, e.g.*, Act to Promote the Defense of the United States, ch. 11, 55 Stat. 32 (1941).

15 *See, e.g.*, Mutual Defense Assistance Act of 1949, ch. 626, § 405(d), 63 Stat. 718 (1949).

16 *See, e.g.*, The Defense Production Act of 1950, ch. 932, § 716(c) (2), 64 Stat. 822 (1950).

17 *See, e.g.*, Universal Military Training and Service Act, Pub. L. No. 82-51, § 1(j), 65 Stat. 80 (1951).

18 See, for example, the authority at issue in the present case, which may be exercised by the Attorney General "in his discretion". Immigration and Nationality Act, § 244(a), 66 Stat. 216, 8 U.S.C. § 1254(a) (1952).

19 *See, e.g.*, Presidential Recordings and Materials Preservation Act, § 104, 88 Stat. 1696, 44 U.S.C. § 2107 note (1974).

20 *See, e.g.*, War Powers Resolution, § 5(b), 87 Stat. 556, 50 U.S.C. § 1544(b) (1973).

In urging the Court to regard this case as presenting an individualized determination, petitioners are in effect suggesting that this proliferating collection of legislative veto provisions be inspected and classified one by one, even though only one (Section 244(c)) has been brought to the bar of this Court in the 49 years since enactment of the first such provision. The volume of enacted legislative veto provisions and the increasing exercise of them are a sufficient circumstance for urging the Court's resolution of the underlying issues in this case. It is the ABA's position that the constitutional infirmities of Section 244(c) are neither created by, nor can be validated by, its own peculiar history and purpose, but rather arise from the generic invalidity of the legislative veto device. A decision which recognizes this invalidity can prevent continued harm to our constitutional system in general and our system of administrative law in particular. By correcting Congress's misapprehensions,[21] the Court can eliminate the necessity for the Executive to make, statute by statute, the governmentally disruptive choice of either observing the veto or appearing to disregard the law.

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21 The absence of any decision by this Court that the legislative veto is unconstitutional has been argued in Congress to be an indication that the legislative veto is constitutional. *See, e.g.*, S. Rep. No. 96-184, 96th Cong., 1st Sess. 18 (1979) (additional views of Senators Schmitt and Goldwater):

> . . ."It is clear, however, that if [the legislative veto] were unconstitutional, we would surely know it by now: since 1932, Congress has enacted over 295 provisions of law with legislative review or veto powers. On those occasions where the veto has been challenged in court, it has not been ruled unconstitutional."

Summary of Argument

As shown in the Introduction, there is compelling need for guidance by the Court in this field. Congress has enacted literally hundreds of legislative veto provisions without authoritative determination of their validity. A decision that appropriately sets forth a clear, generally applicable principle to determine the validity of this form of congressional action can eliminate this harmful uncertainty.

As shown in Point I, the legislative veto violates the principle of separation of powers. That doctrine not only protects, but pre-eminently protects, the Executive obligation to "take care that the Laws be faithfully executed." In principle, unilateral congressional control of implementation of a statute represents an impairment of that function. In practice, the effect of the veto—as exemplified by its application to administrative rule-making—has significantly disrupted the Executive's performance of its function.

As shown in Point II, the legislative veto represents an attempt to avoid the constitutional requirement that legislation be enacted by both houses of Congress and presented to the President for his signature. Whether viewed as involving the invalidation of executive action or the acceptance of executive "recommendations", the legislative veto produces congressional action that is legislative in character and effect. It therefore requires observance of the constitutionally prescribed procedures for legislation.

As shown in Point III, the legislative veto is invalid whether or not, in the particular case, it deprives the President of powers he would otherwise possess, and regardless of whether he acquiesces in, or even urges, its creation. The constitutionally required procedures for legislation were intended not only to protect the Executive from the Congress, but to protect the people from the two branches combined.

As shown in Point IV, there is no unique or irreplaceable legitimate function served by the legislative veto. It is not a necessary, or even an effective, means of assuring appropriate congressional control.

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ARGUMENT

I

THE LEGISLATIVE VETO VIOLATES THE CONSTITUTIONAL PRINCIPLE OF SEPARATION OF POWERS

Both petitioners in this case attempt to portray the central issue, on the merits, as one of separation of powers rather than the observance of constitutionally mandated legislative procedures. The House brief devotes less than three pages to the latter issue (House Br. 39-41), and the Senate brief explicitly states the view that "the fundamental issue in this case, if the merits should be reached, is the separation of powers and not issues of legislative formalities." (Senate Br. 32.) As discussed in Point II below, the ABA does not agree with this analysis, but even if it were correct, the legislative veto is invalid on separation-of-powers grounds alone.

As this Court explained in *Kilbourn v. Thompson,* 103 U.S. 168, 191 (1881):

> . . ."It is . . . essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other."

This constitutional principle is of special importance in its application to the Legislative Branch.[22]

> "The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive and less susceptible of precise limits, it can with the greater facility, mask under complicated and indirect measures, the encroach-

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22 "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them . . . ." *Springer v. Philippine Islands,* 277 U.S. 189, 202 (1928).

ments which it makes on the co-ordinate departments." *The Federalist,* No. 48, at 334 (J. Cooke ed. 1961) (J. Madison).

A. Governmental Functions Delegated to the Executive Are Protected by the Doctrine of Separation of Powers

The House brief (House Br. 25-26) asserts that the separation of powers doctrine is violated by Congress only if Congress interferes with some executive function *other than* the obligation to "take care that the Laws be faithfully executed" (Art. II, § 3). This in fact reverses the main thrust of the doctrine. The execution of laws enacted by Congress is the very *core* of the Executive's responsibility, as the title "Executive" alone should suggest. And it is precisely *when* the President is executing laws enacted by Congress that the need for clear separation of powers is most pronounced. The passage from Montesquieu, quoted in *The Federalist* to provide a "demonstration of the meaning" of separation of powers, reads:

> "When the legislative and executive powers are united in the same person or body . . . there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws, to *execute* them in a tyrannical manner." *The Federalist,* No. 47, at 326 (J. Cooke ed. 1961) (J. Madison, quoting Montesquieu, *The Spirit of Laws*) (emphasis in original).

The House and Senate briefs attempt to avoid the force of this principle by seeking to equate it with "the discredited notion that the separation doctrine means total separation of each of the three great functions of government" (House Br. 22; *see* Senate Br. 34). It is not the same. The issue is not whether, as the House brief puts it (House Br. 24), Congress may "blend and mix" the functions of government. It assuredly may—by delegating to the Executive, for example, functions of a characteristically legislative or judicial nature. Rather, the issue is whether, once functions of whatever nature have been delegated, Congress may continue to exercise and control them unilaterally as though they were still within its

own domain. A principle of "blending and mixing" in this sense would amount to a nullification of the doctrine of separation of powers.[23]

Congress may constitutionally confer upon the Executive a wide range of governmental functions, but, once conferred, they are insulated from direct congressional control except through the process of legislation.

B. The Legislative Veto Disrupts Executive Functions

Not all congressional impingement upon executive action violates the doctrine of separation of powers. The test, as expressed by this Court, is whether the congressional action "prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. Administrator of General Services,* 433 U.S. 425, 433 (1977).

The result of that test applied to a legislative veto should be clear, since the purpose and effect of the legislative veto is to transfer back to one or both houses of Congress dispositive control of implementation of a statute. Nonetheless, the ABA wishes to call the Court's attention to the concrete, disruptive effects of the legislative veto, particularly in the critical context of agency rulemaking.

• Experience with the actual operation of the legislative veto has shown that it produces an *ad hoc,* after-the-fact, piecemeal approach to the formulation of general policy.[24] The

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23 Such unilateral congressional control is impermissible whether or not the delegated functions are of a characteristically legislative or judicial nature. In *Buckley v. Valeo,* 424 U.S. 1 (1976), the Federal Election Commission's "broad administrative powers" (*id.* at 140), including rulemaking, though conceded to be "more legislative and judicial in nature than . . . the Commission's enforcement powers" (*id.* at 140-41), were nonetheless held to trigger the President's exclusive constitutional prerogative to appoint "officers of the United States" within the meaning of Article II, section 2, clause 2 of the Constitution. The approach of that case is inconsistent with the notion that the Constitution's structural division of powers is somehow altered when "blended and mixed" functions are at issue.

24 *See, e.g.,* Symposium, *1976 Bicentennial Institute—Oversight and Review of Agency Decisionmaking,* 28 Ad. L. Rev. 569, 581 (1976) (state-

veto of a rule belonging to an integrated regulatory scheme leaves only a void which can distort or even destroy a comprehensive program.[25] It permits Congress to avoid the difficult task of devising an alternative rule, while providing little guidance to an agency seeking to fulfill its statutory mandate.[26]

• The legislative veto inevitably increases delay and uncertainty in the administrative process.[27] Such delay infects rulemaking prior to the submission of rules to Congress, as agency staffs engage in protracted, tripartite negotiations with committee staffs of both houses, or as agencies await a politically propitious moment for the submission of rules. In order to avoid the possibility of a rule veto, agencies may choose to formulate their policy through case-by-case adjudication rather than notice-and-comment rulemaking, with consequently reduced guidance to the regulated. Disapproval of a rule halts the process of governing when an agency and either house differ irreconcilably over statutory interpretation or administrative policy. Even agency rules that are not disapproved bear

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ment of Roderick M. Hills, Chairman of the SEC); *id.* at 671, 698-99 (statement of Marcus A. Rowden, Commissioner, Nuclear Regulatory Commission).

25 *See, e.g.*, Senate Committee on Government Operations, *Study on Federal Regulation II: Congressional Oversight of Regulatory Agencies*, S. Doc. No. 26, 95th Cong., 1st Sess. [hereinafter *"Study on Federal Regulation II"*] 120 (1977); 122 Cong. Rec. 31639 (Sept. 21, 1976) (remarks of Representative Anderson).

26 *See, e.g., Study on Federal Regulation II* at 120 (testimony of Lloyd N. Cutler).

27 *See, e.g.*, 126 Cong. Rec. S1090 (Feb. 6, 1980) (remarks of Senator Muskie); *Study on Federal Regulation II*, at 118-19; *Hearings on S. 2258, S. 2716, S. 2812, S. 2878, S. 2903, S. 2925, S. 3318, and S. 3428 Before the Senate Committee on Government Operations*, 94th Cong., 2d Sess. [hereinafter *"S. 2258 Hearings"*] 545 (1976) (statement of Roderick M. Hills, Chairman of the SEC); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369, 1379-80, 1397, 1400 (1977); McGowan, *Congress, Court, and Control of Delegated Power*, 77 Colum. L. Rev. 1119, 1146-47 (1977).

the hidden cost of postponed implementation during the review period. With delay comes uncertainty as to the form and effective date of regulations, a burden borne by all who must plan and act on the basis of governmental decisions.

• The legislative veto tends to undermine notice-and-comment rulemaking subject to the safeguards of the APA, replacing it with informal negotiations between the agencies and the staffs of congressional committees.[28] These negotiations can take on a life of their own, leading to the effective, if not readily recognized, amendment of statutes. While apparent power lies in agencies going through the process of public rulemaking, actual power is wielded by committee staffs operating beyond the public eye.

• Even if a congressional committee were disposed to review all the agency rules committed to its charge by a legislative veto provision, and even if staff attention were deemed an adequate substitute for personal consideration by elected representatives, a staff large enough to conduct the task is not likely to be available.[29] In fact, however, congressional intervention through the threat or exercise of a legislative veto has been sporadic and unpredictable, often responding to the political strength of the interests affected by the proposed rule.[30] There

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28 *See, e.g.*, 126 Cong. Rec. S1096 (Feb. 6, 1980) (remarks of Senator Ford); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369, 1377-78, 1404, 1412-14, 1417-20 (1977).

29 *See, e.g.*, 126 Cong. Rec. S1080 (Feb. 6, 1980) (remarks of Senator Hart); *id.* at S1095 (remarks of Senator Ribicoff); 122 Cong. Rec. 31636 (Sept. 21, 1976) (remarks of Representative Frenzel); *id.* at 31639 (remarks of Representative Bingham); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369, 1415 (1977); McGowan, *Congress, Court, and Control of Delegated Power*, 77 Colum. L. Rev. 1119, 1146 (1977).

30 *See, e.g.*, 126 Cong. Rec. S1080 (Feb. 6, 1980) (remarks of Senator Hart); *id.* at S1081 (remarks of Senator Biden); 122 Cong. Rec. 31639 (Sept. 21, 1976) (remarks of Representative Bingham); *S. 2258 Hearings*, at 496 (statement of Karl E. Bakke, Chairman of the FMC); *id.* at 547 (statement of Roderick M. Hills, Chairman of the SEC).

is no standard for exercise of a legislative veto and no discipline to assure consistency of treatment from one session of Congress to the next.

• The judicial review stage of the rulemaking process is also impaired. When Congress disapproves a rule on the ground that the rule is not in accord with the authorizing statute's intent, it in effect preempts the judicial review function. Moreover, when a court reviews under Section 706 of the APA a rule that has passed challenge in the Congress, the court will be reluctant to apply normal standards—perhaps appropriately so if petitioners' theory that the failure to veto constitutes congressional "acceptance" of a "recommendation" is to be credited.

Some examples of the legislative veto in operation make these adverse effects clear:

1. In *Nixon v. Administrator of General Services,* 433 U.S. 425 (1977), this Court had before it the Presidential Recordings and Materials Preservation Act, Title I, 88 Stat. 1695, 44 U.S.C. § 2107 note (1974). The act required the Administrator of General Services to submit to Congress proposed regulations governing public access under the act and provided that they would be ineffective if disapproved by either house.

Notwithstanding the Administrator's compliance with the requirement that he submit the proposed regulations within 90 days of the enactment of the act, no regulations were yet in effect two and one-half years later when this Court rendered its opinion. The Court described the genesis of this deadlock as follows:

> . . . "The initial set [of regulations] proposed by the Administrator was disapproved pursuant to § 104(b) (1) by Senate Resolution. . . . The Senate also disapproved seven provisions of a proposed second set, although that set had been withdrawn. . . . The House disapproved six provisions of a third set. . . . The Administrator is of the view that regulations cannot become effective except as a

package and consequently is preparing a fourth set for submission to Congress." 433 U.S. at 437 (citations omitted).

2. Another example of the actual workings of the legislative veto is provided by the Federal Election Campaign Act of 1971,[31] as amended by the Federal Election Campaign Act Amendments of 1974.[32]

By the time of this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), holding that the appointment of four members of the Federal Election Commission by Congress pursuant to the 1974 amendments violated the doctrine of separation of powers,[33] the Federal Election Commission had already produced rules to implement the 1974 amendments. One of these had provided for initial filing of reports of contributions and expenditures with the Commission, with copies to be forwarded to the Senate and the House. The House had vetoed that proposed rule on the ground that it conflicted with the provision of Section 438(d) of the act that reports were to be "received by" the Clerk of the House and the Secretary of the Senate "as custodian for the Commission."[34]

The Commission had also proposed a rule to the effect that contributions received by an incumbent federal officeholder to defray the costs of office were subject to the statutory limitations on contributions and expenditures. 40 Fed. Reg. 32951 (1975). A Senate committee had criticized this, whereupon the Commission had submitted a revised proposal.[35] This had been

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31 Pub. L. No. 92-225, 86 Stat. 3 (1972).

32 Pub. L. No. 93-443, 88 Stat. 1263 (1974).

33 The Court expressly noted that it was not passing upon the constitutionality of the legislative veto provisions of the 1974 amendments. 424 U.S. at 140 n.176.

34 H.R. Res. No. 780, 94th Cong., 1st Sess.; 121 Cong. Rec. 33664-74, 33699 (1975).

35 S. Rep. No. 94-409, 94th Cong., 1st Sess. 2 (1975).

rejected by the Senate,[36] its committee having concluded that the Commission "may have exceeded" its statutory authority.[37]

When the Federal Election Commission was reconstituted after this Court's decision in *Buckley v. Valeo,* it proposed new regulations[38] and held a series of informational meetings in various regions of the country, as well as formal hearings. Nevertheless, because of the legislative veto provisions, no regulations had become effective by the time of the 1976 election:

> "Despite the FEC's careful preparation, or perhaps because of it, the proposed regulations were again negated by Congress. This time, however, there was no open vote on a veto resolution in one of the houses of Congress, but a legislative version of the 'pocket veto.' When the Ninety-Fourth Congress adjourned *sine die* on October 1, 1976, the FEC's rules had lain before it for only twenty-eight of the required thirty legislative days. Congress had rejected requests by the Commission that it remain in session for two more days so that the rules could take effect before the 1976 elections; thus the rules were left in limbo." Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes,* 90 Harv. L. Rev. 1369, 1408 (1977) (footnotes omitted).

3. The history of energy-related legislation provides further examples of the paralysis of executive action which is effected by the legislative veto. For instance, the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627 (1973), gave the Executive Branch power to exempt certain petroleum products from allocation and price controls, subject to a legislative veto. For nearly two years, repeated attempts by the Executive to exercise this delegated authority were frus-

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36 S. Res. No. 275, 94th Cong., 1st Sess.; 121 Cong. Rec. 31776 (1975).

37 S. Rep. No. 94-409, 94th Cong., 1st Sess. 3 (1975).

38 41 Fed. Reg. 21571, 21591 (1976).

trated by the threat and exercise of this veto power. *See* Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes,* 90 Harv. L. Rev. 1369, 1390-92 (1977). Finally, Congress resolved the issue by legislation. *Id.* at 1392.

In sum, experience with operation of the legislative veto, as it has proliferated in the field of administrative rulemaking during the last decade, has amply demonstrated that it prevents the Executive Branch from performing its constitutionally assigned functions. *A fortiori,* the legislative veto can be expected to have a disruptive effect when applied to administrative adjudicatory actions, as in this case now before the Court.

II

THE LEGISLATIVE VETO IS AN INVALID ATTEMPT TO AVOID THE LEGISLATIVE PROCEDURES MANDATED BY THE CONSTITUTION

Even though the legislative veto is invalid on separation-of-powers grounds alone, that doctrine is not—contrary to petitioners' assertions—the sole issue in this case. That issue arises only *as a result* of Congress's failure to observe what petitioners refer to (and dismiss) as "legislative formalities." No one contends that Congress's enactment of a *law* rescinding an agency rule or even revoking an agency order would be unconstitutional insofar as the doctrine of separation of powers is concerned (although issues might be presented under the ex post facto or bill of attainder clauses). Congress has acknowledged power to make or change the programs and policies to be implemented by the Executive, and the only issue is *how* it may do so. The other constitutional points raised by respondents below (evasion of the presidential veto and of the requirement of bicamerality) also turn upon the observance of "legislative formalities." Ultimately, the central issue with respect to the legislative veto is when Congress must follow the procedures for legislation set forth in the Constitution.

During the 145 years of our national history before enactment of the first legislative veto provision (and perhaps the more than 175 years before the first exercise of a legislative veto) it was quite clear when "legislative formalities" had to be observed. As the Senate Judiciary Committee stated in 1897, all of them—not only the requirement of presidential participation, but also the requirement of concurrent action by the two houses—must turn

> "not upon [the] mere form [of the resolutions], but upon the fact whether they contain matter which is properly to be regarded as *legislative in its character and effect.*" S. Rep. No. 1335, 54th Cong., 2d Sess. 8 (1897) (emphasis added).

A. The Invalidation of Executive Action Is Legislative in Character and Effect

The invalidation by Congress of executive action—whether in suspension of deportation or issuance of binding regulations—is action by Congress that is "legislative in its character and effect". The major proportion of federal legislation consists of authorization for executive action; and elimination or repeal of that authorization is a legislative act as well. The legislative veto consists of an announcement in a statute authorizing executive action that Congress reserves the right to eliminate that authorization by a means other than plenary legislation. The announcement might appear plausible in that Congress does not *have* to confer the authorization in the first place—so it would seem Congress may confer it with such limitations as it desires. In law, however, the greater does not always include the lesser. The power to withhold does not import unrestricted power to condition the grant. Congress may, for example, refuse entirely to fund a particular program, but if it chooses to do so it may not limit the beneficiaries to whites, or to Republicans, or in any other fashion that would violate constitutional prescriptions.[39] So also here. To affirm that Congress in a case such as this may withhold the immigration parole power from the Executive is not to establish that it may grant that power with the limitation that it be controlled or withdrawn in an unconstitutional fashion.

In its particular application to rulemaking, the legislative veto is sometimes defended on the ground that the congressional action need not follow constitutional requirements for legislation because it makes no change in the law. To the contrary, it is asserted, vetoing a rule prevents a change of law from occurring. This argument does not use the ambiguous term "law" in the relevant sense. Used in one sense, law is the body of governmental prescriptions binding upon the public, including agency rules—so that violation of a valid INS regulation is said to be a "violation of law". Used in another sense,

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39 *See, e.g., Sherbert v. Verner,* 374 U.S. 398 (1963).

law connotes only those prescriptions that are the work of Congress, many of which empower or restrict the Executive Branch of government but do not affect citizens directly—so that a valid INS regulation is said to be "authorized by law". It is possible to "change the law" in one of these senses without changing it in the other, but only a change in the legislature-made sense is relevant to the need for the constitutionally prescribed procedures. Thus, when an agency issues a new regulation, the law is not changed in the legislature-made sense even though there is a change in the law that binds the public. On the other hand, when Congress repeals a rulemaking authorization, the law is changed in the legislature-made sense even though the law binding upon the public may be unaffected—as would be the case if the rulemaking authorization had not been used by the authorized agency.

The exercise of a legislative veto makes the same sort of change in legislature-made law as repeal of a rulemaking authorization, because forestalling implementation of a valid rule is equivalent to rescinding the statutory authorization for that rule. While in the enabling statute that confers authorization for a rule Congress can give notice (through inclusion of a legislative veto provision) that it reserves the unilateral right to rescind, the exercise of a legislative veto is no less a rescission, no less a "change in the law" in the relevant sense. Congress's advance specification that it intends to disregard constitutionally required procedures in no way renders that disregard more permissible. *Cf. Smith v. Maryland,* 442 U.S. 735, 741 n.5 (1979).

B. The Acceptance of Executive Recommendations Is Legislative in Character and Effect

Petitioners advance another interpretation of the legislative veto provision at issue in this case. According to the House brief, "[a]t no point . . . has Congress delegated to the Attorney General or the INS any final power to determine which illegal aliens shall be allowed to remain in the United States . . . . Congress has retained that power unto itself". (House

Br. 28) The Senate brief argues that "[t]he nature of the Attorney General's role" is "recommendatory", and in accepting or rejecting the Attorney General's "recommendation", "the Congress exercises its own judgment whether permanent residence should be granted." (Senate Br. 29, 30)

Such a characterization is not consistent with the language and structure of Section 244(a), delegating the power of status determination to the Attorney General.[40] Even if it were, however, there is no reason why it would alter the case. It amounts to an admission that the very same congressional "judgment whether permanent residence should be granted", which used to be made through the normal legislative process in the consideration of private bills, is now made through the legislative veto process. It is impossible to understand how that

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[40] In this case, the Attorney General suspended deportation pursuant to subsection (a) of Section 244, 8 U.S.C. § 1254, which provides, in part:

> . . ."[T]he Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—
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> > (1) is deportable . . . ; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien . . . ."

The House of Representatives then vetoed the Attorney General's suspension order pursuant to subsection (c) of Section 244, which states:

> "(2) In the case of an alien specified in paragraph (1) of subsection (a) of this section—
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> > if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings."

action can be "legislative in its character and effect" in one instance but not in the other.

To put the matter another way, what—other than Congress's own fiat in Section 244(c)—permits Congress to accept the Attorney General's "recommendation" through pure inaction, though it can only accept the recommendations of its own staff through the enactment of legislation? Or may it extend this technique to the recommendations of its staff as well? The idea is not as far-fetched as it might seem. Since its relatively recent birth in 1932, the legislative veto has been progressively extended from action (or "recommendation") by the President,[41] to action by his subordinates (*e.g.*, the legislation at issue in the present case, involving action by the Attorney General), to action by independent agencies,[42] to action by this Court (the legislative veto of Court-adopted amendments to the Federal Rules of Evidence[43]), to action by a federally chartered corporation that is a federal instrumentality,[44] to action by a federally chartered corporation that is *not* a federal instrumentality.[45]

* * * *

In short, neither of petitioners' suggested theories suffices to explain why the legislative veto is entitled to dispensation from normal legislative procedures. Viewed as a device to elicit executive "recommendations" to Congress, it runs afoul of the requirement for the constitutionally prescribed procedures when those recommendations are accepted. And viewed as a

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41 *See* Act of June 30, 1932, ch. 314, 47 Stat. 414 (1932).

42 *E.g.*, Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980).

43 *See* Federal Rule of Evidence 1102, 28 U.S.C. § 2076 (1975).

44 *See* Pennsylvania Avenue Development Corporation Act of 1972, Pub. L. No. 92-578, 86 Stat. 1266 (1972).

45 *See* Section 8 of the Amtrak Improvement Act of 1975, Pub. L. No. 94-25, 89 Stat. 90 (1975).

delegation subject to defeasance, it runs afoul of the requirement for the constitutionally prescribed procedures when the action effecting the defeasance is taken. Nor does it save the veto process in the present case to describe it as "nothing more than a request for legislative mercy". (House Br. 40) Legislative mercy, like legislative justice, or for that matter legislative severity, must be meted out by legislation.

III

THE LEGISLATIVE VETO UNCONSTITUTIONALLY AUGMENTS THE COMBINED POWER OF THE EXECUTIVE AND LEGISLATIVE BRANCHES

There runs through the House and Senate arguments in this case—as there runs through most arguments seeking to justify the legislative veto—the notion that, after all, the Executive is not really harmed. "Section 244," the Senate brief asserts (Senate Br. 28), "augments, and in no manner infringes upon, executive power." Before 1940, after all, the Executive had no role (except through the President's participation in the legislative process) in the canceling of deportations; now, it has "the important but limited role of suspending deportations and reporting to the Congress." (Senate Br. 29) Moreover, since the cancellation only occurs when the President (who, through the Attorney General, proposes it) and both houses (which, through failure to veto, approve it) *agree,* it is in effect legislation in reverse. Therefore the Executive is not harmed; therefore the principle of separation of powers is not violated; and therefore the device is constitutional.

It is not clear, however, that as a general matter the Executive is not harmed by the legislative veto. Viewed in a realistic fashion, it is impossible to say that the device does not profoundly affect the balance of powers between the first two branches. With respect to the vast majority of executive authorizations to which the legislative veto has been attached, the choice is not between no executive authorization and executive

authorization with a legislative veto. Congress has, to be sure, the *power* to withhold the authorization unless the veto is attached to it; but as a practical matter it will not often do so. For example, the realistic choice is not whether the Environmental Protection Agency will have rulemaking functions with the legislative veto attached or no rulemaking functions at all; it is whether EPA rulemaking, which is sure to exist, will or will not be encumbered by the veto. The same may be true of the Attorney General's function at issue in the present case.

But even if the Executive were not harmed, the legislative veto would nonetheless distort our system of government. The "legislative formalities" set forth in the Constitution, which in Article I, Section 7 give the President a role in the legislative process, do serve to protect the Executive against encroachment upon his powers. More importantly, however, those formalities were designed to protect the people. The damage done to the people by ignoring them happens to be greatest when the damage done to the Executive is least—that is, when it is indeed true that if the President had not received the delegated authority subject to a legislative veto he would not have received the authority at all. In these situations, Congress and the Executive sometimes have combined to erect a structure that will deprive the people of their democratic right to have their representatives *vote* on major, often controversial, changes from the status quo—changes which Congress has not unconditionally approved, but which it later approves by inaction, in declining to veto the Executive's "proposal."

Congress may "reserve the decision to itself" instead of committing it to the Executive, but if Congress considers the decision that important, then *when* it decides, it must do so with observance of legislative formalities that include not merely Presidential participation in its decision (through Article I, Section 7) but also affirmative action by both houses. The Founding Fathers were not unaware that this was a cumbersome process, in which the forces of factionalism, regionalism, institutional jealousy and personal ambition would render legislative action difficult. But they regarded it as

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a necessary assurance against not merely the weakening of Executive authority but also the impairment of minority rights and, quite simply, ill-considered legislation.

> "Another advantage accruing from this ingredient [of equal State representation] in the constitution of the senate, is the additional impediment it must prove against improper acts of legislation. No law or resolution can now be passed without the concurrence first of a majority of the people, and then of a majority of the states. It must be acknowledged that this complicated check on legislation may in some instances be injurious as well as beneficial . . . . But . . . as the facility and excess of law-making seem to be the diseases to which our governments are most liable, it is not impossible that this part of the constitution may be more convenient in practice than it appears to many in contemplation." *The Federalist,* No. 62, at 417 (J. Cooke ed. 1961) (J. Madison).

The Constitution does not provide that this cumbersome, bicameral, affirmative legislative process can be avoided, or converted into a process of mute legislation, by an Act of Congress "reserving its decision", nor even by mutual agreement between the Legislative and Executive Branches.

IV

THE LEGISLATIVE VETO IS NOT A NEEDED MEANS OF CONGRESSIONAL CONTROL

Evaluation of the legislative veto's constitutionality should not be influenced by the mistaken belief that it is an essential device of modern government.

Petitioners contend that Section 244(c) is one of the "hybrids that work"; that it has "benefited thousands of deportable aliens over the past forty years"; and that it has "served an entirely beneficial purpose." (Senate Br. 24) But if, as petitioners suggest, that purpose were merely to permit congres-

sional acceptance of executive "recommendations," could not those recommendations have been presented in the form of proposed bills as the Constitution envisions? The houses of Congress could even modify their procedures to permit expedited consideration of such recommendations, so that the proposed bills would be (almost always) routinely passed—just as under Section 244(c) the legislative veto is (almost always) routinely not exercised. Nothing of substance would be lost except the ability of Congress, under the present arrangement, to "accept" the recommendations without acting upon or even considering them.

In the present era of broad delegation of rulemaking authority to administrative agencies, the legislative veto is sometimes portrayed as an indispensable means of reasserting the power of a Congress that is displeased with agency excesses but that has no means available for "getting control of the bureaucracy." This portrayal, while generous in its treatment of Congress, is not accurate. Congress has at hand numerous means of control. It may, of course, legislate with more specificity in the first place. It may reverse agency rules by legislation—a course it pursued, for example, with respect to Department of Transportation automobile seatbelt requirements.[46] It may by legislation stay agency rulemaking and restrict agency authorization—a course it pursued recently with respect to the Federal Trade Commission.[47] It may decline to authorize or appropriate funds for agency rulemaking that it disapproves.[48] Instead of conferring authority to promulgate rules, it may confer authority to propose legislation—which

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46 *See* Motor Vehicle and Schoolbus Safety Amendments of 1974, Pub. L. No. 93-492, 88 Stat. 1470 (1974).

47 *See* Federal Trade Commission Improvements Act of 1980, §§ 7, 11, 19, Pub. L. No. 96-252, 94 Stat. 374 (1980).

48 *See, e.g.*, Act Making Appropriations for the Departments of Labor, and Health, Education and Welfare, and Related Agencies for Fiscal Year 1974, Pub. L. No. 93-192, 87 Stat. 746 (1973).

was the power it originally granted to the Federal Trade Commission.[49] Or it may subject rulemaking to a "report and wait" provision, requiring the rule's effective date to be delayed for a specified period, during which Congress may act to stay or reverse it.[50]

Besides these direct means of congressional control, many indirect means are available. The reality of government is that every item for which an agency requires congressional action—from authorization for new programs, to funding for old ones, to appointment of new officials—can be made the occasion for congressional influence upon any activities of the agency. The agency's continuing dependency upon Congress assures that congressional reports and investigations, committee recommendations, speeches on the floor, even suggestions from individual members of the agency's oversight or appropriations committees, are rarely ignored. In short, the notion that the legislative veto fills some large gap in Congress's power to perform its legitimate functions is without foundation.

While there may be problems in Congress's monitoring of the administrative government it has created, those problems appear traceable not to a lack of adequate means but to (1) the sheer volume and diversity of broad authority delegated to a multitude of specialized agencies,[51] and (2) the compartmentalized nature of the congressional committee structure, which generally requires legislation pertaining to an agency to be brought to the floor by a committee and staff whose point of

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49 Act to Create a Federal Trade Commission, § 6(f), 38 Stat. 717 (1914).

50 *See, e.g.*, Act to Amend the Education of the Handicapped Act, § 620(b), 89 Stat. 773, 20 U.S.C. § 1411 note (1975). This was a technique used by Congress when it acted through legislation to stay, and ultimately to revise in some respects, this Court's proposed Rules of Evidence. *Compare* Act of March 30, 1973, Pub. L. No. 93-12, 87 Stat. 9 (1973), *with* Act of Jan. 2, 1975, Pub. L. 93-595, 88 Stat. 1926 (1975).

51 *See* ABA Commission on Law and Economy, *Federal Regulation: Roads to Reform*, ch. 5 (1979).

view is likely to be as specialized as that of the agency itself. Far from solving these problems, the legislative veto may well aggravate them. Its existence serves to encourage broader and vaguer delegations by the implicit promise (which, as a practical matter, can rarely be redeemed) that actions pursuant to those delegations will be scrutinized by Congress; and its major effect is augmentation of the power of congressional committees and their staffs.[52]

Conclusion

A member of Congress might vote for a legislative veto of executive action on one or more of three grounds, each of which demonstrates the constitutional defect in its exercise:

1. He might wish to veto the executive action because he believes that action to be contrary to or in excess of the legislated intent of the Congress that passed the original statute; but that is to say that the executive action is violative of law—an interpretive function which belongs to the courts and not to the legislature.

2. He might wish to veto the executive action because, although he believes that action to be in accord with the legislated intent of the original statute and therefore not unlawful, he simply disagrees with the manner in which the executive's discretion under that statute has been exercised; but that is usurping the Executive's authority under the original statute (and it can surely make no difference that Congress served notice in the original statute that it intended to usurp).

3. He might wish to veto the executive action because he believes the legislated intent of the Congress which passed the original statute is, in the light of experience, unwise and that the scope of the Executive's discretion should be altered; but

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52 *See generally* Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369 (1977).

that requires an act of legislation which must observe the required constitutional "formalities".

For these reasons, The American Bar Association, as *amicus curiae,* respectfully requests that the Court affirm the judgment entered by the United States Court of Appeals for the Ninth Circuit on December 22, 1980.

Dated: January 8, 1982

Respectfully submitted,

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BEFORE THE COMMITTEE ON RULES
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING THE IMPACT OF THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA UPON THE GOVERNANCE OF THE DISTRICT OF COLUMBIA

March 21, 1984

Mr. Chairman and Members of the Committee on Rules. I welcome this opportunity to appear before you and share my views on the impact of the Supreme Court's historic decision involving legislative vetoes -- Immigration and Naturalization Service v. Chadha, ____ U.S. ____, 103 S.Ct. 2764 (1983)[1] -- upon the governance of the District of Columbia.

My principal concern can be simply stated. While the ability of Congress to delegate federal authority to a subordinate legislature is clear, Chadha muddies the process by which such a body may act. My reading of the fundamental underpinnings of the case suggests that while Congress may delegate its authority to the Council of the District of Columbia to rewrite the public laws of the United States affecting the Nation's Capital, it may not delegate this authority on behalf of the President. Thus, it would appear that when the Council amends an Act of Congress affecting the District of Columbia, that act must be Presented to the President for his or her concurrence or rejection.

(See footnotes at end of article.)

Solution of Part of the Problem: Changing the Manner in Which Congress Exercises its Legislative Veto

Three previous witnesses before the Committee have specifically addressed the impact of Chadha upon the District of Columbia. The Mayor and the Chairman and Ranking Minority Member of the Committee on the District of Columbia emphasized the beneficial effect of H.R. 3932, A Bill To amend the District of Columbia Self-Government and Governmental Reorganization Act, and for other purposes, adopted by the House of Representatives on October 4, 1983. 129 CONG. REC. H7903-07 (daily ed.) This House-passed bill solves one aspect of the Chadha case, but ignores the other.[2] The bill amends certain provisions of the Self-Government Act and the District of Columbia Retirement Reform Act by substituting the use of a joint resolution for either the simple or concurrent resolutions previously authorized.

The curative bill also notes that "any . . . [law] which was passed by the Council of the District of Columbia prior to the date of enactment of this [amendatory] Act, . . . [is] hereby deemed valid . . ." (Sec. 1(i)).

The ratification of actions of the Council in this fashion is not novel, but is a prudent step to ensure that the prior actions of the Council, taken in good faith reliance upon authority presumed to exist, are not invalidated. The same means was employed by the Congress when the Legislative Assembly of 1871 was first temporarily, and then permanently, abolished.[3]

A companion bill in the other House, S. 1858, was favorably reported by the Committee on Governmental Affairs but has not yet been adopted by the Senate. An eleventh-hour initiative by the Department of Justice sought to remove criminal code amendments from the Council's general authority, thus jettisoning the bill's speedy enactment.[4]

Prompt action by the Congress to enact the amendatory legislation described above, with the appropriate ratification

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(See footnotes at end of article.)

of prior actions of the Council, is essential, in order to minimize the threatened rash of litigation which has been filed or is looming on the horizon.[5] This measure will solve the legislative review -- the congressional disapproval mechanism -- problem highlighted by Chadha and the pending Senate measure could become the vehicle with which to make the additional reforms suggested herein. Insofar as a solution goes, H.R. 3932 in its present form solves one-half of the Chadha problem.

Presentment Clause Problem Not Solved by Pending Bills

Quite naturally the prime focus of legislative efforts to solve the constitutional and operational problems posed by Chadha has been in "fixing" the use of the legislative veto process itself. This is the problem of how does Congress recapture power on an ad hoc basis which it has generally delegated to others: be they the federal executive agencies, the President, or a subordinate legislature such as the Council. And the remedial bill discussed above does solve this aspect of the problem.

Left unresolved however, is the other side of Chadha: that any amendment or repeal of an Act of Congress must be accomplished with the same formality as its original enactment. The Supreme Court's view of this issue is unequivocal:

> Presentment to the President and the Presidential veto were considered so imperative that the draftsmen took special pains to assure that these requirements could not be circumvented.
>
> * * * *
>
> We see therefore that the Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions. The President's participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws.
>
> * * * *
>
> Amendment and repeal of statutes, no less than enactment, must conform with Art. 1.
>
> * * * *
>
> There is no provision allowing Congress to repeal or amend laws by other than

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(See footnotes at end of article.)

legislative means pursuant to Art. 1. 103 S.Ct. at 2782-85 & n.18

It is clear that this language requires Congress to honor the constitutional requirement of Bicamerialism and Presentment. The process to ensure compliance with this constitutional rule is simple: use joint resolutions or bills to enact, amend, or repeal the public laws of the United States.

Unique Problems Posed by The Council of the District of Columbia and the Territorial Legislatures

But the manner in which subordinate legislative bodies operate -- whether they be the Council of the District of Columbia or the territorial or special status legislatures of Guam, the Virgin Islands, or Puerto Rico -- must be carefully scrutinized.

These bodies operate under authority delegated by the Congress. The enumerated constitutional power of Congress to manage the affairs of these areas is similar to the specific authority over aliens noted in Chadha. Thus the solemn constitutional processes must be honored in these cases as well as with aliens as in Chadha. The Council of the District of Columbia's authority is found in D.C. Code Ann. §1-227. The authority of other "local legislatures" is found in scattered chapters of title 48 of the United States Code.[6]

Although specific language has differed, each of these delegated authorities allows the Congress to reject or annul an act of the local legislature within some time period. Under 48 U.S.C. §1423i, the Congress must annul an enactment of the Guam Legislature within one year of its date of receipt by the Congress. In some instances in the past, a role for the President has been provided.[7]

Acts of the Council of the District of Columbia become effective at the end of the 30-legislative day

(See footnotes at end of article.)

disapproval period unless rejected by the Congress. D.C. Code Ann. §1-233. These rejection provisions are, of course, constitutional. Now, under Chadha, such authority must merely be exercised by bill or joint resolution, rather than any other previous mechanism.

The more fundamental problem is whether the Congressionally delegated authority to rewrite acts of the Congress affecting the specific area -- be it the District of Columbia or one of the territories -- or to amend these Acts has become defective under Chadha. This rewriting of acts of Congress causes a unique problem in the case of the Nation's Capital and the territories not experienced by the federal administrative agencies. The agencies and the President carry out congressional enactments through the issuance of rules or regulations, but never through the specific rewriting of the organic laws. While it appears that the Council of the District of Columbia and the territorial legislations have authority concurrent with the Congress to rewrite acts of Congress of limited application, I have not been able to verify any such exercise of authority by territorial bodies.[8]

The Extent of the District of Columbia Problem

Of the 723 acts adopted by the Home Rule Council of the District of Columbia since D.C. Law 1-1 became effective on May 13, 1975, a significant number would seem to fall within the proscription of the Chadha impact.[9] (An illustrative sampling of the first Council period and enactments since the Chadha opinion are included within Attachment 1.)

My concern does not challenge the constitutionally sound assumption that Congress may delegate its authority to a local government in the District of Columbia. This proposition has been sustained on myriad occasions.[10] But even when sustained in the Home Rule era, the primary emphasis

(See footnotes at end of article.)

of the challenge was upon the limitations the Congress imposed upon the District of Columbia.[11]

Quite candidly the full logic of Chadha would make the ability of the Council to amend Acts of the Congress suspect even from the legislative side. Thompson and several other cases at least present some constitutional dicta which might allow the Congress to delegate its authority to the District Council in accordance with the congressional interest in removing itself as the "city council" for the District of Columbia. But this would not surrender the President's power.[12] But never litigated before under the principles of Chadha is the ability of Congress to allow a subordinate legislative body to rewrite the public laws of the United States.

Council Actions in Pre-Home Rule Era Not Violative of Chadha

It is interesting to note that the pre-Home Rule Council, acting under the authority of Reorganization Plan No. 3 of 1967, never purported to amend acts of the Congress. Before acting a specific grant of express authority noted in the reorganization plan was required as a necessary prerequisite to action.[13] Once a basis of authority was found, a local "regulation" could be adopted. The fairest analogy to local self-government during this period was that of a federal administrative agency for the District of Columbia. Thus, under a harmonization of the Thompson and Chadha cases, the adoption by the appointed city council of regulations and resolutions presented no constitutional infirmity. And Thompson would sustain no more than that.

Assuming that this was the breadth of authority vested in the Council, H.R. 3932 would effectively cure any Chadha problems. But far greater authority is vested in a locally elected government in the Nation's Capitol and properly so.

(See footnotes at end of article.)

Thus, the Council seems to exercise unfettered authority (subject, of course, to ultimate Congressional review and the Home Rule Act's internal proscriptions) to amend Acts of Congress affecting the District. Both the congressional and Council statutory enactments are contained in the District of Columbia Code. Little mention is made of the local home rule in the United States Code, and in this respect, the District of Columbia situation differs from that of the territorial legislatures outlined above.

The Solution to the Problem

But having resolved that the methods of the present system pose grave constitutional challenges one must posit solutions.[14]

The first and simplest solution would be to have the Congress affirmatively ratify the enactments of the Council of the District of Columbia since 1975. This mechanism has been previously used in a different context to ratify acts of the former home rule government Legislative Assembly which was abolished in 1874, and is contained in the two bills presenting pending.

That would bring us to the present and the more fundamental solution for the future. Here, too, history may be a guide. The organic authority of the Council of the District of Columbia to act could be codified in the Public Laws of the United States in much the same manner as in the instance of Guam and other territories alluded to earlier.[15] The Congress could simply authorize the Council of the District of Columbia to adopt the District of Columbia Code, District of Columbia Statutes-at-Large, and the District of Columbia Municipal Regulations as the Local Public Laws of the District of Columbia. Assuming presidential approval, subsequent action by the District of Columbia government thereafter would merely amend local laws -- not laws enacted by the Congress -- and not require the president's nonwaivable constitutional presentment authority.

(See footnotes at end of article.)

Whatever limited reservations of authority the Congress wished to maintain could be so codified in the original grant of authorizing legislation or achieved subsequently by the joing resolution of disapproval.[16]

This proposal is not just the triumph of form over substance. An apt analogy that comes immediately to mind would be the seminal case of Powell v. McCormack, 395 U.S. 486 (1969), involving an unconstitutional attempt to exclude Congressperson Powell from membership in the House of Representatives rather than admitting him, and then expelling him. Despite severe constitutional problems of jurisdiction, standing, and justiciability the Supreme Court held that procedural niceties and following of the rules is fundamental in a constitutional democracy, even though, on occasion, they are troublesome and annoying.

The Problem of Severability

But having posed these solutions one might be concerned of the immediate impact of judicial adoption of this analysis. While it is not of consequence to the proper functioning of the Congress, I believe the fairest view of the Home Rule Act's provisions concerning congressional vetoes was that they were not severable. The absence of a routine severability clause and scattered remnants of legislative history suggest that the Senate would not have agreed to enactment of the Home Rule Act without the legislative veto provision. But while the weight of legislative history may take the view that the Act is not severable, I think that a careful review of the legislative history supports the conclusion that the will of the Congress is not certain.[17]

Favorable judicial precedent also strives to find provisions of acts severable in the absence of controlling and dispositive legislative intention to the contrary. Such is not the case under the Home Rule Act. Thus, severability is the preferred statutory construction and one also preferred in the situational equities of the legislative

(See footnotes at end of article.)

reform. Buckley v. Valeo, 424 U.S. 1, 108 (1976) (per curiam), Champlin Refining Co. v. Corporation Comm'n., 280 U.S. 210, 234 (1932), 2 Sutherland Statutory Construction §44.03 (C. Sands ed. 1973).

Most post-Chadha decisions have deemed challenged "legislative veto" provisions of organic acts severable if the veto provision was not used. This is a commonsense approach.

In City of Alexandria v. United States, 3 Cl. Ct. 667 (1983), the plaintiff city sought the difference between the price it paid for a parcel of surplus government real property and a lesser price allegedly agreed upon under a prior contract of sale for the same parcel. The government argued that because the congressional review procedure prescribed by the Federal Property and Administrative Services Act had not been undertaken, consummation of a contract had never been authorized. The City argued that the review procedure was unlawful under Chadha and that, therefore, the obstacle to contract formation had disappeared -- since the GSA had manifested its assent, there was a contract implied in fact. The court held that the practice of a committee of the House of Representatives of intervening in and stopping negotiated sales of surplus property was unconstitutional under Chadha and that a contract had been formed between the government and the City.

In National Wildlife Federation v. Watt, 571 F. Supp. 1145 (D.D.C. 1983), plaintiffs sought to temporarily enjoin the Secretary of the Interior from issuing certain coal leases after Congress, pursuant to section 204(e) of the Federal Land Policy and Management Act of 1976. The statute required the Secretary to withdraw a proposed lease upon notification from a designated committee of either House that an emergency exists and that extraordinary measures must be taken to preserve values that otherwise would be lost. The government argued that it had the authority to

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(See footnotes at end of article.)

issue the leases because the Chadha decision required that a provision purporting to authorize a mere congressional committee to alter the duties of the Executive was unconstitutional. Plaintiff's attempt to distinguish a §204(e) withdrawal from a legislative veto on the ground that the withdrawal was only temporary was not well-taken by the court, but the court granted the injunction on other grounds.

In EEOC v. City of Memphis, 33 F.E.P. Cases 1089 (W.D. Tenn. 1983), Chief Judge McRae ruled that the one-house veto provision of the Reorganization Act of 1977, which provided the statutory basis for transfer of the Department of Labor's authority over the Age Discrimination in Employment Act (ADEA) to the EEOC was severable from the remainder of the Reorgnization Act, and, in any event, Congress had ratified the transfer of authority by specific references to and appropriations for the reorganization plan when it enacted the Civil Service Reform Act and by its appropriations of funds for the EEOC to enforce the ADEA. To the same effect is Muller Optical Co. v. EEOC, 574 F. Supp. 946 (W.D. Tenn., 1983), where an employer sought temporary restraining order prohibiting the EEOC from requiring its president to appear at a deposition and produce documents in compliance with a subpoena issued by the EEOC. District Judge Horton held that Chadha had not invalidated the transfer of ADEA administration and enforcement from the Secretary of Labor to the EEOC pursuant to the Reorganization Act, since the transfer did not involve the exercise of the legislative veto contained in the Act; that the invalid veto provision of the Reorganization Act was severable from the remainder of the Act; and that Congress had ratified portions of the Reorganization Act which transferred jurisdiction of the ADEA to the EEOC.

In EEOC v. Hernando Bank, 52 U.S.L.W. 2481 (5th Cir. 1984), the EEOC brought suit against a bank under the Equal Pay Act, alleging that the bank had discriminated

(See footnotes at end of article.)

against female employees on the basis of sex. The bank claimed that the EEOC had no power to enforce the Equal Pay Act since the Reorganization Act and the reorganization plan promulgated thereunder were invalid due to the presence of a legislative veto provision. The Fifth Circuit Court of Appeals found that the veto provision was severable and that because the reorganization plan had conformed to the substantive provisions of the Act, the plan was enforceable as law.[18]

In EEOC v. Allstate Ins. Co., 570 F. Supp. 1224 (S.D. Miss. 1983), pet. for cert. pending, 52 U.S.L.W. 3590 (U.S. 1984), the court, relying on Chadha, ruled that the transfer of Equal Pay statutory authority from the Labor Department to the EEOC was invalid due to the presence of a legislative veto in the reorganization statute, despite the fact that neither house had invoked the veto provision. According to the court, any use of a legislative veto scheme which has the effect of enacting laws without complying with the Constitutional prescription for legislation is unconstitutional and that, therefore, the Reorganization Act of 1977 and the Labor-EEOC reorganization plan of 1978 were both unconstitutional, depriving the EEOC of its authority to enforce the Equal Pay Act. See also, EEOC v. Westinghouse Electric Corp., 725 F.2d 211 Cir. 1984), where District Judge Bloch reached the same result relying upon the Allstate decision. The bizarre results and precedents would have a devastating effect upon the District of Columbia because the reorganization plan analysis of the trial court in Allstate, if applied to the District, would cause a determination that most local measures adopted since 1950 were invalid: increases in local governmental powers have generally been affected by presidential reorganization plans and not acts of the Congress.[19]

I believe that the Home Rule Act is not severable. Nonetheless, the legislative history on this point is far

(See footnotes at end of article.)

from conclusive. Case law suggests in this circumstance that prudence be the watchword before an entire act is struck. This has generally been the approach of the reasoned opinions which have followed Chadha.

The Problem of Retroactivity

And while from a purist view the "new" constitutional analysis of the Home Rule Act should be read as making its provisions void ab initio, the chaos that would be spawned by such a reading render that approach unnacceptable. Leading Supreme Court decisions on this question point the way toward future and prospective application: Heckler v. Mathews, ____ U.S. ____, 52 U.S.L.W. 4333, 4338 (1984); Arizona Governing Committee v. Norris, ____ U.S. ____, 103 S.Ct. 3492, 3510 (1983); Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam); and Chevron Oil Co. v. Hudson, 404 U.S. 97 (1971). These decisions are the lodestar to guide judicial action.[20]

These decisions compel the conclusion that should a court find the legislative veto and authority to amend Acts of Congress to be defective, that any decisions must be prospective in application. This outcome is particularly occasioned in the instance of the District of Columbia because of the Allstate court's far-reaching, and I believe, erroneous analysis.

Conclusion

In conclusion, I would urge the Committee to consider the unique problems of the District of Columbia as a result of the Chadha decision. Prompt remedial legislation along the lines herein suggested would greatly aid the stability of local self-government and ensure the greatest measure of local democracy possible.

Attachment 1

District of Columbia Permanent Laws Enacted During Council Period One (1975-1976). (Some laws could be classified under different headings; they have been arbitrarily assigned)

Subject Matter	Council Act Amends or Repeals an Act of Congress		Laws effective without amendment or repeal; thus is severable	
	YES	NO	YES	NO
Zoning, building and community development	1	2	2	1
Benefit and entitlement programs	5	6	6	5
Housing and rent control	2	11	12	1
Transportation	1	8	8	1
Consumer protection	1	7	7	1
Government employees	5	2	3	4
Education	5	1	2	4
Environment	3	7	7	3
Elections	6	0	0	6
Legislative process	0	3	3	0
Government organization	10	9	11	8
Taxation and bonds	14	2	1	15
Judicial procedures	3	2	2	3
Professions	2	0	0	2
Insurance	1	1	1	1
Public Safety	1	2	2	1
Miscellaneous	7	0	2	5

District of Columbia Permanent Laws Considered on First Reading After June 1983, the Date of the Issuance of the Chadha Decision. Chart Current to January 27, 1984.

Zoning, building and community development	0	7	7	0
Housing and rent control	1	1	1	1
Transportation	2	1	1	2
Consumer protection	4	1	1	3
Education	1	1	1	1
Government organization	1	0	0	1
Taxation and bonds	3	0	0	3
Judicial procedures	1	0	0	1
Insurance	1	0	0	1
Public safety	0	1	1	0
Health	1	0	0	1

The Council has adopted the General Rule of Severability Adoption Act of 1983 to ensure that acts are deemed to be severable. (D.C. Act 5-82 to be codified to D.C. Code §49-601.)

FOOTNOTES

1. Shortly after Chadha the Supreme Court issued two per curiam orders which expanded the breadth of the Chadha holding to independent regulatory agencies. Consumers Energy Council of America v. FERC, 218 U.S. App. D.C. 34, 673 F.2d 425 (1981), aff'd sub nom. Process Gas Consumers Group v. Consumers Energy Council of Am., ____ U.S. ____, 103 S.Ct. 3556 (1983) and Consumers Union of the United States v. Fed. Trade Comm'n., 223 U.S. App. D.C. 386, 691 F.2d 575 (1982) (en banc), aff'd sub nom. Process Gas Consumers Group v. Consumers Energy Council of Am., ____ U.S. ____, 103 S.Ct. 3556 (1983).

2. I have not attempted to quibble about the rationale of Chadha or its precise breadth, because it is certain that the actions of the Council of the District of Columbia are legislative in character as that notion is used in Chadha. While great breadth has been attributed to the opinion of the Supreme Court in Chadha, Karl Llewellyn cautions in The Bramble Bush 42-43 and 54-55 (1973), that a court may only decide the particular dispute before it under a general rule of a whole class of like disputes, and that anything written in the Court's opinion, must be read with primary reference to the particular dispute. Thus, the essential holding of Chadha would run something like this: When the Attorney General advises the Congress of an action he has taken to suspend the deportation of a particular person who was found to be deportable following an administrative hearing and a single house of Congress with little debate adopts a simple resolution to reject the Attorney General's decision and reinstate the deportation order of the individual, then such action by the House of Representatives is unconstitutional.

In addition to the hearings before the Committee, hearings before the Committee on Foreign Affairs, legislative and executive summaries, and scholarly works may be reviewed. See for example, The U.S. Supreme Court Decision Concerning the Legislative Veto: Hearings before the House Comm. on Foreign Affairs, 98th Cong., 1st Sess. (1983), especially id. at 116-129 (prepared statement of Eugene Grossman); id. at 159-226 (memorandum for the Attorney General, July 15, 1983); id. at 231-270 (Summary and Preliminary Analysis of the Ramifications of INS v. Chadha, the Legislative Veto case, by Morton Rosenberg, Specialist in American Public Law, American Law Division, Congressional Research Service, Library of Congress); id. at 231-270; DeConcini, The Legislative Veto: A Constitutional Amendment, 21 Harvard J. on Legis. 29 (1984); Hutchins, Legislative Vetoes and the Administrative Process: A Constitutional and Operational Analysis, 15 Texas Tech. L. Rev. 307 (1984); Strauss, Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision, 1983 Duke L.J. 789; Tribe, The Legislative Veto Decision: A Law by Any Other Name?, 21 Harvard J. on Legis. 1 (1984); Comment, Immigration and Naturalization Service v. Chadha: The Death Knell for the Legislative Veto?, 69 Iowa L. Rev. 497 (1984). These sources also provide commentary upon the severability and retroactivity topics considered below.

3. Act of June 20, 1874, ch. 337, §10, 18 Stat. 116 (1874) and Act of June 11, 1878, ch. 180, §1, 20 Stat. 102 (1878).

4. See Letter of Assistant Attorney General Robert A. McConnell to the Honorable William V. Roth, Jr. (November 15, 1983) at 2-5. This saga of the interaction between the federal government and the District of Columbia is recounted in correspondence to the Honorable Ronald Reagan from the Honorable Marion S. Barry, Jr., dated November 15, 1983; Washington Post, March 14, 1984, at A1 and A8; Washington Post, March 15, 1984, at C1 and C2; and Washington Post, March 16, 1984, at C3.

5. I am aware of one civil action and two pending criminal matters. Dimond, et al. v. District of Columbia, et al., C.A. 83-1938 (D.D.C. 1983); United States of America v. Cole, Criminal No. F-5111-82 (D.C. Super. Ct.) (Motion to Arrest Judgment); and United States of America v. Garet, Criminal No. F-5587-81 (D.C. Super. Ct.) (Motion to Arrest Judgment). The civil action is presently before the Court on Plaintiffs' Motion for Summary Judgment and the Defendants' Motion to Dismiss the Second Amended Complaint or in the Alternative, for Summary Judgment. The criminal matters have been stayed pending an order responsive to interrogatories sought by Judge Donald Smith. But a recent Washington Post article notes another related criminal matter. See Washington Post, March 17, 1984 at B1 and B5.

6. The legislative authority vested in a local legislature in Puerto Rico was originally codified in 48 U.S.C.A. §§811-845 (West 1952). By virtue of ratification of the constitution of the Commonwealth of Puerto Rico by the Congress on July 3, 1952, the previously cited provisions were repealed (West Supp. 1983).

The legislative authority of the Virgin Islands is found in 48 U.S.C.A. §1574 (West Supp. 1983). The Virgin Islands Code is enacted pursuant to the general grant of legislative authority. While the authority of the local legislature is ambiguous with regard to amendment of acts of Congress, (see §1574(c)) it does not appear that this authority has been exercised or that any Act of Congress has been codified in the Virgin Islands Code. An annual report of the laws enacted by the Legislature shall be reported to the Congress. 48 U.S.C.A. §1575(g) (West Supp. 1983).

The local legislature of Guam is authorized to "modif[y] or repeal" Acts of Congress. 48 U.S.C.A. §1421(c) (West Supp. 1983). 48 U.S.C.A. §1423(i) (West Supp. 1983) "reserves [to Congress] the power and authority to annul the . . . [laws]." The Guam Government Code does not contain any provisions of law enacted by the Congress which solely affect Guam. These provisions are within Chapter 8A of title 48 of the United States Code.

7. Compare 48 U.S.C.A. §825-826 & 1405o. (West 1952) (repealed Supp. 1983), with 48 U.S.C.A. §1423(i) (West 1952 & Supp. 1983) and D.C. Code Ann. §§1-147(c)(1) (1973) and 1-227 (1981).

8. Study of the organic acts of the Congress for the governance of Guam, the Virgin Islands and Puerto Rico, and the respective local codes all reflect a similar conclusion: local laws of the home legislature are codified in the local Code while the Acts of the Congress affecting the territory or commonwealth are codified separately in title 48 of the United States Code.

9. I have not considered the impact of this analysis upon the Council's emergency amendatory authority which does not even present the negative Congressional action. Chadha would also require a change in the method by which congressional authority is exercised under D.C. Code Ann. §4-102 (1981). Also questioned would be the ability of the people to use the popular tools of referendum, initiative, and recall, in that these were authorized by concurrent resolution of the Congress. See D.C. Code Ann. §§1-281 - 1-295 (1981).

10. Even before the advent of Home Rule to the District of Columbia, the following have been upheld as permissible exercises of the Congressional power to delegate its lawmaking authority to "rightful subjects of legislation" to the Government of the District of Columbia: District of Columbia v. John R. Thompson Co., 346 U.S. 100, 109 (1953) (Supreme Court sustained a delegation to adopt ordinances and regulations ". . . subject of course to the constitutional limitations to which all lawmaking is subservient."); Stoutenburgh v. Hennick, 129 U.S. 141 (1889) (D.C. constituted a body corporate with all the powers of a municipal corporation, not inconsistent with laws of the United States; act conferred upon D.C. only municipal powers and did not authorize it to impose license upon persons soliciting sales of goods on behalf of persons doing business outside D.C. which would be a regulation of commerce in violation of Constitution. The fact that Congress repealed and modified various parts of the acts of the Legislative Assembly containing the clause imposing such license, cannot be held to amount to a ratification of that clause by congress, the parts repealed and modified being separately operative, and such as were within scope of municipal action); Municipal Railroad Co. v. District of Columbia, 132 U.S. 1 (1889) (D.C. is a municipal corporation, having a right to sue and be sued, and subject to the ordinary rules that govern the law of procedure between private persons); Maryland and District of Columbia Rifle and Pistol Ass'n., Inc. v. Washington, 442 F.2d 123 (D.C. Cir. 1971) (when the legislative branch of the District is working within the scope of its permitted powers, and Congress has likewise legislated on the subject matter, the two may coexist in identical areas although the District may have exacted additional requirements or imposed additional penalties so long as the two are not inconsistent.); Fireman's Ins. Co. of Washington D.C. v. Washington, 483 F.2d 1323 (D.C. Cir. 1973) (Insurance regulations of the District of Columbia were within police power of the City Council. While it possesses no inherent legislative authority, it does have broad delegation of police power from Congress); United States ex rel. the Brightwood Railway Co. v. O'Neal, 10 App. D.C. 205 (1897) (Congress's establishment of the court of the justice of the peace was within the usual scope of the general power of legislation over the District of Columbia). See also on question of delegation and the breadth of Thompson, Newman and DePuy, Bringing Democracy to the Nation's Last Colony: The District of Columbia Self-Government Act, 24 Am. U.L. Rev. 537, 569-73, 631-43 (1975). For a listing of Acts of the Legislative Assembly, see 24 Am. U.L. Rev. at 724-44.

11. District of Columbia v. Greater Washington Central Labor Council, 442 A.2d 110 (D.C.) reh. denied, 445 A.2d 960 (D.C. 1982), cert. denied, 103 S.Ct. 1261 (1983); District of Columbia v. Sullivan, 436 A.2d 364 (D.C. 1981); Bishop v. District of Columbia, 411 A.2d 997 (D.C. 1980) (en banc), cert. denied, 446 U.S. 966 (1980); and McIntosh v. Washington, 395 A.2d 744 (D.C. 1978).

12. Cf. Chadha, 103 S.Ct. at 2779 n.13. (President's approval of law does not immunize it from constitutional attack).

13. See Reorganization Plan No. 3 of 1967 §§402(1) - (432) and 406.

14. This precise problem has been presented to the United States District Court for the District of Columbia in Dimond, supra n.5 at Second Amended Complaint ¶44.

15. In litigation interpreting the Organic Act of Guam, 48 U.S.C.A. §1221 et seq., the federal district court considered that the Act of Congress "serves as a constitution for Guam." Agana Bay Dev. Co. (Hong Kong) Ltd. v. Supreme Court of Guam, 422 F.Supp. 593, 608 (D. Guam 1974), rev'd on other grounds, 529 F.2d 952 (9th Cir. 1975). Congress, of course, under the provisions of 48 U.S.C.A. §1423(i) (West Supp. 1983) retains the authority to amend or repeal an act of the Guam legislature in much the same fashion as under the joint resolution legislative veto. Bordacco v. Comacho, 416 F.Supp. 83, 85 (D. Guam 1973), aff'd. 520 F.2d 713 (9th Cir. 1975). And an appellate court has found that the failure of the Congress to annul a law codified at sections 53577-79 of the Guam Government Code within the prescribed one year period of time constitutes an implied approval of the enactment even though it conflicts with the Guam Organic Act. Ramsey v. Chaco, 549 F.2d 1335, 1338 (9th Cir. 1977). This final decision is most interesting in that the court would require the Congress to affirmatively act when in doubt as to the consistency of the local Guamian enactment, even though the congressional decision to reject a territorial enactment is a political judgment and not necessarily one of law. It is also novel in that a general rule of delegated authority would construe the overbroad action of the subordinate legislature with delegated authority as ultra vires.

16. An alternative approach, which was effectively used in the case of Puerto Rico, would be to have the Congress enact the Constitution of the State of New Columbia as the "constitution for the District of Columbia," coupling with that, joint resolution legislative veto authority. This would not in any manner inhibit the development of full statehood for the citizens of the District of Columbia. In fact, such an enactment might be enhanced. See text D.C. Code Ann., vol. 1 (1983 Supp.). Ideally, too, Congress would repeal its acts affecting the District of Columbia ultimately to be enacted by the local government and placed in the "Local Public Laws."

17. For a recounting of the sketchy legislative history bearing upon the question of congressional intention, see Committee on the District of Columbia, Home Rule for the District of Columbia 1973-1974, Background and Legislative History of H.R. 9056, H.R. 9682, and Related Bills, Serial No. S-4, December 1974 at 3031 (12/7/73 Conference Report); 3050 and 3052 (12/12/73 Congressional Record, remarks of Rep. Diggs); 3116-17 (12/19/73 Congressional Record remarks of Sen. Mathias).

18. Additional pending cases involving Chadha principles include: AFGE, AFL-CIO v. Reagan, Civ. No. 83-1914 (D.D.C.); United States v. Exxon Corp., Civ. No. 78-1035 (D.D.C.); EEOC v. Merrill Lynch, No. 82-C-2922 (N.D., Ill.); EEOC v. Kettering School District, No. C-3-82-043 (S.D. Ohio).

19. The following nondisapproval federal reorganization plans affect the District of Columbia: Reorganization Plan No. 5 of 1952, 17 Fed. Reg. 5849; Reorganization Plan No. 4 of 1966, 31 Fed. Reg. 11,137; Reorganization Plan No. 5 of 1966, 31 Fed. Reg. 11,857; Reorganization Plan No. 3 of 1967, 32 Fed. Reg. 11,669; Reorganization Plan No. 3 of 1968, 33 Fed. Reg. 7747; and Reorganization Plan No. 4 of 1968, 33 Fed. Reg. 7749.

20. See also EEOC v. Pan American World Airways, ____ F. Supp. ____ (S.D.N.Y. 1984) (Slip Opinion).

Ms. BOLLING. We will leave the record open in case other things come in, and now the hearing is adjourned, subject to the call of the Chair.

[Whereupon, at 4:30 p.m., the committee was adjourned.]

[The following material was received for the record:]

THE LEGISLATIVE VETO

Testimony of Judge Stephen Breyer*
before the Committee on Rules of the
United States House of Representatives
on March 8, 1984**

The Supreme Court, in INS v. Chadha, #1 / held the legislative veto unconstitutional. Early reports have described the opinion as changing the balance of power between Congress and the executive. #2 / Certainly, the decision is important; Congress or the courts will have to reexamine dozens of statutes to determine whether an offending veto clause is severable or whether the entire statute falls with the clause. #3 / The balance of power consequences are more difficult to predict.

I shall begin a discussion of that subject by asking whether the old veto might reemerge in new legal clothes. Drawing on my experience on the Senate staff, I shall suggest it is just possible that there may be life after death for the legislative veto; but whether Congress will take the necessary steps is uncertain. One might also ask, "Is such a resurrection desirable?" Here, based upon my study of government regulation, I shall express skepticism.

I

Let me clear the undergrowth with three preliminary questions: What is the legislative veto; where did it come from; what does it do.

What it is, essentially, is a clause in a statute, which says that a particular executive action (and by "executive" I mean to include the independent agencies) will take effect only if Congress does not nullify it by resolution within a specified

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* Judge, U.S. Court of Appeals for the First Circuit.

** This testimony contains the substance of The Thomas F. Ryan Lecture which Judge Breyer delivered at Georgetown University on October 13, 1983. The lecture will appear in the February 1984 issue of the Georgetown Law Journal.

(See footnotes at end of article.)

period of time. Variations of detail are possible; the resolution might have to be passed by one House of Congress, both Houses, or simply by a committee.#4/ The action itself might take effect while Congress debates, or it might rest in limbo. Whatever the details, three elements are essential:

1. A statutory delegation of power to the executive;

2. An exercise of that power by the executive;

3. A power reserved by the Congress to nullify that exercise of authority.

Thus, Congress might delegate to the President the authority to commit armed forces to action overseas;#5/ it might delegate to the Attorney General the authority to suspend the deportation of those not legally entitled to remain in the United States;#6/ it might delegate to the Federal Trade Commission the authority to regulate trade practices by rule.#7/ In each instance, it might reserve to itself the power to nullify an individual act taken pursuant to the delegated authority.

Where did the legislative veto come from? Apparently, the first time Congress enacted a veto clause was in 1932 when it gave President Hoover the authority to reorganize executive departments subject to a one-House veto.#8/ Since 1932, veto clauses have proliferated like water-lilies on a pond (or algae in a swimming pool, depending on one's point of view). One survey found five such statutes enacted between 1932 and 1939, nineteen in the 1940's, thirty-four in the 1950's, forty-nine in the 1960's, and eighty-nine enacted between 1970 and 1975.#9/ Justice White, dissenting in Chadha , lists fifty-six statutes that now contain veto clauses.#10/ He adds that they have appeared in about 200 laws enacted in the past fifty years.#11/ Recently, Congress has found particular delight in applying the veto to

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(See footnotes at end of article.)

regulators--to the actions of the Federal Trade Commission,[12] the Federal Energy Regulatory Commission,[13] and the Consumer Product Safety Commission.[14] Judging from recent legislative proposals to apply the veto across the board to all regulatory activity,[15] Chadha may have cut the veto down well before its prime.

What does the veto do? The short answer is "many different things," for its practical effect differs depending upon whether one looks at Defense Department expenditures on airplanes[16] or FTC regulation of undertakers.[17] At a general level, one might describe the veto's function as a legislative compromise of a fight for delegated power. Such compromises are of various sorts.

The veto sometimes offers a compromise of important substantive conflicts embedded deeply in the Constitution. How are we to reconcile the Constitution's grant to Congress of the power to declare war[18] with its grant to the President of authority over the Armed Forces as their Commander in Chief?[19] The War Powers Act approaches the problem, in part, by declaring that the President cannot maintain an armed conflict for longer than ninety days if both Houses of Congress enact a resolution of disapproval.[20] Similar vetoes are embedded in laws authorizing the President to exercise various economic powers during times of "national emergency."[21] To take another example, how are we to reconcile article I's grant to Congress of the power to appropriate money[22] with article II's grant to the President of the power to supervise its expenditure?[23] Must the President spend all that Congress appropriates? Congress has addressed this conflict, authorizing the President to defer certain expenditures subject to a legislative veto.[24]

The veto has also been used to compromise a quite different type of conflict: that which arises within Congress itself

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(See footnotes at end of article.)

because of ever scarcer legislative time. To what extent should Congress, rather than that the executive, spend time on certain highly individual matters that historically called for private bills? Consider Chadha itself. Traditionally, an illegal alien, seeking to escape deportation on grounds of special hardship, had to ask Congress for relief. Congress, lacking the time to process the many requests, eventually decided to change the matter to one of administrative discretion, instead of legislative grace. Yet, in granting the executive the authority to grant hardship exceptions, Congress retained one element of grace: the right to veto a deportation suspension it believed unwarranted.[25] Similar time pressure can give rise to tension with respect to private claims for money. Without Chadha we might have seen increased delegation to the executive, perhaps with veto attached, as a substitute for some categories of private requests for legislative compensation.

The regulatory veto's focus, however, is upon a still different need for compromise, a need arising out of the classic conflict in the administrative state between political accountability and the necessary complexity of regulatory decisionmaking. This complexity forces broad statutory delegation of power. Of course, in principle under article I of the Constitution, "Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard."[26] Indeed, the Supreme Court in Schechter Poultry Corp. v. United States [27] held the National Industrial Recovery Act unconstitutional as an example of "delegation running riot."[28] In practice, however, since Schechter Congress has delegated agencies vast powers under statutes written in the broadest possible language. The FTC can stop business practices that are "unfair";[29] the ICC sets "reasonable" rates;[30] the FCC simply acts to serve "public convenience, interest, or necessity."[31]

(See footnotes at end of article.)

This breadth of language reflects the underlying complexity of regulatory problems. Congress cannot set individual rates, award television licenses, or identify all undesirable business practices. Examination of the arguments made before commissions about how these tasks should be carried out reveals the inordinate difficulty of writing more specific legislation. Indeed, the practical, as well as the political, difficulties of doing so are sufficiently obvious that few if any federal cases since Schechter have applied the nondelegation doctrine (though one finds the occasional judicial murmuring about its reappearance).#32/

In a word, Congress delegated broadly to the agencies because it had to do so. The federal judiciary, recognizing the need, ratified the means. At the same time that necessity compelled Congress to delegate, however, concern for congressional authority demanded continuing checks on the agencies. The veto offered the most direct and effective guarantee that delegation would not drain power from Congress.

Once we recognize that the legislative veto acts in different ways to compromise different sorts of interests, we can see the difficulty of assessing the impact of its abolition on the relative power of the President and Congress. The power shift that results from a veto clause depends upon what Congress would have done had the veto device not been available as a compromise.

Many choices are available in the absence of a veto power. At one extreme, Congress might simply have delegated unqualified power to the executive. Of course, even then Congress could still later enact a special law setting aside an executive action with which it disagreed; but it is obviously easier to obtain a resolution of veto from one House of Congress than to obtain a new law from both Houses and the President. Thus, if one

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believes that Congress, if forbidden the veto, would delegate authority anyway,[33] then one would believe that the veto makes Congress more powerful, and its absence will shift power to the executive.

At the other extreme, Congress might have declined to delegate in these areas at all if it could not retain the security of the veto, or, more plausibly, Congress might have delegated to the executive only the power to recommend substantive changes to Congress. Narrowly drawn, a law along such lines would consist of a sentence added to a statute where there now appears a legislative veto, stating that the agency's exercise of the authority to which the veto is attached is ineffective unless Congress enacts a confirmatory law within, say, sixty days.[34] This alternative would significantly shift the balance toward the legislature, because agency decisions would be ineffective without the attention and approval of committees of Congress, both Houses, and the President.

Neither of these alternatives seems realistic in many of the contexts in which legislative vetoes appear. The former would often grant too much discretion to the executive to be palatable to Congress. The other would often hamstring governmental decisionmaking. To state that the executive could never commit troops,[35] or suspend alien deportations,[36] or prohibit unfair business practices,[37] or adjust the rules governing railroad passenger service[38] without a confirmatory law might handicap too severely the executive's, and the nation's, ability to perform needed tasks. As a practical matter, Congress and the President would likely have to forge some other compromise, perhaps a delegation of a more circumscribed but unconstrained power, or perhaps a reliance on the other means of congressional oversight of the exercise of delegated powers.

To the extent that the viable alternatives to the veto are uncertain, so is the veto's effect on the balance of governmental

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power. This uncertainty likely accounts for the historical fact that presidential attitudes toward the veto have been ambivalent. Every modern President has criticized the legislative veto in principle and questioned its constitutionality,[39] but the same Presidents have often signed into law bills containing vetoes, defended their constitutionality, and even proposed them.[40]

In sum, the legislative veto is new. Its popularity has grown by leaps and bounds. It can serve several very different objectives by responding to several very different sorts of need for compromise. The effect of its abolition upon the legislative/executive power balance must be described with the words, "it depends."

II

Now let us turn to the Supreme Court's decision in Chadha. The most important feature of that decision, in my view, is that its holding that the veto is unconstitutional does not turn upon any fact concerning the veto's origin, its purposes, or its balance of power effects. Rather, the decision appears formal; it is based upon the language of the Constitution, upon its structural dictates, not upon the function of the veto.

The Court's logic might be explained roughly as follows. From a logical point of view, the exercise of a legislative veto must constitute an exercise of legislative, of executive, or of judicial power--the powers that the Constitution specifically grants to the federal government. If the power is executive or judicial, Congress cannot exercise it, for with a few specifically mentioned exceptions (none of which is relevant here)[41] the Constitution grants Congress only legislative power. If, however, the power is legislative, it must be exercised in the constitutionally prescribed manner. Article I, section 1 vests "all legislative Powers . . . in a Congress . .

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. which shall consist of a Senate and House of Representatives," both of which must concur in the enactment of legislation. Further, article I, section 7, clause 3, the presentment clause, specifically requires that "[e]very Order, Resolution, or Vote to which the Concurrence of [the two Houses] may be necessary" must be "presented to the President" for his signature or veto. How then can a legislative act such as the legislative veto be valid under the Constitution without both bicameral action and the opportunity for Presidential participation?

The delegation of specified powers from the states and the people to particular branches of the federal government and the system of specified procedural checks on enactment of legislation are, of course, at the very heart of the Constitution's scheme. The Chadha majority's simple reliance on the logic and letter of the Constitution and its disclaimer of any concern for the possible wisdom or utility of the legislative veto[142] reflects recognition of this fact. Still, one might wonder at the formality of the decision. Is the logic of the Constitution here so compelling that one can ignore the purposes, the effects, the practical virtues of the legislative veto? In constitutional matters this would be unusual, but the majority believed it had before it that unusual case.

Justice White, in dissent, urged that attention to the functional importance of the veto demanded a more circumspect approach that would allow a more flexible interpretation of the Constitution's language.[143] Yet a reading of his dissenting opinion is instructive in part because it demonstrates how difficult it is to read the language more flexibly in this particular case. The pure constitutional logic to which the majority pointed is very difficult to overcome. Essentially, the dissent agreed that to legitimate the veto the Court would have to stretch the Constitution's language, but Justice White argued that its language has been stretched equally far in other

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analogous instances. The analogies he offered, however, did not persuade the Court.

First, if Congress can delegate a form of legislative power to the executive,[44] Justice White asked, why can it not delegate a form of legislative power to some of its own members?[45] This question, however, does not answer itself. The type of legislative power that Congress has delegated to the executive is the power to make rules, and rulemaking is often an integral part of administering just as it is an integral part of judging. Thus, one does not depart far from the Constitution's letter in stating that the Constitution, in granting administrative powers to judges allows them, at least in some instances, to make rules. So, this example does not readily justify the greater departure from the Constitution's letter that would be necessary to allow a part of Congress to legislate on its own.

Similarly, the dissent points to cases that have upheld congressional delegation of legislative-like powers to private groups.[46] The legislative veto, however, involves a delegation to those who will act in their official capacities as members of Congress; in that capacity they can possess only those powers bestowed upon them by article I. The question of how, say, one House could exercise legislative power in the face of express bicameral and presentation requirements then seems to arise in a context different enough to make the private group analogy less compelling.

Finally, the dissent noted that the one-House veto carries out the Constitution's spirit, for it means that executive action would take effect only if the Executive and both Houses of Congress approved it.[47] The executive action might be viewed as an executive proposal to the Congress, later enacted by the silence of both Houses. Yet, to analogize silence to legislating goes rather far. If one takes the analogy literally (if, for example, one would still require the President to act pursuant

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only to constitutionally, and thus congressionally, delegated authority) one destroys the analogy's power. If the President can act only along express constitutional paths, how can Congress act differently? Why is it any more reasonable to view silence as the legislative approval of an executive act taken pursuant to statutorily delegated authority than to view it as a grant of appropriate legislative authority? In both cases, silence seems quite far removed from the Constitution's paths of bicameralism and presentation to the President.

This brief discussion points to weaknesses in the force of the dissent's analogies. Perhaps stronger analogies are available. Professor Freund has suggested looking at the basic veto-conditioned delegation as an effort to make certain that future Congresses and Presidents continue to agree to the delegation, and the nonexercise of the veto as evidence of the continued agreement. Regardless, the main difference between the majority and the dissent in my view is a difference that centers on the role of the Constitution's language here. The majority believed that approval of the veto would require too much flexibility in reading the words, too drastic a departure from the Constitution's form. It would leave us at sea as to what the Constitution does or does not require when separation of powers is at issue. The dissent's analogies failed to convince the majority (again, when separation of powers is at issue) that the Court has ever previously departed so significantly from the Constitution's text and logic.

If I am right, the majority may have believed it had before it a Schecter -type example--an extreme case. Chadha may then follow Schecter as a judicial tree that bears little fruit. To define an extreme tells us little about what happens in the more ordinary case.

(See footnotes at end of article.)

III

Chadha 's avoidance of consideration of the veto's functions or objectives leaves open the question of the extent to which Congress can still accomplish those functions and pursue those objectives after Chadha . Congress unquestionably retains a host of traditional weapons in its legislative and political arsenal that can accomplish some of the veto's objectives. These include the power to provide that legislation delegating authority to the executive expires every so often. To continue to exercise that authority, the executive would have to seek congressional approval, at which point past agency behavior that Congress disliked would become the subject of serious debate. Moreover, Congress might sometimes tailor its statutes more specifically, limiting executive power.[48] Further, Congress can require the President, before taking action, to consult with congressional representatives whose views would carry significant political weight. Additionally, Congress can delay implementation of an executive action (as it does when the Supreme Court promulgates rules of civil procedure)[49] until Congress has had time to consider it and to enact legislation preventing the action from taking effect. Finally, each year Congress considers the agency's budget. If a significant group of legislators strongly opposes a particular agency decision, it might well succeed in including a sentence in the appropriations bill denying the agency funds to enforce that decision.[50]

All of these traditional alternatives, however, have obvious drawbacks or features that make them function quite differently from the legislative veto itself, and their balance of power effects are different. Building in an expiration of executive authority risks agency program disruption; trying carefully to tailor legislation presents the practical difficulties of greater linguistic specificity; requiring consultation does not compel obedience; delaying implementation would condition congressional

(See footnotes at end of article.)

control upon the eventual enactment of a law; and budget control is often random, given time pressure to enact appropriations bills. Still, these alternatives, imperfect as they are, count for something.

Moreover, if my basic view of the Chadha opinion is correct, it should be possible to come closer--to develop a veto substitute that satisfies the literal wording of the Constitution's bicameral and presentation clauses while it more nearly approximates the compromise functions of the legislative veto. I shall describe as a veto substitute the closest I have been able to come to doing so.

My veto substitute is a variant on the suggestion that Congress could replace veto provisions in present statutes with provisions that conditioned the legal effect of exercises of delegated authority on subsequent enactment of a confirmatory statute. We noted before that the confirmatory law strategy would drastically and unworkably undermine executive or agency power because it is so much harder to enact a new law than to decline to exercise a veto.[51] Thus, the confirmatory law approach is too big a gun to be of practical value.

Whether a confirmatory law is easy or difficult to enact, however, is largely a function of internal congressional procedural rules, a matter that is within the exclusive control of Congress. If those rules could be changed to make confirmatory law procedures rather like legislative veto procedures, the practical effect of the two could be made quite similar; the confirmatory law gun could be reduced to a size about equal to the legislative veto gun. Then Congress could reasonably have no more qualms about attaching the one to a delegated power than the other, and the shift of power from legislative to executive branch need not take place.

To be more specific, if the legislative procedural rules can be changed to make the enactment of a confirmatory law no more

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difficult than stopping the enactment of a veto resolution, then there will be no shift of power away from the executive branch. If those rules could make stopping the passage of such a law precisely as easy as the passage of a resolution of veto, then there would be no shift of power toward the executive branch. In fact, there would be no change at all in the balance of power. Because the burden of inertia is a function of internal legislative procedure, not of the Constitution, this might be done.

Take the Senate as an example. Assume that all legislative veto provisions in statutes were replaced with special confirmatory law requirements. Then suppose that the Senate rules provided a special fast track for special confirmatory laws. That fast track rule would provide: 1) when an executive branch agency enacts a regulation (or takes other action) subject to a special confirmatory law requirement, a bill embodying that special confirmatory law shall be introduced automatically (say, under the name of the Majority Leader, as sponsoring Senator); 2) the bill will be held at the desk, and not referred to committee; 3) the bill will be neither debatable nor amendable; it cannot be tabled or subjected to filibuster, etc.; and 4) the Senate will vote upon the bill, up or down, within sixty days of its introduction. The House would have a similar fast track. If the fast track is followed, the bill automatically becomes law (unless, of course, one House opposes it).

The rule could even go on to say that the bill can be derailed, that is, removed from the fast track, but only by a majority vote of the Senate. Because derailing means referral to committee, etc., it likely means defeat. In other words, the confirmatory law could be stopped, and thus the executive action at issue could be stopped, if and only if a majority of the Senate or the House votes to derail it. That <u>is</u> the one-House veto. To replicate a committee veto the rule would simply allow derailment by a majority vote of the relevant committee. If there is a need to have the executive branch action take effect

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immediately instead of after sixty days, the basic authorizing law would simply allow the action (say, committing troops) for sixty days, but no longer, without a confirming law.

In its main features then, the substitute fast track approach closely resembles the legislative veto. The agency is given effective authority to take an action of a specified type unless Congress disagrees. All of the compromises achieved by the veto can be largely preserved. Congress is able to delegate broad powers but retains the opportunity to review any exercises of those powers that it finds particularly objectionable, without imposing on itself the burden of reviewing each particular exercise. The method by which this is done, however, is different from that followed by the traditional legislative veto; the Constitution's language is followed as a matter of form. Thus, whatever legal questions might arise, they should not be the same as those at issue in Chadha .

The substitute does not replicate the veto perfectly, and the difference should be noted. First, the veto substitute imposes on Congress a degree of visible responsibility for the actions it confirms, a burden that the veto system allowed it to avoid. Under the legislative veto, the vast bulk of decisions subject to review would elicit absolutely no congressional action or consideration. Even when congressional action was initiated, a resolution of veto might be introduced into a committee only to disappear, thereby freeing the Senators from having to take a public vote on the matter. With the proposed veto substitute, however, a small group of senators could force a roll-call vote on even the most run of the mill (nondebatable, nonamendable) confirmatory law because the Constitution requires that one-fifth of the senators present retain the power to require a roll-call on any matter.[52] Even in cases where no vote was recorded, the fact that the legislators had to admit that Congress acted , rather than passively failed to act, might make a difference to constituents. That in turn might make a difference to the legislator. Moreover, a future Congress or either House, hostile

(See footnotes at end of article.)

to the agency, might simply repeal the special procedural rules. All this might make the balance of power consequences somewhat different than those of the legislative veto.[53]

Second, the veto substitute could affect judicial review of administrative exercises of delegated authority. The chief task of judicial review at present is to determine whether the administrative action abides by the terms of the statutory delegation that authorizes it. If, however, the agency action were promptly embodied in a new statute, there would be no opportunity for this issue to be raised because the new statute would stand independent of the original delegating statute. One can minimize this problem by making the proposal more complex. Judicial review could be preserved if the congressional rules required that each special confirmatory law include a clause rendering it ineffective unless the administrative action that initiated it would have been a valid exercise of the delegated authority, absent the requirement of a confirmatory statute. Alternative forms of language are possible, but all are complicated and Congress might be reluctant to provide them.

Third, the confirmatory law approach, unlike the legislative veto, would require the President's signature to confirm each administrative action. Where the original delegation was to the executive branch, the President might routinely be expected to back the executive agency so that the added requirement would not make much difference. Where independent agencies are involved, however, the substitute approach would, in effect, introduce an executive veto everywhere it provided for legislative review. Congress would have to choose whether to subject agency action to checks by both branches or by neither.

Fourth, it is difficult to replicate the two-House veto. One could try by having the Senate rules, for example, condition derailment on the House also voting to derail from the fast track. The fast track, however, must eventually lead to a vote,

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(See footnotes at end of article.)

and if one House votes "no," the confirmatory law is stopped and the agency action fails.

Fifth, there is an important question of practical politics: Would Congress wish to amend its rules even if it knew that it could replicate the veto by doing so?[54] For one thing, the overall political effects of doing so are uncertain. For another, some fine tuning, hence several consecutive amendments, would likely be needed. Finally, to open the subject of rules change is itself treacherous. Many different legislators with wide-ranging and conflicting notions of rules reform would be likely to seize the occasion to present their own ideas. Present House and Senate rules have the virtue of an uneasy compromise that has stood the test of time. Opening the subject and adopting changes that are potentially far-reaching and of uncertain outcome cannot be undertaken lightly.

In sum, the veto substitute is not a precise functional replica of the veto, but it comes close. Still, the question for Congress is whether it so strongly desires the legislative veto that it will pay the price of radical and complex change of its internal rules of procedure (a change that could bring with it a more thorough consideration of rules reform), or whether Congress will rest content with a status quo that includes the less effective substitutes for the veto that I have mentioned.[55] To answer the question, Congress will have to reconsider a matter that the Chadha Court expressly put to one side, namely the veto's wisdom or desirability. In a word, is it necessary?

IV

I cannot answer the question of the veto's necessity as a general matter. Because the veto serves many different purposes, one can only conclude whether the veto is good or bad after studying the particular substantive areas where its use is proposed. Of course, at a highly abstract level of argument, one

(See footnotes at end of article.)

can imagine a general point in its favor. The veto allows Congress to mitigate the risks of delegating vast, unchecked power to the executive. It assures Congress that when the executive makes a decision that has political impact it can review that decision. Thus, ultimate case-by-case authority rests in a poltically responsible body, one elected by the people, rather than a bureaucracy.

Even this argument, however, does not ring true as applied, for example, to presidential war powers. As soon as one is at all specific, it becomes apparent that questions concerning national defense or the President's spending powers are quite different from those surrounding the regulatory powers of the Federal Trade Commission, the Consumer Product Safety Commission, or the Federal Energy Administration. My view of the veto's wisdom is not necessarily the same in all of these areas. I can, however, discuss the practical arguments for and against the veto in the regulatory area, an area with which I am familiar, and doing so might suggest the type of pragmatic judgment called for in evaluating the veto in other contexts.

The major argument favoring the regulatory veto, and one accounting for its popularity, is a simple one: Regulatory agencies are out of control and the veto offers the electorate a rein to halt or to guide them. This argument draws added force from our growing disenchantment with alternative methods of checking agency power.[56] At the time of the New Deal, some believed that the agencies might develop a science of regulation, the canons of which would hold agency managers in check through their sense of professional discipline. Today, few believe, for example, in a science of ratemaking. In the 1940's and the 1950's it seemed that fair and open procedures, as embodied in the Administrative Procedure Act,[57] would keep agency power in check, but today we suspect that at best procedures guarantee a fair result; and we are aware that a fair ratesetting or power plant siting process does not necessarily mean an economically sensible rate or an environmentally optimal plant location.

(See footnotes at end of article.)

It is not surprising that those who now diagnose the regulatory problem as one of unchecked bureaucratic power look for another responsible body to provide a check. Under our Constitution, when we search for checks and controls we are inevitably drawn toward one of the three major branches. #58 /

One might reasonably find flaws in proposals that would give the President more power to control agencies. Does the President have the time or the inclination to involve himself in the details of regulation? Can the Executive Office staff adequately second guess the agencies, or, in order to understand the subject matter and hence the merits of a proposed regulation, will it have to grow in size, replicating the very bureaucracy it seeks to replace? The subject requires more discussion, but it is safe to say that increased Presidential power to control the agencies is no panacea for the problems of regulators.

The judges cannot control the agencies very effectively. Statutory standards that are broad enough to allow them to escape congressional control similarly inhibit review of agency action by judges. The judges' legal ability to require more procedure, the efficacy of their doing so, their ability to second guess agencies on matters of substance, are all open to most serious question.

Under these circumstances, a broad congressional delegation of power to the agency coupled with a veto that allows Congress subsequently to review actions that turn out to have political importance appears to be a plausible compromise with the needs of the administrative state. If the regulatory agencies are out of control, the veto provides a practical check on the power of the agencies to act in a politically unpopular way, a power that, without a veto, practical necessity might require Congress to concede them through a broad statutory delegation.

Despite the appeal of this argument, there are powerful if not overwhelming practical considerations on the other side. #59 /

(See footnotes at end of article.)

Some of its opponents argue that the veto gives those who are subject to regulation a chance to escape it; those likely to succeed are those with sufficient political influence to capture the attention of Capitol Hill. The critics add that the possibility of a veto would make it difficult for agencies to plan. How could a Maritime Commission Chairman, for example, introduce procompetitive reform of ocean shipping regulation, knowing that Congress might veto one essential element of the plan but approve another? Furthermore, what would happen to the procedural regularity that, from the point of view of fairness, is one of the virtues of agency practice? Given the large number of agency rules, would a legislative veto or veto substitute not tend to become a congressional staff veto? In self-defense, would agencies not have to seek the advice of congressional staff before promulgating a rule? If so, would interested parties not seek to convert that staff before approaching the agency? Because Congress has no set procedures for such negotiations, the parties would thereby circumvent agency procedures designed to allow them to see and comment upon one another's claims. Finally, will the veto increase the congressman's fear of special interest groups, each of which is likely to hold the member responsible for numerous agency decisions over which, in reality, he has little control?

The argument against the veto that I find strongest, however, is one that asks, is the diagnosis of the regulatory disease that it presupposes the correct one? Is it that agencies are, or were, simply out of control and that the veto acted as a salutory check on bureaucratic overreaching? I think it fair to say that such was not true of airline or trucking regulation, two instances where overregulation severely harmed the public and where procompetitive reform has brought shippers, travelers and consumers significant benefits in the form of lower prices.#60/ The agencies prior to reform may not have been doing well, but they were not overreaching. They were simply following the statutes that Congress had previously enacted, carrying out

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(See footnotes at end of article.)

regulatory practices developed over half a century and doing so, at worst, in an overly literal manner. Reform in those areas consisted of a total rethinking of the regulatory program followed by a total rewriting of the basic statutes in order to introduce price competition into the industries.[61] There is no reason whatsoever to believe that the legislative veto of agency rules, had it existed, could have contributed significantly to the reform process.

Vetoes have typically been used only in interstitial ways. Consider the two regulatory vetoes that so far have atttracted the most attention: the congressional decisions to veto the Federal Trade Commission rule concerning used car dealers[62] and the Federal Energy Regulatory Commission rules governing the distribution of price increases resulting from the deregulation of natural gas.[63] Arguments can be made for, and against, each of the vetoed rules, but it is difficult to see how, from any point of view, they can be viewed as exemplifying the worst agency abuses or how the vetoes of them constitute major regulatory reform.

I shall stop the discussion of the regulatory veto's wisdom here, for I have said enough to show that the arguments and considerations are very different from those at issue in the context of, say, Presidential war powers or even deportation suspensions. I have expressed a strong note of skepticism as to the need for the veto in the regulatory area.

V

One result of Chadha is that either Congress or the courts will have to reexamine the many statutes in which legislative vetoes appear and redetermine their wisdom. A reexamination is necessary because undoubtedly parties affected by each of the many statutes will argue that, without the veto, Congress would intend the whole delegation of authority to fail, so the agency

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(See footnotes at end of article.)

lacks authority to act. Others will argue that without the veto Congress would still wish to delegate authority, so the agency retains the authority to act. If Congress does not answer these questions, the courts apparently will have to draw on past legislative history in an effort to do so.

If my analysis is correct, then Congress, in addressing the many statutes containing veto provisions, has the option of eliminating the veto and falling back on traditional alternatives, such as reliance upon hearings or appropriations bill amendments, or it can make radical changes in its rules and create a veto susbstitute. The latter course is open to it if it believes the veto necessary. The political difficulties of changing the rules will create a practical test of congressional belief in the veto's importance.

One suspects that, in fact, the traditional alternatives will prove adequate in most areas. If the veto totally disappears, however, one need not necessarily blame the Supreme Court. One might conclude that there was not a sufficiently strong demonstration of its practical necessity.

FOOTNOTES

#1. 103 S. Ct. 2764 (1983).

#2. N.Y. Times, June 24, 1983, at 1, col. 4; Wash. Post, June 24, 1983, at 1, col. 1; see Chadha , 103 S. Ct. at 2792-93 (White, J., dissenting); id. at 2788 (Powell, J., concurring).

#3. See Chadha , 103 S. Ct. at 2811-16 (appendix to opinion of White, J., dissenting) (listing examples of current statutes containing legislative veto provisions).

¶4. There are also various, more exotic arrangements. Many statutes condition executive actions not on the absence of a legislative veto, but on affirmative endorsement by a congressional resolution. See, e.g. Trade Expansion Act of 1962, 19 U.S.C. § 1981(a)(2)(B) (1976); Energy Conservation and Production Act, 42 U.S.C. § 6834(c) (1976) (specific section repealed by Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1041(b), 95 Stat. 357, 621 (codified at 42 U.S.C. § 6834 (1976 & Supp. V 1981))). Several statutes employ what has been labelled the "one and one-half House veto," which gives one House the power to veto an executive action unless the other House affirmatively supports the executive. See, e.g., Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9655(a)-(d) (1976 & Supp. V 1981); Omnibus Budget Reconciliation Act of 1981, 15 U.S.C. § 1276(a)-(d) (1982).

¶5. See War Powers Resolution, 50 U.S.C. § 1541 (1976 & Supp. V 1981).

¶6. See Immigration and Nationality Act, 8 U.S.C. § 1254 (1982).

¶7. See Magnuson-Moss Warranty-Federal Commission Improvement Act, Pub. L. No. 93-637, § 202(a), 88 Stat. 2183, 2193 (1975) (codified at 15 U.S.C. § 57(a) (1976)) (amended to include legislative veto by Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 21, 94 Stat. 374, 393, (codified at 15 U.S.C. § 57a-1 (1982))).

¶8. Act of June 30, 1932, ch. 314, § 407, 47 Stat. 382, 414; see Chadha , 103 S. Ct. at 2793 (White, J., dissenting).

¶9. Abourezk, The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives , 52 "Ind. L. Rev." 323, 324 (1977).

¶10. Chadha , 103 S. Ct. at 2811-16 (White, J., dissenting). It should be noted that a number of Justice White's examples involve requirements of affirmative congressional endorsement of executive actions, rather than standard veto provisions.

¶11. Id. at 2793.

¶12. See supra note 7. This particular legislative veto was held unconstituional in Consumers Union of United States, Inc. v. FTC, 691 F.2d 575, 577 (D.C. Cir. 1982) (per curiam) (en banc), aff'd mem. , 103 S. Ct. 3556 (1983).

¶13. Natural Gas Policy Act of 1978, Pub. L. No. 95-621, § 202(c)(1)-(2), 92 Stat. 3350, 3372 (codified at 15 U.S.C. § 3342(c)(1)-(2) (1982)). This legislative veto provision was held unconstituional in Consumers Energy Council of Am. v. Federal Energy Regulatory Comm'n, 673 F.2d 425, 478-79 (D.C. Cir. 1982), aff'd mem. , 103 S. Ct. 3556 (1983).

¶14. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1207, 95 Stat. 357, 718-19 (codified at 15 U.S.C. §§ 1204, 1204, 1276, 2083 (1982)). The Consumer Product Safety Commission veto provisions are instances of the one and one-half House veto. See supra note 4.

¶15. See S. 1080, §§ 801-803, 97th Cong., 2d Sess., 128 °Cong. Rec.° S2719-21 (daily ed. Mar. 24, 1982).

¶16. See Department of Defense Appropriation Authorization Act, 50 U.S.C. § 1431 (1976 & Supp. V 1981).

¶17. See supra note 7. The funeral industry regulations are codified at 16 C.F.R. § 453 (1983). Although the regulations were hotly contested and a veto resolution was introduced in the House, no veto was voted and the rules are to go into effect at the beginning of 1984. See 44 °Antitrust & Trade Reg. Rep.° (BNA) No. 1118, at 1123 (June 9, 1983).

#18. "U.S. Const." art. I, § 8, cl. 11.

#19. Id. art. II, § 2, cl. 1.

#20. War Powers Resolution, 50 U.S.C. § 1544(b) (1976).

#21. See International Emergency Economic Powers Act, 50 U.S.C. § 1706(b) (1976 & Supp. V 1981).

#22. "U.S. Const." art. I, § 8, cl. 1.

#23. Id. at art. II, § 3.

#24. Congressional Budget and Impoundment Control Act of 1974, 31 U.S.C. § 1403(a)-(c) (1976).

#25. Immigration and Nationality Act, Pub. L. No. 82-414, § 244(c), 66 Stat. 163, 216 (1952) (codified at 8 U.S.C. § 1254(c) (1982)). For a brief history of congressional handling of the responsibility for deportation decisions, see Chadha, 103 S. Ct. at 2803-04 (White, J., dissenting).

#26. United States v. Chicago, M. St. P. & Pac. R.R., 282 U.S. 311, 324 (1931).

#27. 295 U.S. 495 (1935).

#28. Id. at 553 (Cardozo, J., concurring).

#29. 15 U.S.C. § 45(a)(1)-(2) (1982); see FTC v. Gratz, 253 U.S. 421, 427 (1920) (construing phrase "unfair method of competition"); Sears, Roebuck & Co. v. FTC, 258 F. 307, 312 7th Cir. 1919) (same).

#30. 49 U.S.C. § 15a(2) (1976 & Supp. V 1981); see Atchison, T., & S.F. Ry. Co. v. United States, 284 U.S. 248, 262 (1932) (discussing nature of ICC's duty to set "reasonable rates").

¶31. 47 U.S.C. § 303 (1976); see FCC v. RCA Communications, Inc., 346 U.S. 86, 90 (1953) ("public interest, convenience, or necessity" criterion gives ICC wide but not unbounded discretion); Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 285 (1933) ("public convenience, interest or necessity" criterion does not confer unlimited power).

¶32. See, e.g., Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 646 (1980) (plurality opinion); id. at 664 (Powell, J., concurring); id. at 671-88 (Rehnquist, J., concurring in judgment); National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 342 (1974); Fort Worth & D. Ry. Co. v. Lewis, 693 F.2d 432, 435 n.8 (5th Cir. 1982).

¶33. See S. 1714, 98th Cong., 1st Sess. (1983), reprinted in 45 "Antitrust & Trade Reg. Rep." (BNA) No. 1133, at 486-92 (Sept. 20, 1983) (reauthorizing FTC rulemaking without a legislative veto).

¶34. See 129 "Cong. Rec." H4773 (daily ed. June 29, 1983) (text of Congressman Levitas' amendment to Consumer Product Safety Commission reauthorization bill).

¶35. See supra note 5.

¶36. See supra note 6.

¶37. See supra notes 7, 29.

¶38. See 45 U.S.C. § 564(c)(3) (1976 & Supp. V 1981).

¶39. See Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 "Calif. L. Rev." 983, 1002-29 (1975).

¶40. See Chadha , 103 S. Ct. at 2793 & nn. 4-5 (White, J., dissenting).

¶41. The exceptions include "U.S. Const." art. I., § 2, cl. 5 (House's power to impeach); id. art. I, § 3, cl. 6 (Senate to try impeachments); id. art. II, § 2, cl. 2 (Senate power to approve Presidential appointments and to ratify treaties); id. art. I, § 5, cl. 2 (control over internal congressional rules).

¶42. Chadha , 103 S. Ct. at 2784-88.

¶43. Id. at 2796-98 (White, J., dissenting).

¶44. See supra text accompanying notes 26-33.

¶45. Chadha , 103 S. Ct. at 2801-03 (White, J., dissenting).

¶46. See id. at 2802-03 (discussing Currin v. Wallace, 306 U.S. 1, 16-17 (1939), and United States v. Rock Royal Co-operative, Inc., 307 U.S. 533, 577-78 (1939)).

¶47. Chadha , 103 S. Ct. at 2807-08 (White, J., dissenting). As Justice White observes, this justification is applicable only to one-House veto provisions. When a two-House veto is required to block executive action, one House's unwillingness to go along with a proposal will not render it null if the other House sides with the executive and refuses to join the first House in enacting a veto resolution. Justice White concluded that "the one-House veto is of more certain constitutionality than the two-House version." Id.

¶48. See S. 1714, §§ 6,9, 98th Cong., 1st Sess. (1983), reprinted in 45 "Antitrust & Trade Reg. Rep." (BNA) No. 1133, at 486, 488, 489 (Sept. 29, 1983) (narrowing authority of FTC to engage in rulemaking in wake of Chadha).

#49. See 28 U.S.C. § 2072 (1976).

#50. See Federal Trade Commission Improvements Act of 1980, 15 U.S.C. § 57a-1(c)(1) (1982) (refusing the FTC funds for issuing rules concerning funeral industry unless rules conform to congressionally prescribed contours).

#51. See supra notes 34-38 and accompanying text (discussing use of confirmatory laws).

#52. "U.S. Const." art. I, § 5, cl. 3.

#53. Another limitation of the veto substitute is its inability to replicate the one and one-half House veto. See supra note 4 (discussing one and one-half House veto). The one and one-half House veto permitted one House to override, by affirmative vote, the veto of agency action adopted by the other House. Under any arrangement, no matter how streamlined, that conditions agency actions on a confirmatory law, opposition to a particular agency decision by a majority of either House will be fatal, regardless of the other House's overwelming approval of the agency's choice.

#54. Congress' attitude on this question may be tested by an amendment offered by Senator Kasten to the Senate's proposed FTC reauthorization bill. See 129 "Cong. Rec." S13,110-11 (daily ed. Sept. 28, 1983) (text of Kasten amendment). Senator Kasten would delay the effective date of any FTC rule to allow Congress an opportunity to enact an overriding law and would place any proposed "resolutions of disapproval" on a special fast-track in both Houses.

#55. See supra notes 33-40 and accompanying text (discussing possible veto substitutes).

#56. See "S. Breyer, Regulation and Its Reform" 341-68 (1982) (discussing virtues and weaknesses of alternative methods of controlling agencies).

¶57. Act of June 11, 1946, ch. 324, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C. & 7 U.S.C.).

¶58. See °S. Breyer°, supra note 56, at 357-61 (discussing possible supervisory roles of three branches at greater length).

¶59. See id. at 357; Improving Congressional Oversight of Federal Regulatory Agencies: Hearings Before the Senate Government Operations Comm. , 94th Cong., 2d Sess. 166-72 (1976) (statements of Alan B. Morrison and Reuben B. Robertson).

¶60. For a good general history of airline regulation and deregulation, see °E. Bailey, D. Graham & D. Kaplan, Deregulating the Airlines--An Economic Analysis° 6-53 (report of Civil Aeronautics Board, May 1983); see generally Oversight of Civil Aeronautics Board Practices and Procedures: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary , 94th Cong., 1st Sess. (1975) (presenting background for deregulation).

¶61. See Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C.); Revised Interstate Commerce Act, Pub. L. No. 95-473, 92 Stat. 1464 (1978) (codified in scattered sections of 49 U.S.C.).

¶62. S. Con. Res. 60, 97th Cong., 2d Sess., adopted by Senate, 128 °Cong. Rec.° S5402 (daily ed. May 18, 1982), and by House of Representatives, 128 °Cong. Rec.° H2882-83 (daily ed. May 26, 1982). The veto was invalidated as unconstitutional in Consumer Union v. FTC, 691 F.2d 575, 577-78 (D.C. Cir. 1982) (per curiam) (en banc), aff'd mem. , 103 S. Ct. 3556 (1983).

¶63. H.R. Res. 655, 96th Cong., 2d Sess., 126 °Cong. Rec.° 11,800 (1980). The veto was invalidated as unconstitutional in Consumer Energy Council of Am. v. Federal Energy Regulatory Comm'n, 673 F.2d 425, 478-79 (D.C. Cir. 1982), aff'd mem. , 103 S. Ct. 3556 (1983).

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May 9, 1984

The Honorable Claude Pepper, Chairman
House Committee on Rules
Room B-346 Rayburn House Office Bldg.
Washington, D.C. 20515

Re: Hearings on Legislative Veto

Dear Chairman Pepper:

I appreciate the opportunity to submit this statement for the record to supplement my previous testimony before the Administrative Law Subcommittee of the House Judiciary Committee, a copy of which has already been forwarded to your staff. I have just a few points to make in addition to my prior testimony, but before doing so I wish to make it clear that my position is hardly a neutral one on this question, since I was counsel for Jagdish Rai Chadha in INS v. Chadha, the Supreme Court decision which has prompted these hearings.

Perhaps the most interesting point to note about the post-Chadha environment is that not all that much has changed. Agencies are still issuing rules, individuals, labor unions, trade associations, and corporations are still objecting, courts are still upholding and rejecting rules, and Congress is still looking askance and occasionally acting to overturn them. The principal difference now is that, from the Congressional point of view, changes can be made only through the full legislative process. Perhaps the single biggest change is that the tendency which was becoming increasingly evident to try to add a legislative veto to almost any bill that came to the floor has now stopped, but other methods are being sought to reassert Congressional perrogatives. However, a number of these substitutes for the legislative veto, although constitutional, suffer from many of the same flaws that caused so much opposition to the veto in its prior form.

It seems to me that the principal reason that Congress continues to search for a substitute is that it has an erroneous notion of what constitutes "oversight" and that it is trying to do that which it is institutionally incapable of doing, and failing to do that which only it can do under our Constitution. Thus, the fundmental error behind the legislative veto was believing that Congress could look over the shoulders of administrative agencies and correct errors on a regular basis. Of course, Congress can always correct an error by passing a law, but Congress cannot do it in anything but the most reactive way, often for political reasons such as pressure from political supporters.

Whatever may be said about administrative agencies, they do take the time to compile and analyze massive records before they issue rules. Partly in response to rulings of the federal courts, they do write lengthy explanations, closely keyed to the record. They are, of course, not always correct, but their explanations are almost always complex. Thus, if

Congress actually intends to undertake a meaningful review of administrative determinations, it must do so in a detailed way. However, Congress generally does not have either the expertise or the time or money to go into the level of detail required to do more than a superficial examination of a multitude of rules issued by federal agencies. And when Congress attempts to review not simply an occasional aberrant decision, but to make a determination with respect to every rule put forth by every agency, as some proponents suggest, it is simply never going to begin to make a dent in the problem.

This gets me to another reason why the legislative veto and its progeny are ill-advised. If Congress had nothing else to do but look over rules and reglations, perhaps it would be no great loss for it to devote the time of its staff and members to such tasks. But under our Constitution, Congress has a number of responsibilities that only it can perform, the most important of which are passing laws appropriating money and raising revenues. Despite the improvements made by the Budget Act of 1974, Congress has not passed a full appropriation bill for every federal agency in any recent fiscal year, and it routinely passes continuing resolutions, sometimes for an entire fiscal year, for major federal agencies. It is also common for agencies to run without new authorizations, when old levels expire and Congress is unable to avoid an impasse. Thus, to the extent that Congress becomes involved in a detailed review of agency rules and regulations, it is taking essential time away from other activities which no other institution can perform.

Finally, let me be clear about what I do not suggest. I do not for a moment believe that Congress should get out of the business of oversight. Not only is it proper, but it is also necessary for Congress, for example, to investigate the non-enforcement of our environmental laws at EPA, to inquire into how Vitamin E supplements which reportedly caused the death of more than 28 infants got on the market without FDA approval, and to look into whether the antitrust enforcement policies at the Department of Justice and the FTC are sensible and whether there need to be changes in our laws regulating competition. What Congress does not need to do, however, is second-guess specific decisions by agencies, either in issuing specific rules or deciding whether to bring specific enforcement actions against specific companies. It is not the job under our constitutional system for Congress to try to run the administrative agencies, but it is Congress's duty to pass laws and to be sure that the policies laid down in those laws are being properly enforced.

The clear message from the separation of powers doctrine and from the Chadha decision is that Congress should do that which is given unto Congress by our Constitution: to make the laws of the country. And it should not try to do that which the Constitution has assigned to the Executive branch: the duty to see that those laws are properly carried out. Therefore, it is not simply the unconstitutional means employed in the legislative veto that lies at the heart of the problem, but the fact that Congress is attempting to do that which it should not do and failing to do that which it must.

I appreciate the opportunity to submit this statement for the record, and I stand ready to assist the Committee in any way possible.

Respectfully yours,

Alan B. Morrison

Alan B. Morrison

ABM/pse

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February 27, 1984

Andrea Bolling
House Rules Committee
346B Rayburn Building
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Washington, D.C. 20515

Dear Andrea:

Pursuant to our telephone conversations, I am enclosing a copy of my testimony before the Subcommittee on Administrative Law and Government Regulations of the Committee on the Judiciary, regarding the impact of INS v. Chadha, together with a summary of a program in which I appeared at the Administrative Conference of the United States on September 20, 1983, which further sets forth my position on those issues.

It is my understanding that this will be sufficient prior to my hearing on March 8, 1983, at 2:00 p.m. in Room H313 at the Capitol.

My testimony will make two basic points. First, Congress should do something about both retroactivity and severability, recognizing that the former is far easier to take care of than the latter. Second, in most instances, Congress should not try to find a substitute for the veto because there is no need for one, and embroiling Congress in the day to day running of federal agencies is counterproductive and prevents Congress from doing things that it has to do and that only it can do under our Constitution.

I look forward to seeing you on the 8th.

Sincerely,

Alan B. Morrison

ABM/pse

Enclosures

TESTIMONY OF ALAN B. MORRISON, DIRECTOR,
PUBLIC CITIZEN LITIGATION GROUP
ON THE IMPACT OF INS V. CHADHA
Before The
SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS OF
THE COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

July 18, 1983

Mr. Chairman, and Members of the Committee. I am pleased to appear here today to discuss the question of what Congress should do in the aftermath of the decision of June 23, 1983, by the United States Supreme Court in Immigration and Naturalization Service v. Chadha, ___ U.S. ___, 51 U.S.L.W. 4907. As counsel for Mr. Chadha in that case, as well as counsel for the consumer groups who successfully challenged the one-house veto of the incremental pricing rules in Consumer Energy Council of America v. Federal Energy Regulatory Commission, 673 F.2d 425 (D.C. Cir. 1982), affirmed, ___ U.S. ___, 51 U.S.L.W. 3935 (July 6, 1983), my position on the constitutionality, and I would add the wisdom, of the legislative veto is clear.

Instead of discussing the veto's merits and demerits, I would like to direct my attention to what Congress should do now that the veto has been ruled out. In particular, I would like to focus on two separate aspects of the problem: (1) what should be done in those statutes which already contain a legislative veto provision and (2) what should be done in the general area of regulatory reform, including what is the appropriate kind and degree of legislative control of executive agencies. Before turning to those two areas, I would like to state my premises clearly for the Committee.

First, all legislative vetoes of the one-house, two-house, and intermediate varieties are unconstitutional. That That is so whether the veto is of a rule or an adjudication and whether the decision was made by the President, an executive branch agency, an independent regulatory commission, or any other governmental body or official. Stated another way, if

Congress wishes to make laws or to overrule decisions of the executive branch, the only way it can do so is by the constitutional means of obtaining a majority of both houses of Congress and the approval of the President, or in the event of a presidential veto, an override by a two-thirds vote of each House. Moreover, I do not believe that there is any serious dispute about that proposition in light of the broad terms in which Chadha is written and the subsequent affirmances in the FERC case, voiding the one-house veto of the incremental pricing rules, and the later decision setting aside the two-house veto of the used car rule. Consumers Union v. FTC, 691 F.2d 575 (D.C. Cir. 1982), aff'd, ___ U.S. ___, 51 U.S.L.W. 3935 (July 6, 1983).

Second, despite the sweeping nature of the decision in Chadha, the Court's opinion made clear -- and the executive branch does not dispute this -- that the issue of severability remains to be decided in every case in which a veto is challenged. Thus, the question on which the courts must rule is, what would Congress have done if it had known that the veto were unconstitutional? Would it have made the delegation anyway, or would it have eliminated the delegation entirely? That question, which is directly implicated in every case in which a veto is being tested, can only be decided on a statute-by-statute basis, under the principles reaffirmed by the Supreme Court in Chadha.

For some statutes, such as the one contained in the Federal Trade Commission Act, the decision on severability will not be difficult. Indeed, in that case, neither the Senate nor the House even argued that the veto was not severable from the underlying authority of the FTC to issue trade rules. In other areas, such as arms sales, impoundment, and war powers, the severability issues are much more difficult, and only a detailed examination of the legislative history can produce the information needed to analyze the problem and to make the ultimate legal judgment. However, for the future, the severability question is entirely up to Congress in the sense that it can decide whether to leave the delegated power with the executive or to deny or otherwise condition its use,

provided that it can obtain the votes needed to pass a law to that effect.

Third, the issue of severability cannot be avoided given the pervasive nature of the veto and the number of important powers to which it is linked. In my view, the first situation in which severability is likely to come to a head is the deferral area under the Impoundment Control Act of 1974. It seems almost certain that the Administration will seek to postpone the spending of money until later in the fiscal year for which it is appropriated, or, more importantly, for multi-year appropriations, into a later fiscal year. At that point it will be necessary to confront the question of severability since the power to defer is presently subject to a one-house veto. Given the amounts of money at stake, it seems likely that litigation will ensue unless the Administration decides not to impound the money. Thus, unless Congress can resolve the problem of severability, litigation, confrontation, or perhaps stalemate may well result.

Fourth, there is nothing wrong in a constitutional sense with provisions, such as contained in the Rules Enabling Act, which have automatic delays in the effective date of otherwise final action to allow an opportunity for Congress to review the action to see whether it wishes to seek legislation overturning, modifying, or delaying it. Similarly, there is no constitutional impediment in delaying the effectiveness of every rule to allow Congress time to override it by a duly enacted statute, nor is there anything constitutionally impermissible about providing that no rule shall go into effect until Congress had passed a statute specifically approving it. There are, however, serious questions about the wisdom and practicality of such schemes which I shall discuss below.

Fifth, the Chadha decision does not mean that Congress is impotent or unable to protect its rights and those of our citizens. It has substantial authority through authorizing legislation, the appropriations process, controlling the terms of statutory delegations, the power of the Senate over Presidential appointments and treaties, oversight hearings, the power to alter the standard of judicial review and to grant

increased standing to those who may seek it, and ultimately, if its laws are not being enforced, the power to impeach officials in the executive branch. There is, in short, no dearth of resources for Congress to deploy; the difficult questions arise in the effort to determine which method is appropriate in a particular set of circumstances.

Sixth, despite the legitimate need and desire for legislative oversight, Congress cannot run the executive branch. Indeed, one of the most frequent complaints heard from Members of Congress is that they are already overworked and do not have time to carry out their existing responsibilities, particularly with the new importance that the budget process has taken on. Perhaps the clearest example of the difficulty that Congress would have in trying to run the executive branch is demonstrated by its inability to agree on amendments to the Clean Air Act over the last two years. If Congress is unable to reach a consensus on the amendments to basic legislation such as that, it cannot possibly hope to be able to write the rules that would implement that and other similarly complex legislation. The difficulty is due in part to the problem of reconciling different interests and in part is a result of Congress' other obligations. In addition, the technical nature of many of the judgments required in rulemaking makes it impossible, in any practical sense, for Congress to do the basic administering of the law, even if it were constitutional for it to do so.

Moreover, most of these decisions -- Chadha being a prime example -- are simply not important enough for Congress to deal with. Recognizing that fact and acting accordingly, may mean from time to time that Members must tell constituents that there is nothing that their elected representatives can or ought to do. But in my view such hard decisions are necessary if Congress is to save enough time to do the jobs which only Congress is qualified and constitutionally permitted to do. Thus, Congress needs to focus on improving the institutions of government and not reversing individual decisions, even if those decisions are occasionally not precisely what Congress would have preferred. Stated another way, Congress needs to do a better job of estab-

lishing priorities and deciding which matters are sufficiently important to warrant its attention.

RECOMMENDATIONS

1. The Severability Problem

If I am correct that a significant number of severability questions will arise in the near future, the notion that they all should be resolved by litigation or confrontation ought to be unacceptable. While litigation would produce specific answers to specific questions, it would also result in enormous expenditures of effort by Congress, the executive branch, and the private parties who will inevitably be involved in this litigation.

The fact is that Congress wrote all of these veto provisions and Congress is now in a position to change them, provided that it can obtain the concurrence of the President or can override his objections by a two-third vote of both Houses. In my opinion, the likelihood of obtaining Presidential concurrence on severability issues is significantly reduced if Congress attempts to proceed on a statute-by-statute basis to redefine the respective roles of the executive and the legislative branches. It will be all too easy in many cases for the President to veto restrictions on his power if they are passed one by one.

It is for this reason, as well as for reasons of efficiency, that I urge the Congress and the Administration to seek to put together a carefully crafted package, in which all currently existing veto provisions would be reviewed, and the power in some cases allowed to permanently reside in the executive, in other cases it would be taken away, and in others it would be made subject to conditions or limitations not currently existing or existing in a different form. If this prospect of an omnibus severability act seems frightening, the prospect of litigation, confrontation, and stalemate seems to me to be far more so.

In any such process, it would be necessary not only for the Administration and the Congress to participate, but for representatives of business, labor, consumer, environmental and other groups that are interested in particular aspects to be heard on

the question of the proper scope of delegation. To accomplish this, I urge the leadership of the House and Senate to organize a small group of Members who would, working with the relevant committees, develop this package.

There are two other matters related to severability that deserve brief mention. First, in the war powers area, and perhaps others, there may be claims of the inherent power of the President to undertake certain activities. I urge the Congress and the Administration to avoid dealing with those questions unless absolutely necessary. The most that should be done is to it make clear that Congress is not seeking to legislate in any areas in which the President has a claim of inherent authority and thus to leave the matter in a state of some uncertainty. Our country has, after all, operated tolerably well with that minimal degree of uncertainty for over 200 years, and, given the breadth of the severability problems that cannot be avoided, I see no reason to take on the added task of trying to sort out the inherent powers of the President.

Second, while legislative vetoes were contained in some two hundred statutes, their actual exercise was fairly rare, although they often provided the leverage needed to "persuade" agencies to make certain changes in their proposals. Since at least some of the underlying powers will be found nonseverable from the veto, there is at least an argument that all of the actions previously taken pursuant to those reasonable provisions are void.

In my view that argument would not ultimately succeed and the Supreme Court would rule, under cases such as Chevron Oil v. Huson, 404 U.S. 97 (1971), that Chadha was not retroactive, at least with respect to executive actions which were not actually vetoed. I further believe that the courts will address the retroactivity issue first in order to avoid the very complex question of severability. However, to avoid needless litigation, such as that already underway in American Federation of Government Employees v. Reagan, No. 83-1914 (D.D.C. filed July 1, 1983), which challenges three separate adjustments made by Presidents Carter and Reagan under the

Federal Pay Comparability Act of 1970, 5 U.S.C. § 5305(c), and seeks back pay in the millions, if not billions of dollars, Congress should promptly pass a statute ratifying all such vetoable, but not actually vetoed actions taken by the executive branch prior to June 23, 1983, when Chadha was decided. See also United States v. Exxon Corp., No. 78-1035 (D.D.C.), Defendant's Motion for Reconsideration and Relief from Judgment, filed July 5, 1983, making similar arguments regarding the Energy Petroleum Allocation Act of 1973 and the Energy Policy and Conservation Act.

2. General Regulatory Reform Questions

First, I believe that there are no fundamental changes needed in the regulatory process. The methods by which rules are made and cases adjudicated are working reasonably well, given the complexity of the task and the variety of interests that are generally pulling in opposite directions in a given proceeding. There are, however, a few changes that would be useful, such as those eliminating some of the current exemptions from notice and comment rulemaking and others opening up the process to greater public participation. While I have in the past and will continue in the future to support such incremental changes, they are surely not worth the price of some of the sweeping revisions that others would make in the Administrative Procedure Act. And, most importantly, any revisions to the APA should be considered on their own and not as part of Congress' review of Chadha and the problem of severability.

Second, Congress should beware of gimmicks, of which the legislative veto is one variety. There are no short cuts to improving the administrative process and, just as the veto was ill advised (as well as unconstitutional), so too are the other quick fixes such as increased presidential involvement, the so-called Bumpers Amendment (which would mandate a greater role for the courts), and sunset legislation for both agencies and their rules. These attempts to short cut the hard road to reform are not likely to succeed and, particularly if they are enshrined in statutes, are more prone to cause mischief than to improve regulations. Indeed, even the much-vaunted Executive Order 12291 has not improved

the quality of regulatory decision making, as witnessed by the decision of the Supreme Court in Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance, ___ U.S. ___, 51 U.S.L.W. 4953 (June 24, 1983). In that case the Department of Transportation rescinded the passive restraint standard after going through the so-called cost-benefit procedures for major rules, and yet the Supreme Court found that its actions were arbitrary and capricious and set the attempted revocation aside. In short, there is no substitute for conscientious and careful staff work, and simply engrafting new procedures will not resolve the hard issues of regulation in the future any more than they have done in the past.

For the Committee's consideration, I am submitting for the record copies of three articles on this general subject that I have authored that appeared in the Legal Times of Washington, the Administrative Law Review, and the Tulane Law Review. In addition, I am submitting a copy of an article that appeared in the June 6, 1983 Wall Street Journal (and a letter replying to it), which demonstrates how the administrative process becomes undermined when officials at the Office of Management and Budget make health and safety decisions that Congress has assigned to the regulatory agencies.

Third, the idea of delaying the effective date of certain decisions to allow Congress the opportunity to determine whether it wishes to pass legislation overriding them may be useful, but only in a few situations. As noted above, that approach is surely constitutional, but in my view it should be used extremely sparingly, principally under those statutes in which an event to be reviewed occurs infrequently, such as changes in the Federal Rules of Civil Procedure, which occur at most once a year. In those cases, it seems realistic for Congress to take the necessary time to review the changes and in some cases to enact legislation postponing the effective date until further study can be concluded. It is particularly important to limit these "report and wait" provisions to those decisions which need not go into effect immediately and which occur only occasionally. While it may be that Congress would

not choose to pass delaying or overriding legislation in any but a few cases, it simply does not have the resources to undertake a meaningful evaluation if a large number of report and wait provisions are enacted. And if Congess were to write in an exception for emergency rules, there would develop a whole body of law under which agencies would try to circumvent Congressional review by claiming emergencies when none truly existed. Thus, while I believe that there may be situations in which the report and wait approach can be helpful, I urge the Congress to stringently ration its use.

Fourth, in the recent House debate over amendments to the Consumer Product Safety Act, one proposal that was adopted would require the positive approval of both Houses and the President before any safety standard could go into effect. While such a provision is surely constitutional, it is equally surely unwise and unworkable. If one of the best ways to improve our agencies is to find qualified people who are willing to serve in them, any across-the-board limitation on the power to issue rules would mean that individuals of competence and dedication would simply not accept a job which would be little more than an advisory position. Similarly, our country is far too complex today to await Congressional action on every rule that an agency might promulgate. While there may be occasional decisions of such great importance as to require positive congressional approval before they become effective, there is no conceivable basis to justify that approach for all safety standards under the Consumer Product Safety Act. In fact, such a provision is simply a signal to the agency to go out of business. If that is the approach being taken, Congress should have the intestinal fortitude to stand up and abolish the agency directly, instead of doing it by making it impossible for the agency to carry out its assigned responsibilities.

Fifth, whatever Congress does, it should be certain that it does not create incentives for agencies to move away from rulemaking into adjudication. While rulemaking is not without flaws, in general it is a better way for agencies

to operate because of the increased public input, the opportunity to take a broader view of a problem, the ability to avoid harsh results by not applying new standards to prior conduct, and the elimination of many of the formal and burdensome requirements of adjudication. Thus, to the extent Congress imposes restrictions on agencies, it should do so in a way that will not force policy judgments to be made through the back door of adjudication when they would be forbidden through the front door of rulemaking.

CONCLUSION

There are many difficult issues that now must be considered in light of Chadha. These cannot be resolved in a day or a week or a month or perhaps a year, but work must be begun on them immediately. I and others at Public Citizen stand ready to assist the Committee in any way possible in this most important endeavor.

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OFFICE OF
THE CHAIRMAN

Colloquium on Regulatory Design in Theory and Practice

Summary of Meeting

September 20, 1983

Session #1

Loren Smith, Chairman of the Administrative Conference of the United States, opened the first session of the second year of Administrative Conference-sponsored discussions on regulatory issues that are designed to provide a forum for the interchange of information within the government. Dr. Harold Sharlin, coordinator of the series, introduced the two featured speakers: Alan B. Morrison, Director of the Public Citizen Litigation Group (and member of the Administrative Conference) and Congressman Charles Pashayan, Jr. (17th District of California). Both speakers offered their views on the question, "Where do we go from here: the legislative veto issue?"

Mr. Morrison, who served as counsel for Mr. Chadha in Immigration and Naturalization Service v. Chadha, the recent (June, 1983) case in which the Supreme Court declared the legislative veto to be unconstitutional, offered his perspective first. He stated that after Chadha and the subsequent FTC and FERC cases, the legislative veto, whether a one house, two house, or committee veto, was unconstitutional, regardless of whether it concerned regulations of executive branch or independent agencies, reorganization plans or whatever. "Report and wait" provisions, requiring that a statute lay before Congress for a specified number of days before effectiveness, are still permissible, he said.

The biggest remaining issue is severability: If Congress had known the legislative veto would be declared unconstitutional, would it have granted the particular power at issue to the executive agency anyway? In Chadha and in the FERC case, the Supreme Court found the legislative veto provision to be severable, allowing the rest of the law to remain effective. In subsequent cases, Mr. Morrison believes the severability question will either be very easy, as in the FTC case, where the veto was later added to the existing authority or very complex, as in reorganization plans, where Congress would arguably not have given the broad reorganization authority without the veto string attached. He thought budget authority deferral provisions are also probably not severable. Federal salary recommendations also fall in the gray area. The Supreme Court has held that severability must be decided on a case-by-case, statute-by-statute basis by looking at the legislative history. However, Mr. Morrison pointed out the difficulty in studying the legislative history to find the answer to a hypothetical question Congress never considered.

A second, smaller, issue is that of retroactivity. Mr. Morrison sees no reason to make Chadha retroactive, which could void agency actions (although never vetoed) made pursuant to statutes containing a veto provision. For example, a district court has already ruled that the Equal Pay Act cannot be administered by the EEOC because it was shifted to the EEOC under a reorganization act that contained a veto provision [EEOC v. Allstate Insurance Co. 52 U.S.L.W. 2152 (S.D. Miss.)]. However, there is also authority pointing to the conclusion that Chadha is not retroactive [Chevron Oil v. Huson, 404 U.S. 97 (1971)], and a strong "good government" argument exists against retroactivity. In addition, a long line of cases involving the War Powers Act has held that by subsequently appropriating money, Congress has ratified actions that might originally have been unconstitutional. Thus, by continuing to appropriate money for agencies whose responsibilities shifted under reorganization plans, Congress made the reorganizations constitutional. Although he believes the retroactivity issue will not impair the functioning of the government, Mr. Morrison believes it will be the subject of litigation.

Looking to the future, in order to eliminate the issue of retroactivity, Mr. Morrison suggested that Congress pass legislation ratifying and reaffirming any action not previously vetoed. Severability is more difficult but it is preferable for Congress to solve the problem instead of a leaving it to the time consuming process of litigation. Mr. Morrison suggested that interest groups, Congress and the President should negotiate a

package which sets priorities among the existing provisions. New balances can be struck (e.g., in the arms sales area where the President can make decisions below a specific dollar amount, but Congress would have a voice in larger transactions).

Mr. Morrison next offered his views on the options available in a post-legislative-veto world:

1) Report and wait provisions may be very useful for occasional use in discrete issues or programs that are not ongoing (e.g., arms sales). He cautioned against widespread use because of delay caused by legislative consideration, the uncertainty produced by not knowing the date a rule will become effective and the need for emergency provisions.

2) Requiring Congressional approval of all agency rules does not make sense because it take agencies out of the rulemaking business and requires Congress to pass on every rule the more expert agency issues.

3) Sunset in regard to agencies and agency rules is an idea that has come and gone. Although Congress should engage in review, it doesn't make sense to put agencies out of business automatically.

4) Appropriations riders make sense for money-related items (e.g., arms sales), but are not a proper substitute for substantive legislation.

5) Raising points of order in Congress if some element of Congress has urged a veto raises significant questions of constitutionality.

6) Increased judicial review may not be necessary because there now exists a good equilibrium. Expanding Congressional standing to challenge executive actions, especially in foreign affairs, makes sense because in those areas citizens have difficulty gaining standing.

7) Better drafting of statutes is a good idea but may be a false solution to a false issue. The real problems may be the inability to predict which issues will come up (e.g., clean air act) and the need to form political consensus (where specificity may lose votes e.g., the Betamax home recording case).

Mr. Morrison suggested that the legislative veto really arose because Congress did not like the outcomes of agency decisions, not because the agency failed to follow the statute or look at the facts. However, if it's a question of improper procedure or arbitrary or capricious action, the courts can take care of it. The legislative veto, in its focus on the substantive outcome, most closely resembles OMB intervention in the rulemaking process.

In conclusion, Mr. Morrison believes that it is not the role of Congress or the President to correct agency errors or write regulations, but to make basic policy choices (e.g., appointments, tax, budget, defense, social policy). If there is no fundamental redirection from minutia to broad policy, Congress and the President will not be able to do the job the Constitution assigned to them.

Congressman Pashayan presented the opposite perspective, one critical of the broad holding of the Chadha case and favoring the use of the legislative veto. Although agreeing that Chadha has eliminated the legislative veto, he believes it is a profound, historically incorrect and ultimately harmful policy decision. He believes the Supreme Court reached the correct specific result in Chadha but went wrong in the FTC and FERC cases.

Congressman Pashayan traced the history of the legislative veto back through colonial America and the English parliamentary system. Historical evidence suggests that legislative control over authority delegated to make rules and regulations is appropriate but that control over fundamental executive decisions (such as the deportation of Mr. Chadha) is not appropriate.

Congressman Pashayan regretted that the Supreme Court took the narrowly analytical rather than a historical approach in deciding Chadha. He argued that the English view holds that rules and regulations are subordinate laws which fall within the powers of Parliament to delegate. There is no nondelegation doctrine in England. And as the English separation of powers system is indistinguishable from our system, their interpretation of the legislative veto should be given weight here. Furthermore, the Australian Supreme Court, interpreting a constitution modeled after ours, has held that the legislature can delegate its power per se and found it unnecessary to develop a nondelegation doctrine. He believes our courts should follow these precedents.

Congressman Pashayan believed that the making of regulations is really the making of law. The real issue is accountability, which can only be solved by making elected officals accountable through the legislative veto. He feel that Congress should have conceded the Chadha case, but because of Congress' concern with war powers, it took an overbroad approach. Its briefs and arguments should have more carefully delineated between impermissible veto of executive functions and permissible veto of delegated rulemaking actions by administrative agencies.

Congresman Pashayan concluded by summarizing Congress' reaction. He believes that Congress feels the elimination of the legislative veto is a challenge to its power as an institution and that there are suggestions floating to rework the scheme. For example, although unsure whether the Supreme Court will involve itself in internal Congressional procedure, Congress may consider changing its rules to allow a point of order to lie against any appropriation for the making or carrying out of any regulations disapproved of.

In a general discussion, the following issues were raised:

—Mr. Morrison stated that although a constitutional amendment is possible (several states do have constitutionally created legislative vetoes) it is unlikely.

—Congressman Pashayan suggested the possibility of granting standing to Congress to challenge agency action as ultra vires. He also believes that the legislative veto was valuable because it encouraged informal talks among Congressional and agency staffs prior to the vote.

—It was suggested that the reason our courts have held differently from the English courts may be a direct reaction and rejection of the English scheme after the revolution.

—Since the Chadha decision makes no distinction between executive and independent agencies, one commenter suggested that in reality, the decision will bolster OMB power to oversee the rules of independent agencies. Mr. Morrison believes the Supreme Court made no distinction because it focused on the nature of the act of Congress (i.e., overstepping Constitutional authority) not on the structure of the agency. He thinks the only practical difference between executive and independent agencies is in the appointment process. Independent commissioners cannot be fired. He suggested that Congress had the power to further eliminate the distinction by making independent agency decisions subject to Presidential override or by insulating executive agencies from such override.

—The Bumpers Amendment or other suggestions involving judicial review involve slippery concepts. Mr. Morrison believes that reversing the presumption of deference to agency expertise, shifting the burden of going forward or the burden of persuasion, or requiring the agency to demonstrate that its decision is not arbitrary, might change the balance in judicial review but will have little practical effect because courts usually make their decisions on their view of the reasonableness of the agency's action.

—California's success with the "superagency" concept was pointed out. Congressman Pashayan finds the imposition of another bureaucratic level to be cumbersome and prefers a process where the legislative and agency staffs develop informal lines of communication to review the decisions. Mr. Morrison thinks California's version of the superagency might work, if it does, because it is part of the legislative branch. He opposes the use of informal communications, believing instead that all staff interaction should be part of the public record.

—Both Mr. Morrison and Congressman Pashayan agree that in the future Congress will restrict its delegation of authority (e.g., over federal pay, reorganizations, arms sales) and will limit the subjects of agency rulemakings.

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TRANSMITTAL OF "LEGISLATIVE VETO STATUTES WITH AND WITHOUT SEPARABILITY CLAUSES"

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April 25, 1984

This report lists legislative veto statues that do and do not have separability clauses. For each statute the report states the public law number (P.L. No.), the citation (Cite) of the legislative veto provision in the United States Code or, if uncodified, to the page of the Statutes-at-Large (Stat.) where the statute begins, the popular name, and the section number (Section) of the separability clause in the public law. The "Compilation of Currently Effective Statutes That Contain Legislative Veto Provisions," revised edition, November 4, 1983, prepared by the Office of Legal Counsel, Department of Justice, was used as the master list of all legislative veto provisions.

Statutes with Separability Clauses

This section includes statutes that have separability clauses themselves as well as those that amend earlier acts. While an amendatory statute may not itself have a separability clause, it is placed here if the statute it amends has such a clause; the clause applies to the later statute by implication. Acts that amend more than one statute are included here if any one of the amended statutes has a separability clause.

P.L. No.	Cite	Popular Name	Section
Pub. Res. 76-54	22 U.S.C. sec. 441	Neutrality Act of 1939	17
80-402	22 U.S.C. sec. 1431 note	U.S. Information and Educational Exchange Act of 1948	1010
81-774	50 U.S.C. app. sec. 2166(b)	Defense Production Act	714
82-51	50 U.S.C. app. sec. 454(k)	Universal Military Training and Service Amendments of 1951	5
82-414 (amended by 87-885)	8 U.S.C. sec. 1254(c)	Immigration and Nationality Act of 1952	406
83-703 (amended by 85-479, 85-681, 93-485)	42 U.S.C. secs. 2071, 2091, 2153(c) & (d), 2204	Atomic Energy Act of 1954	281
85-79 (amended by 88-489)	42 U.S.C. sec. 2078	Atomic Energy Act of 1957	
(This act amends P.L. 83-703, the Atomic Energy Act of 1954, which has a separability clause.)			
87-794	19 U.S.C. sec. 1981(a)	Trade Expansion Act of 1962	404
88-489	42 U.S.C. sec. 2201	Atomic Energy Act of 1964	
(This act amends P.L. 83-703, the Atomic Energy Act of 1954, which has a separability clause.)			
90-620 (amended by 95-19)	44 U.S.C. secs. 312, 501-517	Enactment of Title 44, U.S. Code, "Public Printing and Documents"	2(f)
91-379	50 U.S.C. app. sec. 2168(h)(3)	Defense Production Act Amendments, 1970	
(This act amends P.L. 81-774, the Defense Production Act, which has a separability clause.)			
93-148	50 U.S.C. 1544(c)	War Powers/Resolution	9
93-153	30 U.S.C. sec. 185(u)	Trans-Alaska Pipeline Authorization Act	411
93-236	45 U.S.C. sec. 718	Regional Rail Reorganization Act of 1973	604
93-377 (amended by 93-485)	42 U.S.C. sec. 2074(a)	Atomic Energy Act Amendments of 1974	
(This act amends P.L. 93-703, the Atomic Energy Act of 1954, which has a separability clause.)			
93-618	19 U.S.C. secs. 2253(c), 2432, 2434, 2435, 2437	Trade Act of 1974	605

P.L. No.	Cite	Popular Name	Section
94-88	42 U.S.C. sec. 602	Amendments to Social Security Act Child Support Provisions	

(This act amends chapter 531, P.L. 271, 74th Congress, 1st Session, the Social Security Act, approved on August 14, 1935, which has a separability clause).

94-579	43 U.S.C. secs. 1712(e)(2), 1713(c), 1714(c) (1), (e), & (l)(2)	Federal Land Policy and Management Act of 1976	707
95-216	42 U.S.C. sec. 433(e)	Social Security Act Amendments of 1977	

(This act amends chapter 531, P.L. 271, 74th Congress, 1st Session, the Social Security Act, approved on August 14, 1935, which has a separability clause).

95-223	50 U.S.C. sec. 1706(b)	International Emergency Economic Powers Act	208
95-242	22 U.S.C. sec. 3223(f) 42 U.S.C. secs. 2153(c) & (d), 2155(b), 2157(b), 2158, 2160(f)	Nuclear Nonproliferation Act of 1978	

(The portion of this act codified in title 42 amends P.L. 83-703, the Atomic Energy Act of 1954, which has a separability clause.)

95-557	42 U.S.C. sec. 3535(o)	Housing and Community Development Amendments of 1978	

(This act amends P.L. 89-174, the Department of Housing and Urban Development Act, which has a separability clause.)

96-88	20 U.S.C. sec. 3474	Department of Education Organization Act	505
96-252	15 U.S.C. sec. 57a-1	Federal Trade Commission Improvements Act	

(This act amends chapter 311, P.L. 203, 63rd Congress, 2d Session, the Federal Trade Commission Act of 1914. A separability clause was added to the 1914 act by chapter 49, P.L. 447, 75th Congress, 3d Session, the Federal Trade Commission Amendments, on March 21, 1938.)

96-294	50 U.S.C. app. secs. 2091(e)(1)(B), 2095, 2096, 42 U.S.C. secs. 8722(d)(2) & (3), 8737, 8741(d), 8779, 6240	Energy Security Act, Defense Production Act Amendments of 1980 (Title 50 U.S.C.), U.S. Synthetic Fuel Corporation Act of 1980 (title 42 U.S.C.), and amending Energy Policy and Conservation Act (42 U.S.C. sec. 6240)	

(The portion of this act codified in title 50 amends P.L. 81-774, the Defense Production Act, which has a separability clause.)

96-515	16 U.S.C. sec. 4702-6	National Historic Preservation Act Amendments of 1980	308

P.L. No.	Cite	Popular Name	Section
96-539	7 U.S.C. sec. 136w	Federal Insecticide, Fungicide and Rodenticide Extension Act, 1980	

(This act amends chapter 125, P.L. 102, 80th Congress, 1st Session, the Federal Insecticide, Fungicide and Rodenticide Act, approved on June 25, 1947. A separability clause was added to the 1947 act by P.L. 92-516, the Federal Environmental Pesticide Control Act of 1972.)

97-35	15 U.S.C. secs. 1204 1276, 2083 20 U.S.C. sec. 1078 23 U.S.C. sec. 402(j) 45 U.S.C. secs. 761, 767, 564(c)(3)	Omnibus Budget Reconciliation Act of 1981: Consumer Product Safety Amendments of 1981 (title 15 U.S.C.), Post Secondary Student Assistance Amendments of 1981 (title 20 U.S.C.), Amendment to Highway Safety Programs (title 23), U.S.C. Rail Passenger Service Act (title 45 U.S.C.)	

(The portion of this act codified in title 45 amends P.L. 93-236, the Regional Rail Reorganization Act of 1973, which has a separability clause.)

97-88	16 U.S.C. sec. 3443	Agriculture and Food Act of 1981	1719

Statutes without Separability Clauses

The following legislative veto statutes do not have separability clauses:

P.L. No.	Cite	Popular Name
72-240	25 U.S.C. sec. 386a	Act of July 1, 1932
79-649	10 U.S.C. secs. 7308, 7545	Disposal of Surplus Vessels and Other Naval Property
80-395	50 U.S.C. app. sec. 1917	Taft Anti-Inflation Law
81-60	50 U.S.C. sec. 502	Long Range Proving Ground for Guided Missiles, 1948
81-451	43 U.S.C. sec. 504	Act to Expedite the Rehabilitation of Federal Reclamation Projects.
83-205	50 U.S.C. app. § 1941g	Rubber Producing Facilities Disposal Act of 1953
84-575	42 U.S.C. sec. 505	Act to Facilitate the Construction of Drainage Works, etc.
85-316	8 U.S.C. sec. 1255b(c)	Immigration and Nationality Act Amendments
85-599	10 U.S.C. sec. 125	Defense Reorganization Act of 1959

P.L. No.	Cite	Popular Name
86-249	40 U.S.C. sec. 610	Public Buildings Act of 1959
87-195	22 U.S.C. secs. 2304(c)(3), 2314(g)(4)(B), 2367, 2429(b)(2), 2429(a)	Foreign Assistance Act of 1961, as amended
97-279	25 U.S.C. sec. 15	Government-Owned Utilities Used for Bureau of Indian Affairs
87-283	25 U.S.C. sec. 165	Restoration of Indian Tribes of Unclaimed Payments, 1961
87-297	22 U.S.C. sec. 2587(b)	Arms Control and Disarmament Act of 1961
87-639	16 U.S.C. sec. 1009	Amendment to Watershed Protection and Flood Prevention Act
88-643	50 U.S.C. sec. 403 note	Central Intelligence Agency Retirement Act of 1964 for Certain Employees
90-206 (amended by 95-19)	2 U.S.C. 359	Postal Revenue and Federal Salary Act of 1967
90-629 (amended by 93-559, 94-329 95-92, 96-533, 97-113)	22 U.S.C. secs. 2753(d)(2)(B), 2755(d)(2), 2776(b), 2776(c)(2), 2796b	Arms Export Control Act, as amended
91-230	20 U.S.C. sec. 1233g (b)	Elementary and Secondary Education Assistance Program Expansion
91-656	5 U.S.C. sec. 5305	Federal Pay Comparability Act of 1970
92-313	40 U.S.C. sec. 606(d)	Public Building Amendments of 1972
92-520	40 U.S.C. sec. 616(d)(4)	Dwight D. Eisenhower Memorial Bicentennial Civic Center Act
93-134 (amended by 97-164, 87-458)	25 U.S.C. secs. 1402(3), 1405	Indian Claims Judgment Funds Act
93-155	50 U.S.C. sec. 1431, 50 U.S.C. app. secs. 468, 2092, 10 U.S.C. sec. 2307	Department of Defense Appropriation Authorization Act, 1974
93-197	25 U.S.C. sec. 903(b)	Menominee Restoration Act
93-198	Uncodified 87 Stat. 774	District of Columbia Self-Government and Governmental Reorganization Act
93-251	33 U.S.C. sec. 579	Water Resources Development Act of 1974
93-320	42 U.S.C. sec. 1598(a)	Imperial Dam Project Modifications--Colorado River Basin Salinity Control Act
93-344	2 U.S.C. sec. 684	Congressional Budget and Impoundment Control Act of 1974

P.L. No.	Cite	Popular Name
93-365	50 U.S.C. app. sec. 2403-1(c)	Export Administration Act, amended by Department of Defense Appropriation Authorization Act, 1975
93-378	16 U.S.C. sec. 1606	Forest and Rangeland Renewable Resources Planning Act of 1974
93-380 (amended by 94-142, 94-482, 96-374, 97-35)	20 U.S.C. secs. 1232(b) (2) (B) & (d)-(g)	Education Amendments of 1974
93-435	48 U.S.C. sec. 1705(c)	Conveyance of Submerged Lands to Guam, Virgin Islands, and American Samoa
93-443 (amended by 94-283)	2 U.S.C. sec. 438(d), 26 U.S.C. secs. 9009 (c), 9039(c)	Federal Election Campaign Act Amendments of 1974
93-492	15 U.S.C. sec. 1410b(b) (3) (B) & (C)	Motor Vehicle and Schoolbus Safety Amendments of 1974
93-526	44 U.S.C. sec. 5911	Presidential Recordings and Materials Preservation Act
93-577	42 U.S.C. sec. 5911	Federal Nonnuclear Energy Research and Development Act of 1974
93-595	28 U.S.C. sec. 2076	Federal Rules of Evidence
93-646	12 U.S.C. sec. 635e	Export-Import Bank Amendments of 1974
94-110	22 U.S.C. sec. 2441 note	H.J. Res. 638
94-161	22 U.S.C. secs. 2151a, 2151n	International Development and Food Assistance Act of 1975
94-163	42 U.S.C. secs. 6239(a) & (e), 6261(d) (2), 6261(b) & (d) (1),	Energy Policy and Conservation Act
	15 U.S.C. sec. 2002(a) (4) & (5)	Motor Vehicle Information and Cost Savings Act
94-258	10 U.S.C. sec. 7422(c)(2)(C)	Naval Petroleum Reserves Production Act of 1976
94-280	23 U.S.C. sec. 104(b)(5)(A)	Federal Aid Highway Act of 1976
94-286 (amended by 96-584, 97-295)	10 U.S.C. sec. 673b	Amendments to Chapter 38 of Title 10, United States Code
94-412	50 U.S.C. sec. 1622	National Emergencies Act
94-578	16 U.S.C. sec. 251g	Olympic National Park—Authority to Accept Land
94-75	33 U.S.C. sec. 1602(d)	International Navigational Rules Act of 1977
95-238	22 U.S.C. sec. 3224a 42 U.S.C. sec. 5919(m)	Department of Energy Act of 1978—Civilian Applications

P.L. No.	Cite	Popular Name
95-319	15 U.S.C. sec. 2082(c) (2) (D) (iv)	Emergency Interim Consumer Product Safety Standard Act of 1978
95-372	43 U.S.C. secs. 1337(a) (4), 135(c)	Outer Continental Shelf Lands Act Amendments of 1978
95-405	7 U.S.C. sec. 16a	Futures Trading Act of 1978
95-454	5 U.S.C. sec. 3131 note	Civil Service Reform Act of 1978
95-504	49 U.S.C. sec. 1552(f)	Airline Dergulation Act of 1978
95-557	42 U.S.C. sec. 3535	Housing and Community Development Amendments of 1978
95-561	25 U.S.C. sec. 2018, 20 U.S.C. secs. 927, 1221-3(e)	Education Amendments of 1978
95-621	15 U.S.C. secs. 3332, 3342(c), 3346(d) (2), 3417	Natural Gas Policy Act of 1978
95-625	Uncodified 92 Stat. 3467	National Parks and Recreational Act of 1978
96-72	50 U.S.C. app. secs. 2406(d) (2) (B), 2406(g) (3)	Export Adminstration Act of 1979
96-122	Uncodified 93 Stat. 867	District of Columbia Retirement Reform Act
96-151	38 U.S.C. sec. 219 note	Veteran's Health Program Extension and Improvements Act of 1979
96-164	Uncodified 93 Stat. 1267	Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1980
96-187	2 U.S.C. sec. 438(d) (2)	Federal Election Campaign Act Amendments of 1979
96-332	16 U.S.C. sec. 1432(b) (2)	Marine Protection, Research, and Sanctuaries Act Amendments of 1980
96-364	29 U.S.C. sec. 1322(a)	Multiemployer Pension Plan Amendments Act of 1980
96-374 (amended by 97-35)	20 U.S.C. sec. 1463a	Education Amendments of 1980
96-464	16 U.S.C. sec. 1463a	Coastal Zone Management Improvements Act of 1980
96-487	43 U.S.C. sec. 1635(j) (5)	Alaskan National Interest Lands Conservation Act
96-510	42 U.S.C. sec. 9655	Comprehensive Environmental Response, Compensation and Liability Act of 1980
96-540	Uncodified 94 Stat. 3197	Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1981

P.L. No.	Cite	Popular Name
96-592	12 U.S.C. secs. 2121	Farm Credit Act Amendments of 1980
97-86	10 U.S.C. sec. 2382(b)	Department of Defense Authorization Act, 1982
97-88	Uncodified 95 Stat. 1135	Energy and Water Development Appropriations Act, 1982
97-90	Uncodified 95 Stat. 1163	Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1982
97-100	Uncodified 95 Stat. 1391	Appropriations--Department of the Interior--Fiscal Year 1982
97-121	Uncodified 95 Stat. 121	Foreign Assistance and Related Programs Appropriations Act, 1982
97-125	8 U.S.C. sec. 814(e)	Union Station Redevelopment Act of 1981
97-214	10 U.S.C. secs. 2676, 2803, 2854	Military Construction Codification Act
97-216	Uncodified 96 Stat. 180	Urgent Supplemental Appropriations Act for Fiscal Year 1982
97-252	10 U.S.C. sec. 139(e)(3)	Department of Defense Authorization Act 1983
97-272	Uncodified 96 Stat. 744	Department of Housing and Urban Development--Independent Agencies Appropriation Act, 1983
97-301	22 U.S.C. secs. 1078, 1089	Student Financial Assistance Technical Amendments Act of 1982
97-324	Uncodified 96 Stat. 1597	National Aeronautics and Space Administration Act, 1983
97-369	Uncodified 96 Stat. 1765	Department of Transportation and Related Agencies Appropriations Act, 1983
97-377	Uncodified 96 Stat. 1830	Further Continuing Appropriations Act, 1983
97-378	Uncodified 96 Stat. 1925	District of Columbia Appropriations Act, 1983
97-394	Uncodified 96 Stat. 1966	Department of the Interior and Related Agencies Appropriations Act, 1983
97-415	Uncodified 96 Stat. 2067	Nuclear Regulatory Commission Authorization Act, 1983
97-425	42 U.S.C. sec. 10222(a)(4)	Nuclear Waste Policy Act of 1982
97-449	49 U.S.C. sec. 334	Revisions of Title 49, United States Code
98-45	Uncodified 97 Stat. 219	Department of Housing and Urban Development--Independent Agencies Appropriation, 1984

P.L. No.	Cite	Popular Name
98-50	Uncodified 97 Stat. 247	Energy And Water Development Appropriation Act, 1984
98-52	Uncodified 97 Stat. 281	National Aeronautics and Space Administration Authorization Act, 1984
98-63	Uncodified 97 Stat. 301	Supplemental Appropriations Act, 1983
98-67	Uncodified 97 Stat. 369	Caribbean Basin Economic Recovery Act
98-78	Uncodified 97 Stat 453	Department of Transportation and Related Agencies Appropriation Act, 1984
98-94	Uncodified 97 Stat. 614	Department of Defense Authorization, 1984
98-141	40 U.S.C. sec. 871	Public Lands and National Parks Act of 1983

Thomas J. Nicola
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April 25, 1984

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

May 8, 1984

TO : Honorable Claude Pepper, Chairman
House Rules Committee
Attention: Andrea Bolling

FROM : American Law Division

SUBJECT: Legislative Veto Litigation Since Chadha

The sweeping nature of the Supreme Court's landmark decision in Immigration and Naturalization Service v. Chadha, 462 U.S. , 103 S. Ct. 2764 (1983), declaring the legislative veto device unconstitutional, has spawned a flood of litigation. The challenges have raised questions as to the applicability of the Chadha rationale in particular circumstances, whether a provision found unconstitutional is severable from the statutory scheme, and whether the invalidity of a veto provision is to be given retroactive effect.

The area which has produced the largest volume of court decisions involves the one-House veto provision in the Reorganization Act of 1977, 5 U.S.C. 901 et seq., under which enforcement authority under the Age Discrimination in Employment Act (ADEA) and the Equal Employment Act (EPA) was transferred from the Department of Labor to the Equal Employment Opportunity Commission (EEOC). See Reorganization Plan No. 1 of 1978, 43 F.R. 19807, 92 Stat. 3781 (1978). All courts which have considered the issue have found the veto provision unconstitutional. Where the courts have differed is over the question of its severability and the retroactive effect of its invalidity. The vast majority of decisions (11) have held that the veto provision to be severable from the rest of the Act and that the EEOC may enforce the powers given it under the reorganization plan.[1/] They have also held that subsequent congressional actions, i.e., the passage of appropriations measures have ratified past Commission enforcement actions. See EEOC v. Hernando Bank,

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1/ The implication of this holding is that the President is free to unilaterally effect reorganizations of government agencies. However, authority to act under the Reorganization Act expired in April 1981 and has not been revived.

724 F.2d 1188 (5th Cir. 1984); EEOC v. State of New York, 34 FEP Cases 379 (N.D. N.Y. 1984); EEOC v. Radio Montgomery, Inc., 34 FEP Cases 378 (W.D.Va. 1984); EEOC v. Old Dominion Freight Lines, Inc., 34 FEP Cases 377 (M.D. N.C. 1984); EEOC v. Pan American World Airways, 34 FEP Cases 321 (N.D. Cal. 1984); EEOC v. Chrysler Corp., 33 FEP Cases 1838 (E.D. Mich. 1984); EEOC v. El Paso Natural Gas Co., 33 FEP Cases 1837 (W.D.Texas 1984); EEOC v. Cudahy Foods Co., 33 FEP Cases 1836 (W. D. Wash. 1983); EEOC v. City of Memphis, 33 FEP Cases 1089 (W.D. Tenn. 1983); EEOC v. Jackon County, 33 FEP Cases 963 (W.D. Mo. 1983); Muller Optical Co. v. EEOC, 574 F. Supp. 946 (W.D. Tenn. 1983). Two courts have held that the provision is not severable and that the Commission lacks enforcement authority. EEOC v. Westinghouse Electric Corp., 33 FEP Cases 1232 (W.D. Pa. 1984); EEOC v. Allstate Insurance Co., 570 F. Supp. 1224 (S.D. Miss. 1983), appeal docketed, 52 U.S.L.W. 3512 (U.S. Dec. 15, 1983). One court has refused to rule on the matter. EEOC v. Pan American World Airways, 576 F. Supp. 1530 (S.D. NY 1984).

In Allen v. Carmen, Civil Action No. 83-3099, D.D.C., December 30, 1983, (per Hogan, J.), the district court declared the one-House veto provision of the Presidential Recording and Materials Preservation Act, 44 U.S.C. 2107 note (1976) unconstitutional and the rules promulgated under that provision to be invalid.[2/] It also found the veto provision to be severable from the statutory scheme, thereby allowing the Administrator of the General Services Administration to promulgate new regulations. The new regulations must be reported to the Congress but they are no longer subject to one-House disapproval.

Two decisions have been rendered by the Superior Court of the District of Columbia upholding the one-House veto provision of the District of Columbia Self-Government and Governmental Reorganization Act, D.C. Code 1-233 (c)(2). United States v. McIntosh, Criminal No. F. 4892-83, March 28, 1984; and United States v. Langley, Criminal No. F.366 6-82, March 28, 1984. Both cases involved prosecutions under the District's criminal code provisions dealing with rape. Those provisions were putatively superceded by passage of the Sexual Assault Reform Act of 1981 which was vetoed by the House of Representatives. Defendents claimed that under Chadha the veto of the 1981 law was unconstitutional and that they should be tried under that law and not the law (which contains more stringent penalties) which the D.C. Council sought to supercede. The courts' rejected the contention, holding that Chadha does not apply to Congress' authority under Article I, section 8, clause 17 over the District of Columbia. Separation of powers principles, they reasoned, do not apply to Congress' relation to the District. Congress' power over

2/ Three sets of regulations were vetoed by the Congress before those being challenged were allowed to go into effect.

the District is like that of a state to a local government and thus encompasses the full authority of government, including necessarily, the executive and judicial powers as well as the legislative. Congress is therefore not required to establish a local government for the district which embodies the separation of powers principles of the national government. The cases are now on appeal to the District of Columbia Court of Appeals.

Another case raising a different facet of the problem arose in the United States Court of Claims. City of Alexandria v. United States, 3 Ct. Cl. 667 (1983), involved the sale of surplus federal property pursuant to the Federal Property and Administrative Services Act, 40 U.S.C. 471 et seq. Section 484 (e)(6) of the statute requires that in the case of disposal by negotiation of surplus property having a fair market value in excess of $1000, a statement of the circumstances of the disposal "be transmitted to the appropriate committees of the Congress in advance of such disposal...." On its face, then, the provision merely requires reporting, a permissible requirement under Chadha. However, GSA regulations provide that a sale is to be consummated, "[i]n the absence of adverse comment by an appropriate committee." 41 CFR 101-47.305-12(f). The court declared section 484(e)(6) unconstitutional. It pointed to the agency regulation as a "procedure established by statute, regulation, and practice....whereby one committee of one House of Congress can intervene in and stop a decision of the Executive Branch to contract." 3 Ct. Cl. at 675. Elsewhere the court held that "the practice of a committee of the House of Representatives of intervening in and stopping negotiated sales of surplus property proposed by the GSA is an unconstitutional invasion of the separation of powers." 3 Ct. Cl at 678 (emphasis added).

The court's decision would seem to be a significant extension of the Chadha rationale in that there is no statutory compulsion present to comply with a legislative veto in this case. The decision is now on appeal to the Court of Appeals for the Federal Circuit.

The City of Alexandria ruling may be contrasted with the District Court's decision in National Wildlife Federation v. Watt, 571 F. Supp. 1145 (D.D.C. 1983). Under scrutiny was a statutory provision enabling the Senate or House Interior committees to direct the secretary of Interior to withhold public lands for sale or lease. 43 U.S.C. 1714 (e)(1976). The Department voluntarily incorporated the statutory requirement in its own departmental rules. The court, evading a direct ruling on the constitutionality of the committee veto, held that the Interior Department had to obey the committee directive since it had voluntarily subjected itself to the limitation on its freedom of action.

Finally, most recently, the Temporary Emergency Court of Appeals (TECA) held that it was not deprived of jurisdiction to hear appeals of oil price overcharge cases even though the legislative veto provisions of the Economic Stabilization Act of 1970 and the Emergency Petroleum Allocation Act--from which TECA receives its authority to act--are unconstitutional. Gulf Oil Corp. v. Dyke et al., TECA Nos. 9-80, 9-81, April 17, 1984. The court held that the veto provisions are severable and that the relevant price control provisions are "intact and operable." TECA rejected Gulf's motion to dismiss the case on jurisdictional grounds, holding that the legislative history lacked any evidence suggesting that Congress would not have enacted price controls absent the legislative veto. The court held that "the hard-fought compromise between the executive and Congress over pricing and decontrol, which Gulf contends demonstrates the inseverability of the vetoes, is maintained after severance."

The impact of Chadha on the ability of Congress to oversee and control executive agency actions is not confined to decisions of the courts. In a recent opinion of the Department of Justice's Office of Legal Counsel (OLC) to the Office of Management and Budget (OMB), OLC expressed the view that the authority heretofore exercised by the Joint Committees on Printing (JCP) under Title 44, United States Code, over the federal printing establishment was invalid under Chadha and that Executive departments and agencies are free to contract for their printing needs as they find convenient. The impact of this opinion, if put into effect by OMB and the agencies, would be to confine JCP's authority to the printing needs of the Congress or closely related matters.

Copies of most of the decisions referred to above are attached for your perusal.[3/] We are certain that many other cases now in the process of litigation, but not yet decided, have had Chadha issues raised in them. We will bring them to your attention as we become aware of them.

Morton Rosenberg
Specialist in
American Public Law
May 8, 1984

3/ We have not included most of the EEOC decisions as they are essentially summary and repetitious.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellant Cross Appellee,

v.

The HERNANDO BANK, INC., Defendant-Appellee Cross Appellant.

No. 82-4298.

United States Court of Appeals, Fifth Circuit.

Feb. 13, 1984.

Equal Employment Opportunity Commission sued bank under Equal Pay Act and Civil Rights Act claiming sex discrimination in pay of female assistant cashiers. The United States District Court for the Northern District of Mississippi, L.T. Senter, Jr., Chief Judge, rendered summary judgment dismissing the claims, and agency appealed. The Court of Appeals, Politz, Circuit Judge, held that: (1) unconstitutional one-house legislative veto provision of Reorganization Act of 1977 is severable; (2) acting under the Act the president properly transferred authority from Secretary of Labor to EEOC to enforce the Equal Pay Act; (3) claims were not barred by limitations, notwithstanding that subject female employees were listed in prayer for relief section and not specifically named as plaintiffs; (4) agency is not required to conciliate as precondition for filing suit; (5) it was error to dismiss on basis of employees' affidavit that they were not aware of sex discrimination and did not authorize the agency to represent them.

Reversed and remanded.

1. Statutes ⇐64(2)
United States ⇐29

One-house veto decision of Reorganization Act of 1977 is unconstitutional, but is severable. 5 U.S.C.A. § 906.

2. Statutes ⇐64(1)

Ultimate determination of severability of an invalid provision of an enactment will rarely turn on presence or absence of a severability clause as relevant test is whether Congress would have enacted remainder of the statute absent the invalid provision.

3. Statutes ⇐64(1)

Mere uncertainty about legislative intent, i.e., whether legislature would have enacted remainder of act absent invalid provision, is not determinative of severability issue.

4. United States ⇐29

Reorganization Act of 1977 validly delegated to the president legislative authority to promulgate executive branch reorganization plans. 5 U.S.C.A. §§ 901-912.

5. United States ⇐29

Since president's Reorganization Plan No. 1 of 1978 conformed to substantive provision of Reorganization Act and did not transgress any limitations imposed by Act, the plan was enforceable and effected a valid transfer of governmental authority to enforce the Equal Pay Act from the Secretary of Labor to the Equal Employment Opportunity Commission. Fair Labor Standards Act of 1938, § 6(d), as amended, 29 U.S.C.A. § 206(d); Reorganization Plan No. 1 of 1978, § 1 et seq., 42 U.S.C.A. § 2000e-4 note; 5 U.S.C.A. § 905.

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6. Labor Relations ⇐1477

District court had subject-matter jurisdiction of Equal Pay Act suit brought by Equal Employment Opportunity Commission alleging that defendant bank discriminated against several of its female employees by paying them less than it paid males for performance of substantially similar work. Fair Labor Standards Act of 1938, §§ 16(c), 17, as amended, 29 U.S.C.A. §§ 216(c), 217; 28 U.S.C.A. §§ 1331, 1345.

7. Labor Relations ⇐1478

Equal Employment Opportunity Commission's naming of three female assistant cashiers at defendant bank in prayer for relief section of complaint charging sex discrimination in pay in violation of Equal Pay Act satisfied the "named as party" requirement of statute defining when action commenced for limitations purposes, as did reference to the females in agency's answer to bank's interrogatories, notwithstanding that the employees were not specifically named as plaintiffs. Fair Labor Standards Act of 1938, § 16(c), as amended, 29 U.S.C.A. § 216(c); Portal-to-Portal Act of 1947, § 6, 29 U.S.C.A. § 255.

8. Labor Relations ⇐1474

Equal Employment Opportunity Commission is not required to conciliate as a precondition to filing of a suit to enforce substantive provisions of Equal Pay Act. Fair Labor Standards Act of 1938, §§ 6(d), 16, 17, as amended, 29 U.S.C.A. §§ 206(d), 216, 217.

9. Labor Relations ⇐1471

Affidavits whereby three female assistant bank cashiers named in Equal Pay Act complaint filed by Equal Employment Opportunity Commission stated that they were not aware of any sex discrimination and did not desire or authorize the agency to represent them in the action were not dispositive of the factual and legal issues involved in determining whether bank paid male employees greater amount for performing substantially equal work and it was error to dismiss action on basis of the affidavits. Fair Labor Standards Act of 1938, §§ 6(d), 16, 17, as amended, 29 U.S.C.A. §§ 206(d), 216, 217.

10. Labor Relations ⇐1333

Operative test in an Equal Pay Act case is whether a woman is paid less for a job substantially equal to a man's and test relates to job content rather than to job title or description and factored into the determination are such diverse considerations as seniority systems, merit systems, quantity or quality of work activity schemes and differentials based on any factor other than sex. Fair Labor Standards Act of 1938, §§ 6(d)(1), 16(c), 17, as amended, 29 U.S.C.A. §§ 206(d)(1), 216(c), 217.

11. Federal Civil Procedure ⇐2498

Material fact issue existed whether bank paid male employees a greater amount for performing work substantially similar to that performed by female employees, precluding summary judgment in Equal Pay Act case. Fair Labor Standards Act of 1938, §§ 6(d)(1), 16(c), 17, as amended, 29 U.S.C.A. §§ 206(d)(1), 216(c), 217.

Appeals from the United States District Court for the Northern District of Mississippi.

Before CLARK, Chief Judge, GOLDBERG and POLITZ, Circuit Judges.

POLITZ, Circuit Judge:

The Equal Employment Opportunity Commission (EEOC) brought suit against The Hernando Bank, Inc. under the Equal Pay Act, 29 U.S.C. § 206(d), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e—2000e–17, alleging that the Bank had discriminated against several of its female employees on the basis of sex. Specifically, the EEOC claimed that the Bank paid female assistant cashiers less than it paid male assistant cashiers for the performance of substantially similar work. The EEOC brought its Equal Pay Act claims under sections 16(c) and 17 of the Fair Labor Standards Act, 29 U.S.C. §§ 216(c), 217.

The Bank moved for summary judgment on the basis, *inter alia*, of identical affidavits executed by the three female employees named in the EEOC's initial complaint. The affidavits stated, in pertinent part: "I am not aware of any sex discrimination at Hernando Bank, therefore, I did not request, do not desire, nor have I authorized the Equal Opportunity Commission to represent me in the foregoing civil action."

Relying heavily upon the affidavits, the district court entered a summary judgment dismissing all of the EEOC's claims. The court denied the Bank's request for attorneys' fees.

The EEOC appeals the summary judgment only as it applies to the three female assistant cashiers named in its original Equal Pay Act complaint. It does not appeal the Title VII summary judgment. The Bank cross-appeals, claiming that (1) the EEOC had no power to enforce the substantive provisions of the Equal Pay Act, (2) the district court lacked subject matter jurisdiction, and (3) the district court abused its discretion in denying the Bank's request for attorneys' fees.

This appeal presents several serious questions of far reaching consequences. Concluding that the summary judgment was improvidently granted, we reverse and remand for further proceedings.

Authority of EEOC

A threshold consideration, anticipated in Hernando Bank's brief, is precipitated by the intervening decision of the Supreme Court in *INS v. Chadha*, — U.S. ——, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). In *Chadha*, the Supreme Court held that the one-house congressional veto provision in § 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1254(c)(2), was unconstitutional because it violated the doctrine of separation of powers.

Hernando Bank alleges that *Chadha* requires us to hold that the EEOC had no authority to enforce the substantive provisions of the Equal Pay Act. Reorganization Plan No. 1 of 1978, 43 Fed.Reg. 19807, 92 Stat. 3781, *reprinted in* [1978] U.S.Code Cong. & Admin.News 9795–9800, which was promulgated under the authority delegated to the President by the Reorganization Act of 1977, 5 U.S.C. §§ 901–12, transferred the federal government's authority to enforce the Equal Pay Act from the Secretary of Labor to the EEOC. Hernando Bank argues that the Reorganization Act and all reorganization plans promulgated thereunder must be found invalid because the Reorganization Act contains a legislative veto provision similar to the one struck down in *Chadha*, *see* 5 U.S.C. § 906.[1] We do not agree.

1. Subject to certain limitations, the Reorganization Act of 1977 authorizes the President to

[1] After a close analysis of the language and legislative history of the Reorganization Act, we conclude that its unconstitutional one-house legislative veto provision is severable. We further conclude that the remainder of the Reorganization Act is constitutional and that President Carter's Reorganization Plan No. 1 of 1978 effected a valid transfer of Equal Pay Act enforcement authority from the Secretary of Labor to the EEOC.

[2] The Reorganization Act of 1977 does not contain a severability clause. Although we might infer from such legislative silence that Congress intended the provisions of the statute to be nonseverable, "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." *United States v. Jackson*, 390 U.S. 570, 585 n. 27, 88 S.Ct. 1209, 1218 n. 27, 20 L.Ed.2d 138 (1968). Rather, the court must inquire into whether Congress would have enacted the remainder of the statute in the absence of the invalid provision. *Consumer Energy Council v. FERC*, 673 F.2d 425 (D.C.Cir.1982). "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley v. Valeo*, 424 U.S. 1, 109, 96 S.Ct. 612, 677, 46 L.Ed.2d 659 (1976), *quoting Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234, 52 S.Ct. 559, 564, 76 L.Ed. 1062 (1932).

Congressional intent and purpose are best determined by an analysis of the language of the statute in question. What reasons did Congress assign for its enactment of the Reorganization Act? Congress formally declared the Act's policy and purpose in 5 U.S.C. § 901(a):

> The Congress declares that it is the policy of the United States—
>
> (1) to promote the better execution of the laws, the more effective management of the executive branch and of its agencies and functions, and the expeditious administration of the public business;
>
> (2) to reduce expenditures and promote economy to the fullest extent consistent with the efficient operation of the Government;
>
> (3) to increase the efficiency of the operations of the Government to the fullest extent practicable;
>
> (4) to group, coordinate, and consolidate agencies and functions of the Government, as nearly as may be, according to major purposes;
>
> (5) to reduce the number of agencies by consolidating those having similar functions under a single head, and to abolish such agencies or functions thereof as may not be necessary for the efficient conduct of the Government; and
>
> (6) to eliminate overlapping and duplication of effort.

In 5 U.S.C. § 901(b), Congress explained that the policies of § 901(a) could best be accomplished by delegating to the President the legislative authority to reorganize the executive branch. The words of Congress are explicit:

> Congress declares that the public interest demands the carrying out of the pur-

reorganize the executive branch of the federal government by submitting plans of reorganization to both Houses of Congress. Under 5 U.S.C. § 906, a plan becomes effective if neither House objects to it within sixty days of its submission. This one-house legislative veto provision is unconstitutional under *Chadha*.

> poses of subsection (a) of this section and that the purposes may be accomplished in great measure by proceeding under this chapter, and can be accomplished more speedily thereby than by the enactment of specific legislation.

Thus Congress obviously concluded that it would be more efficient and better attuned to the public interest to delegate to the President authority to formulate the specifics of reorganization plans.

The legislative veto provision reflects Congress' desire to vote its approval of any specific reorganization plan. But there is more of relevance to our inquiry in the language of the Act. The Reorganization Act of 1977 is the first such statute in which Congress placed specific limitations upon the authority delegated. Section 905 provides that no plan may create a new executive department, abolish or transfer an executive department or independent regulatory agency, continue an agency or function beyond the time authorized by law, or authorize an agency to exercise a function not already expressly conferred by law. *See* H.R.Rep. 95–105, *reprinted in* [1977] U.S.Code Cong. & Admin.News 41.

A review of the Reorganization Act's legislative history demonstrates congressional awareness of the serious constitutional questions raised by the legislative veto. Congressman Robert Drinan doubted the wisdom of bypassing the normal legislative process and, thereby, of risking a judicial declaration of unconstitutionality. He observed that the Reorganization Act "intentionally does not contain a severability clause. The one House veto provision is deemed to be an integral and necessary part of the legislative scheme for reorganization." *Id.* at 69.

With the exception of Congressman Drinan's comments, nothing in the wording of the Act or in its legislative history indicates that Congress would not have enacted the Reorganization Act without the legislative veto provision or that Congress even considered the issue of severability.

The legislative history is replete with statements calling for efficient change in the organization of the executive branch. The House Report notes that in our constantly shifting society, "[f]unctions change, new methods are developed, bureaucratic structures become obsolete, [and] new laws are passed." *Id.* at 43–44. Congress expected the Reorganization Act to bring about organizational changes in the executive branch that would result in "cost reduction, improved management and better services to the public." *Id.* at 43.

It is clear from the legislative history that Congress undertook several steps in its drafting of the Act to "strengthen the role of Congress and help allay, in part, fears of unconstitutionality." *Id.* The substantive limitations imposed retain for Congress control over the substantive operations of the federal government. The Act does nothing more than delegate to the President the authority to reorganize the complex bureaucratic machinery of the executive branch so as to implement most effectively Congress' substantive policies.[2]

2. We perceive a significant distinction between the exercise of a one-house legislative veto, such as that held invalid in *Chadha*, and the mere presence of an unexercised legislative veto in the Reorganization Act. *Chadha* involved a situation in which Congress delegated to the Attorney General "the authority to allow deportable aliens to remain in this country in certain specified circumstances." 103 S.Ct. at 2786. By its unilateral veto of the Attorney General's deci-

Congress was acutely aware of the ongoing need for flexibility in the reorganization of the executive branch, and it adopted what it perceived to be the most efficient, expeditious means of achieving that end. In so doing, it retained, as the Constitution requires, the ultimate power to establish by legislation the substantive policies of the federal government.

[3] We conclude that the unconstitutional legislative veto provision is severable even though the Reorganization Act of 1977 contains no severability clause, because neither the express language of the statute nor the Act's legislative history makes it "evident that the legislature would not have enacted" the remainder of the Act in the absence of the legislative veto provision. *See Buckley v. Valeo*, 424 U.S. 1, 109, 96 S.Ct. 612, 677, 46 L.Ed.2d 659 (1976). Mere uncertainty about the legislature's intent is insufficient to satisfy the test announced in *Buckley v. Valeo*. We therefore hold that the remainder of the Act "is fully operative as a law." *Id.*

[4, 5] We further find and hold that the Reorganization Act validly delegated to the President the legislative authority to promulgate executive branch reorganization plans. Because President Carter's Reorganization Plan No. 1 of 1978 conformed to the substantive provision of the Act and did not transgress any of the limitations imposed by 5 U.S.C. § 905, the plan is enforceable as law. The plan thus effected a valid transfer of governmental authority to enforce the Equal Pay Act from the Secretary of Labor to the EEOC.

Jurisdiction

[6] Hernando Bank alleges that the district court lacked subject matter jurisdiction. We do not agree. The EEOC brought this action pursuant to sections 16(c) and 17 of the Fair Labor Standards Act, 29 U.S.C. §§ 216(c), 217. Section 17 provides that "[t]he district court ... shall have jurisdiction ... to restrain violations of section 15...."

In addition, the district court had jurisdiction under both 28 U.S.C. § 1331 and 28 U.S.C. § 1345. Section 1331 provides that "the district courts shall have original jurisdiction of all civil actions arising under the constitution, laws or treaties of the United States." A suit brought under the Equal Pay Act is obviously an action arising under a law of the United States. Section 1345 grants the district courts original jurisdiction of civil actions brought by federal agencies, such as the EEOC, that are ex-

sion to allow Mr. Chadha to remain in the United States despite an outstanding deportation order, the House of Representatives "took action that had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch." 103 S.Ct. at 2784. The Supreme Court held that once Congress delegated its legislative authority, it was obliged to honor its delegation "until that delegation is legislatively altered or revoked." 103 S.Ct. at 2786.

In the instant case, there was no congressional delegation and subsequent withdrawal of delegated legislative powers. Further, no action was taken that affected the substantive rights of any person. The challenged executive action did nothing more than transfer the federal government's responsibility for enforcing the Equal Pay Act from one executive agency to another, *i.e.* from the Secretary of Labor to the EEOC. The reorganization plan effected no substantive change in the applicable substantive legislation; indeed, 5 U.S.C. § 905 forbids any such changes.

pressly authorized to sue by an Act of Congress.[3]

Statute of Limitations

[7] The district court held that the statute of limitations[4] bars the EEOC's claims under 29 U.S.C. § 216(c)[5] because, even though employees Harris, Fuquay, and Sullivan were listed in the prayer for relief section of the EEOC's initial complaint, the EEOC did not specifically name the three as plaintiffs before the expiration of the two-year limitation period.[6] However, courts that have considered the "named as party plaintiff" requirement of 29 U.S.C. § 256, a statute very similar to § 216(c), have required merely that the employee be identified in the complaint or in a pleading equivalent to it. *E.g. Donovan v. Crisostomo*, 689 F.2d 869 (9th Cir.1982) (Wisdom, J., sitting by designation), *citing Prickett v. Consolidated Liquidating Corp.*, 196 F.2d 67 (9th Cir.1952); *Ciemnoczolowski v. Q.O. Ordinance Corp.*, 119 F.Supp. 793 (D.Neb.1954), *affirmed*, 233 F.2d 902 (8th Cir.), *cert. denied*, 352 U.S. 927, 77 S.Ct. 226, 1 L.Ed.2d 162 (1956). The EEOC's naming of the three women in the prayer of its complaint satisfies this test, as does the agency's specific references to them in its answers to Hernando Bank's interrogatories. Therefore, the statute of limitations does not bar the EEOC's claims under § 216(c).

Conciliation as a Precondition to Litigation

[8] The district court stated in support of its grant of summary judgment that the EEOC's conciliation efforts prior to commencement of this litigation were grossly inadequate. The trial court thus implicitly

3. 28 U.S.C. § 1345 provides in full:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

Hernando Bank argues that the EEOC may not invoke § 1345 jurisdiction because the Equal Pay Act authorizes the Secretary of Labor and not the EEOC to bring enforcement proceedings. The EEOC assumed its enforcement powers from the President's Reorganization Plan No. 1 of 1978 rather than from an Act of Congress. However, since a presidential reorganization plan that is not rejected becomes law, *Young v. United States*, 212 F.2d 236 (D.C.Cir. 1954), *cert. denied*, 347 U.S. 1015, 74 S.Ct. 870, 98 L.Ed. 1137 (1954), and since the application of the Reorganization Plan No. 1 of 1978 to pending litigation "contradicts neither 'statutory direction [n]or legislative history,'" *United States v. City of Miami*, 664 F.2d 435, 437 (5th Cir.1981) (en banc), *quoting Bradley v. School Bd.*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974), we hold that the EEOC was "expressly authorized to sue" under the Equal Pay Act within the meaning of § 1345.

4. 29 U.S.C. § 255 provides, in pertinent part:

> Any action commenced ... to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended ...
>
> (a) ... may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued ...

5. The EEOC sought remedies under 29 U.S.C. §§ 216(c) and 217. Hernando Bank concedes that the EEOC's § 217 claims were commenced in a timely fashion.

6. 29 U.S.C. § 216(c) provides, in pertinent part:

> In determining when an action is commenced ... under this subsection for the purposes of the statutes of limitations provided in [29 U.S.C. § 255], it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

held that the EEOC must undertake conciliation efforts before it may commence a judicial proceeding to enforce the Equal Pay Act. Although it is undisputed that the EEOC must "endeavor to eliminate any ... alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion" before it may bring a judicial enforcement proceeding under Title VII, *see* 42 U.S.C. 2000e–5(b), the question whether the EEOC must do the same before it may commence such an action under the Equal Pay Act is one of first impression in this circuit. We now hold that the EEOC is not required to conciliate as a precondition to the filing of a suit to enforce the substantive provisions of the Equal Pay Act. It follows *a fortiori* that inadequate conciliation efforts present no bar to judicial proceedings.

We briefly sketch the relevant statutory history. Congress enacted the Equal Pay Act of 1963, 29 U.S.C. § 206(d), as an amendment to the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* By providing that "any amounts owing to any employee which have been withheld in violation of this subsection [*i.e.* the Equal Pay Act] shall be deemed to be unpaid minimum wages or unpaid overtime compensation under [the FLSA]," 29 U.S.C. § 206(d)(3), Congress intended that the Equal Pay Act be enforced in accordance with well established FLSA procedures. H.Rep. No. 309, 88th Cong., 1st Sess., *reprinted in* [1963] U.S.Code Cong. & Admin.News 687. These procedures do not include conciliation. *See* 29 U.S.C. §§ 206(d), 216, 217. When Congress amended the Equal Pay Act in 1974, it did not add a conciliation requirement, an administrative procedure that it had ordained in the intervening years when it first adopted and then expanded Title VII. *Compare* 29 U.S.C. §§ 204(f), 216(b) *with* 42 U.S.C. §§ 2000e–5(b), 2000e–16(c).

The Reorganization Act of 1977 and Reorganization Plan No. 1 of 1978 are at the end of the scenario. We find nothing in the language of the Reorganization Act, the Reorganization Plan, the message of President Carter accompanying the plan, or in the Executive Order implementing it that supports the proposition that the conciliation requirements of Title VII automatically apply to Equal Pay Act claims after the transfer. *See* the Reorganization Act and Reorganization Plan; Executive Order No. 12,144, *reprinted in* 44 Fed.Reg. 37,193 (1979). *See also* S.Rep. No. 750, 95th Cong., 2d Sess. (1978); H.R.Rep. No. 1069, 95th Cong., 2d Sess. (1978).

Our holding today is based upon several considerations. We first note the absence of any reference to a conciliation requirement in the statutory language of the Equal Pay Act. Nothing in the legislative history suggests that this omission was due to congressional oversight or inadvertence. We are persuaded that had Congress wished to require conciliation as a prerequisite to litigation, it would have done so expressly, as it did for actions brought under both Title VII, 42 U.S.C. § 2000e–5(b), and the Age Discrimination in Employment Act, 29 U.S.C. § 626(b).

Further, a conciliation requirement would be inconsistent with the remedial scheme of the Equal Pay Act. The FLSA provides for the payment of unpaid wages, but limits an award to the two-year period (and in some instances three-year period) immediately preceding the filing of the lawsuit. 29 U.S.C. § 255(a). Under Title VII, back pay is available for the two-year period immediately prior to the commencement of administrative proceedings with the

EEOC. 42 U.S.C. § 2000e-5(g). Accordingly, the conciliation requirement of Title VII has no practical adverse effect upon that statute's remedial scheme, but the delay caused by such a requirement under the Equal Pay Act would seriously diminish, or destroy, the back pay claim it would purport to prescribe.

In addition, the legislative history reveals that the Congress considered but declined to adopt a permissive conciliation provision in the Equal Pay Act.[7] Finally, we find instructive the passing observation by the Supreme Court in *County of Washington v. Gunther*, 452 U.S. 161, 175 n. 14, 101 S.Ct. 2242, 2251 n. 14, 68 L.Ed.2d 751 (1981), that "the Equal Pay Act, unlike Title VII, has no requirement of filing administrative complaints and awaiting administrative conciliation efforts."

Our holding today is consistent with the decisions recently reached by our colleagues in the District of Columbia Circuit, *Ososky v. Wick*, 704 F.2d 1264 (D.C.Cir. 1983), and in the Eighth Circuit, *EEOC v. Home of Economy, Inc.*, 712 F.2d 356 (8th Cir.1983).

Affidavits of Discriminatees

In granting Hernando Bank's motion for summary judgment, the district court was obviously impressed by the affidavits of the three female assistant cashiers named in the EEOC's complaint. The affidavits, which were attached to Hernando Bank's motion, stated: "I am not aware of any sex discrimination at Hernando Bank, therefore, I did not request, do not desire nor have I authorized the Equal Employment Opportunity Commission to represent me in the foregoing civil action." The three women also executed supplemental affidavits containing the same statement. The September 2, 1980 affidavit of one of the female assistant cashiers, and her supplemental affidavit dated March 25, 1981, are set out in full in the margin.[8] All three

7. The rejected provision stated in part, "If a violation is found to exist, the Secretary may, before taking further action hereunder, by informal methods of conference, conciliation, and persuasion, endeavor to eliminate ..." S.Rep. 910, 88th Cong., 1st Sess., 109 Cong.Rec. 2886, 2887 (1963).

8. AFFIDAVIT OF IMOGENE HARRIS

STATE OF MISSISSIPPI
COUNTY OF DESOTO

Personally appeared before me the undersigned authority in and for the jurisdiction aforesaid, while within my jurisdiction, Imogene Harris who, after being duly sworn by me, stated to me upon her oath as follows:

1.

My name is Imogene Harris. I am an adult resident citizen of the State of Mississippi, have personal knowledge of the facts stated herein, and, if sworn as a witness, could competently testify thereto.

2.

I am employed by the Hernando Bank. My position with the Hernando Bank is that of Assistant Cashier.

3.

It is my understanding that the Equal Employment Opportunity Commission is presently seeking relief on my behalf in a civil action styled *Equal Employment Opportunity Commission v. Hernando Bank, Inc.*, Civil Action No. DC 80-26-LS-P, on file in the United States District Court for the Northern District of Mississippi, Delta Division. It is my further understanding that said action is founded upon allegations of sex discrimination.

4.

I am not aware of any sex discrimination at Hernando Bank, therefore, I did not request, do not desire nor have I authorized the Equal Employment Opportunity Commission to represent me in the foregoing civil action.

5.

No official officer or other agent of the Hernando Bank has requested or required me to give this affidavit, instead, I initiated the contact with the bank officials regarding the necessary

Note 8—Continued

steps to terminate my involvement in this action. I have freely voluntarily and of my own volition given this affidavit without any coercion or promise of reward by any official, officer or agent of the Hernando Bank. I have been assured by officers of the Hernando Bank that no reprisal will be taken in the event I choose to have the Equal Employment Opportunity Commission continue to pursue this action on my behalf, however, I do not desire the Equal Employment Opportunity Commission to continue to maintain this action on my behalf.

6.

I hereby request that the Court terminate this action as it relates to me.

Dated this 2nd day of September, 1980.

/s/ Imogene Harris
IMOGENE HARRIS

Sworn to and subscribed before me this 2nd day of September, 1980.

/s/ Donna B. Harris
NOTARY PUBLIC

My Commission Expires:
My commission expires June 10, 1981

SUPPLEMENTAL AFFIDAVIT OF
IMOGENE HARRIS

STATE OF MISSISSIPPI
COUNTY OF DESOTO

Personally appeared before me the undersigned authority in and for the jurisdiction aforesaid, while within my jurisdiction, Imogene Harris, who, after being duly sworn by me, stated to me upon her oath as follows:

1.

My name is Imogene Harris. I am an adult resident citizen of the State of Mississippi, have personal knowledge of the facts stated herein, and, if sworn as a witness, could competently testify thereto.

2.

I am employed by the Hernando Bank. My position with the Hernando Bank is that of Assistant Cashier.

3.

I am the same Imogene Harris who previously provided an affidavit in this civil action on September 2, 1980. Furthermore, I am the same Imogene Harris who was deposed by the Equal Employment Opportunity Commission on March 24, 1981. This affidavit was provided to the bank after the March 24, 1981 deposition.

4.

It is my understanding that the Equal Employment Opportunity Commission is presently seeking relief on my behalf in a civil action styled *Equal Employment Opportunity Commission v. Hernando Bank, Inc.*, Civil Action No. DC 80-26-LS-O, on file in the United States District Court for the northern District of Mississippi, Delta Division. It is my further understanding that said action is founded upon allegations of sex discrimination.

5.

I am not aware of any sex discrimination at Hernando Bank, therefore, I did not request, do not desire, nor have I authorized the Equal Employment Opportunity Commission to represent me in the foregoing civil action.

6.

No official, officer, or other agent of the Hernando Bank has requested or required me to give this supplemental affidavit. Instead, I initiated the contact with the bank officials regarding the necessary steps to terminate my involvement in this action. I have freely, voluntarily and of my own volition given this affidavit without any coercion or promise of reward by any official, officer or agent of the Hernando Bank. I have been assured by officers of the Hernando Bank that no reprisal will be taken in the event I choose to have the Equal Employment Opportunity Commission continue to pursue this action on my behalf, however, I do not desire the Equal Employment Opportunity Commission to continue to maintain this action on my behalf.

7.

On March 24, 1981, I discussed this case with the attorneys for the Hernando Bank. My discussions with the bank's attorneys were voluntary. The bank's attorneys explained my involvement in this civil action and I was permitted to ask any questions I wished to ask. I was assured by the attorneys that no reprisal will be taken in the event I choose to have the Equal Employment Opportunity Commission continue to pursue this action on my behalf, however, as I previously stated to the bank's officials, I do not desire the Equal Employment Opportunity Commission to continue to maintain this action on my behalf.

8.

Based on the foregoing facts I hereby reaffirm and renew my request of September 2, 1980, that the Court terminate this action as it relates to me.

Dated this 25 day of March, 1981.

/s/ Imogene Harris
IMOGENE HARRIS

affidavits are identical, as are all three supplemental affidavits.

[9, 10] In finding that these affidavits rendered the EEOC "powerless to prosecute a suit" under either section 16(c) or 17 of the FLSA, 29 U.S.C. §§ 216(c), 217, the district court accorded inordinate weight to them. This was error. The affidavits are material, but they are not dispositive of the factual and legal issues involved in the determination of whether Hernando Bank complied with the congressional directives contained in the Equal Pay Act. Like the affidavits, the Equal Pay Act speaks of discrimination, but it does so in terms that may not appear to be discrimination to a layman. The Equal Pay Act obliges an employer to provide equal pay for "equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions." 29 U.S.C. § 206(d)(1). The operative test is whether a woman is paid less for a job "substantially equal" to a man's; the test relates to job content rather than to job title or description. *Hodgson v. Behrens Drug Co.*, 475 F.2d 1041 (5th Cir.1973). Factored into the court's determination are such diverse considerations as seniority systems, merit systems, quantity or quality productivity schemes, and differentials based on any factor other than sex. 29 U.S.C. § 206(d)(1). The court's inquiry is often complicated and oblique. A proper determination demands far more than the mere conclusional attestation by the alleged discriminatees that they are not aware of any discrimination.

Summary Judgment

Under Fed.R.Civ.P. 56, the district court may grant a summary judgment only if "there is no genuine issue as to any material fact." In determining whether there is a genuine fact issue, the court must review "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits." We addressed the specifics of summary judgment in *Keiser v. Coliseum Properties, Inc.*, 614 F.2d 406, 410 (5th Cir.1980), and held:

> The burden of proof falls on the party seeking summary judgment, and any doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. (Citations omitted.) We note that a court can only enter a summary judgment if *everything* in the record—pleadings, depositions, interrogatories, affidavits, etc.—demonstrates that no genuine issue of material fact exists. Rule 56 does not distinguish between documents merely filed and those singled out by counsel for special attention—the court must consider both before granting a summary judgment.

After reviewing all of the record now before us, we find that there was a substantial differential in the pay of male and female assistant cashiers throughout the entire relevant time period. No female assistant cashier at Hernando Bank has ever been paid as much as any male assistant cashier. Indeed, one male assistant cashier who received an unfavorable performance rating and was reassigned to a lower position as "courier," continued to receive a

Note 8—Continued

Sworn to and subscribed before me this 25th day of March, 1981.

/s/ Lola H. Robison
NOTARY PUBLIC

My Commission Expires:
My Commission Expires July 23, 1983.

higher salary than all of the female assistant cashiers.

[11] The record includes several descriptions of the duties of various assistant cashiers. While some were responsible for the general ledger, vault supervision, and customer assistance, others balanced accounts and supervised other employees. All assistant cashiers, male and female, rotated among the various functions. Whether Hernando Bank paid different amounts to females than it paid to males for substantially equal job assignments is a disputed question of fact on the record before us. Because this disputed issue is material to the EEOC's Equal Pay Act claims, the summary judgment should not have been granted.

It necessarily follows that there is no basis for Hernando Bank's cross-appeal for attorneys' fees.

The judgment of the district court is REVERSED, the grant of summary judgment is vacated and the matter is REMANDED for further proceedings consistent herewith.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

EEOC v. PAN AMERICAN WORLD AIRWAYS

U.S. District Court,
Northern District of California

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION v. PAN AMERICAN WORLD AIRWAYS, INC., et al., and related cross and third party actions, No. C-81-3636-WAI, March 6, 1984

AGE DISCRIMINATION IN EMPLOYMENT ACT

1. Standing to sue — Authority of EEOC ► 108.502 ► 106.1302 ► 108.7441 ► 108.7456

Employer and union, which EEOC is suing following transfer of authority over ADEA from Secretary of Labor, have standing to challenge EEOC's power to sue, even though one-house legislative veto provision of statute authorizing transfer of authority was not exercised, since injury in fact to employer and union is not result of veto provision but rather is harm threatened by EEOC's action with respect to at least issues of seniority relief and burden to be borne by parties who are not alleged victims of age discrimination.

2. Authority of EEOC ► 108.502 ► 106.1302 ► 106.0410

Reorganization statute under which authority over ADEA was transferred from Secretary of Labor to EEOC is not unconstitutional as a whole as result of its inclusion of unconstitutional one-house legislative veto provision, where it appears that the statute would have been enacted even absent veto provision, and, in any event, Congress ratified transfer of authority to EEOC by subsequent legislation and legislative references.

3. Consent decree — Approval of court ► 250.551

Proposed consent decree that would settle EEOC's ADEA action against airline will not be approved at present time, where fundamental reason asserted by parties in support of proposed settlement is uncertainty of law regarding issue of case, but U.S. Supreme Court will be considering issue.

Action under Age Discrimination in Employment Act by EEOC against airline and unions, wherein one union moved to dismiss, and EEOC and airline moved for approval of proposed consent decree. Motions denied.

Daniel M. Williams, Jr., Washington, D.C., and F. Cancino, Regional Attorney, and Oscar Williams, David T. Kelley, and Fritz Wollett, Trial Attorneys, San Francisco, Calif., for plaintiff.

Scott A. Fink (Heller, Ehrman, White & McAuliffe), San Francisco, Calif., for defendant airline.

Michael E. Abram (Cohen, Weiss & Simon), New York, N.Y., for defendant Air Line Pilots Association, International.

Lloyd Egenes (O'Gara, Friedman, Egenes & Burke), San Francisco, Calif., for defendant Flight Engineers International Assn.

Full Text of Opinion

INGRAM, District Judge: — On September 28, 1983, a hearing was held in this court to entertain objections to a consent decree proposed by plaintiff EEOC and defendant Pan Am in this action brought under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 et seq., ("ADEA"). During the hearing, defendant/intervenor Flight Engineers International Association, National Airlines Chapter, ("NALFEIA") orally moved to dismiss this action on the grounds that the EEOC lacks authority to maintain the suit.

All parties who have made general and limited appearances have now had opportunity to address both the issues raised by the motion to dismiss and the merits of the proposed consent decree. For reasons herein, the court finds that the EEOC has the authority to bring this action, and the motion to dismiss is accordingly DENIED. The court also finds that the proposed consent decree cannot be entered at this time and is accordingly DISAPPROVED.

I. *MOTION TO DISMISS: EFFECT OF CHADHA*

NALFEIA has contended that the EEOC lacks the authority to initiate lawsuits to enforce the ADEA because the legislation which transferred to the EEOC its authority to do so contains an invalid legislative veto. They rely upon the recent case of Immigration and Naturalization Service v. Chadha, 462 U.S. ——, 103 S.Ct. 2764 (1983), wherein the Supreme Court held unconstitutional a section of the Immigration and Nationality Act, at 8 U.S.C. §1105a(a), which had authorized either body of Congress to invalidate the U.S. Attorney General's decision to allow an otherwise deportable alien to remain free from deportation. Id. at 2788. The Court held that the veto exercised by the House of Representatives ran afoul

of the constitutional mandates of bicameral consideration and presentment. The Court found only the severable one-House veto provision unconstitutional, not the entire act.

NALFEIA also cites EEOC v. Allstate Ins. Co., 570 F.Supp. 1224, 32 FEP Cases 1337 (D.C. S.D. Miss. 1983), U.S. App. Pending, Dec. 15, 1983, 52 LW 3512, where the court found unconstitutional the entire Reorganization Act of 1977, 5 U.S.C. §901 et seq., (the "Act"), which, by way of Reorganization Plan No. 1 of 1978, 92 Stat. 3781, had transferred to the EEOC the power to litigate ADEA suits. In sum, NALFEIA contends that Chadha and Allstate mandate that this court lacks subject matter jurisdiction and must dismiss this action. See, e.g., Pressroom Unions-Printer League Income Security Fund v. Continental Assurance Co., 700 F.2d 889 (2d Cir.), cert. denied, —— U.S. ——, 52 LW 3264 (Oct. 3, 1983).

EEOC's opposition is four-pronged: 1) defendants each lack standing to challenge the EEOC's power to sue; 2) the legislative veto provision of the Act is severable from the remainder of the Act; 3) the veto problem has been cured by subsequent legislative ratification; and 4) Chadha should not be applied retroactively.

[1] EEOC argues especially that, because the legislative veto in the Act was not exercised, movants have suffered no injury in fact. The court finds this reading of Article III's standing requirements is incorrect.

Movants standing is determined by whether they have suffered some actual or threatened injury fairly traceable to the challenged action which is likely redressable. See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 102 S.Ct. 752, 758 (1982), and cases cited therein. The injury in fact herein is not the result of the legislative veto provision. It is the harm to defendants and intervenors that is threatened by this lawsuit with respect to at least the issues of "rightful place seniority" relief and the burden to be born by parties in this matter who are not the alleged victims of age discrimination.

Regarding Congress' failure to exercise the veto, Congress is bereft of authority once delegated, and "until that delegation is legislatively altered or revoked ...." Chadha, supra, 103 S.Ct. at 2786. Hence, in this context, the mere inclusion of a clause giving Congress the ability to avoid constitutional mandates is unconstitutional and the court is satisfied that said parties may therefore challenge it.

[2] While there has been no argument set forth to support the continuing viability of the one-House veto of the Act in light of Chadha, this court does not believe the entire Act is invalid as a result. The question is whether Congress would have enacted the Act in the absence of the invalid veto provision. See Consumer Energy Council v. Federal Energy Regulatory Comm'n., 673 F.2d 425, 442 (D.C. Cir. 1982), aff'd., 463 U.S. ——, 51 LW 395 (June 28, 1983).

The inclusion of a one-House veto in this case is obvious: to restrict the President's ability to alter Congress' reorganization plans which were designed to streamline the powers of administrative agencies. However, there is no conclusive evidence to be drawn from the Congressional Record concerning the importance of the veto to the Act. The record contains a statement by Rep. Drinan that "[t]he one-House veto provision is deemed to be an integral and necessary part of the legislative scheme for reorganization. That is a proposition to which all agree." H.R. Rep. No. 95-105, 95th Cong., 1st. Sess., reprinted in 1977 U.S. Code Cong. & Ad. News 41, 69 ("H.R."). The record also contains statements by Rep. Brooks which acknowledged the confrontation between the questionable constitutionality of the veto and Congress' concern for maintaining control over reorganization, apparently favoring the latter. 123 Cong. Rec. at 9344.

While the court is inclined to conclude from the record that the import of the Act *in toto* was great enough such that it would have been enacted absent the veto provision, the court agrees with the conclusion reached by Judge Horton, in Muller Optical Company, et al. v. EEOC, 574 F.Supp. 946, 33 FEP Cases 420, No. 83-2836 H, (W.D. Tenn. Nov. 10, 1983), that the court's decision herein should also rest on the conclusion that Congress had ratified the transfer of authority to the EEOC by subsequent legislation and legislative references.

Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 301-302 (1937), provides that Congress may ratify the President's unauthorized acts by passing appropriate legislation or by making confirmatory references to such acts in subsequent legislation.

Here, two recent duly passed appropriations acts support EEOC's position, in that they indicated the beneficiary of the funds was the enforcement (by the EEOC) of the ADEA and Title VII. Pub. L. No. 97-377, 96 Stat. 1830, 1874 (1982) (ADEA and Equal Pay Act); Pub. L. No. 97-92, 95 Stat. 1192 (1981) (Title

VII). There is also an implication, albeit somewhat tenuous, that Congress had ratified the ADEA enforcement authority transfer to the EEOC by leaving it unaffected by the Civil Service Reform Act of 1978, 5 U.S.C. §1101 note (Supp. IV 1980), which superseded other parts of Reorganization Plans Nos. 1 or 2 of 1978.

The counter-argument is exemplified by Greene v. McElroy, 360 U.S. 474 (1959), wherein the Supreme Court apparently declined to find congressional ratification in areas of "questionable constitutionality," which, in that case, concerned due process rights of persons processed for security clearances. Id. at 506-507. Subsequent cases rejecting ratification have also held that general appropriations bills may not, under certain circumstances, constitute ratification. See Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978); Andrus v. Sierra Club, 442 U.S. 347 (1979).

The instant case is readily distinguishable. There is no due process issue or aspect of present questionable constitutionality regarding the mere transfer of authority from one executive agency to another. Further, there is no issue of general appropriations as constituting proposed legislation.

Accordingly, the court accepts the contentions of the EEOC regarding severability of the one-House veto from the Act, leaving the balance of the Act in full force and effect, and the subsequent ratification of Reorganization Plan No. 1 of 1978. On this basis, and pursuant to the authority cited herein, the motion to dismiss is hereby DENIED.

II. *CONSENT DECREE*

[3] The issue in this case is whether Pan Am intentionally discriminated against pilots and co-pilots over age 60 by denying them an opportunity, equal to that of those under age 60, to downbid for flight engineer positions. A fundamental reason asserted by the EEOC and by Pan Am in support of the proposed settlement at this point is the uncertainty of law regarding this issue.

This Circuit has provided some direction, see Criswell v. Western Air Lines, etc., 514 F.Supp. 389, 29 FEP Cases 350, aff'd., 709 F.2d 544, 32 FEP Cases 1204 (9th Cir. 1983). However, in light of the recent Supreme Court position on the same issue, Air Line Pilots Association v. Trans World Airlines, 713 F.2d 940, 32 FEP Cases 1185 (2d Cir.), cert. granted, No. 83-997, Feb. 24, 1984, the court is reluctant to venture into uncharted waters by approving of the proposed settlement at this time.

Accordingly, the consent decree is hereby DISAPPROVED. The parties are requested to refrain from filing further pleadings or memoranda pending the imminent reassignment of this case to another Northern District court.

FRANCOEUR v. CORROON & BLACK CO.

U.S. District Court,
Southern District of New York

FRANCOEUR v. CORROON & BLACK CO., No. 82 Civ. 7098, December 10, 1982

EQUAL PAY ACT

1. Job content ► 130.320

Female former personnel manager/office administrator's job was not substantially equal to that of higher-paid male former office manager for purpose of Equal Pay Act, despite fact that they performed similar services in several respects and that employer referred to her position as "replacement" for his position, where man was primarily office administrator and supervisor whereas woman was primarily concerned with personnel, and nature of position had shifted because of significant change in employer's needs.

CIVIL RIGHTS ACT OF 1964

2. Sex discrimination — Salary — Pretext ► 108.4142 ► 108.7338

Female former employee who was paid less than man has failed to prove that employer's asserted reasons for pay disparity were pretextual, where she failed, given differing natures of their jobs, to adduce sufficient evidence of either objective or subjective form that would permit finding that her salary was based even in part on her sex.

3. Retaliation ► 108.4505

Employer violated Title VII's ban on retaliation when it discharged personnel manager within one month after learning that she had filed EEOC charge, where its assertion that her overall prior performance was unsatisfactory is irreconcilable with reviews and merit salary increases that she consistently had received, and its reliance on incident involving her handling of discharge of another worker is pretextual in view of its failure to obtain her version of what transpired.

4. Retaliation — Opposition — Filing of charge ► 108.4505 ► 108.4511

Increased prominence or sensitivity of a particular employment position

MULLER OPTICAL CO. v. EEOC

U.S. District Court,
Western District of Tennessee

MULLER OPTICAL COMPANY, et al. v. THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, No. 83-2836 H, November 10, 1983

AGE DISCRIMINATION IN EMPLOYMENT ACT

1. Standing to sue ► 108.7441 ► 108.502 ► 106.1302 ► 108.621

Employer and its president subpoenaed by EEOC to bring specified records and to testify before EEOC personnel, have suffered sufficient injury in fact to have standing to challenge constitutionality of EEOC's exercise of jurisdiction over ADEA charges, where they will have been subjected to intrusive investigation by agency acting outside the law if they comply with subpoena and EEOC is without authority to issue subpoena, and if they do not comply with subpoena, they may be subjected to court action to enforce compliance, with failure to obey court order being punishable as contempt.

2. EEOC's authority ► 108.502 ► 106.1312 ► 106.3601 ► 108.621

U.S. Supreme Court's decision in Immigration and Naturalization Service v. Chadha concerning constitutionality of legislative veto does not necessitate ruling that legislative veto provision of Reorganization Act of 1977, under which authority over ADEA was transferred to EEOC, deprives EEOC of its authority to investigate ADEA charge, where transfer of authority did not involve exercise of legislative veto or affect any substantive rights.

3. EEOC's authority ► 108.502 ► 106.3601 ► 106.1302

One-house legislative veto provision of Reorganization Act of 1977, under which authority over ADEA was transferred to EEOC, is severable from remainder of Act, even though there is no evidence in legislative history that severability clause was considered, where it cannot be said that it is evident that Congress would not have enacted other provisions of Reorganization Act independent of legislative veto provision.

4. EEOC's authority ► 108.502 ► 106.1302 ► 110.03

Congress ratified Reorganization Plan No. 1 of 1978, under which authority to enforce ADEA was transferred to EEOC, where two appropriations acts indicate that money appropriated to EEOC is to be used to enforce ADEA as well as Title VII, Civil Service Reform Act (CSRA) provides that any provision of Reorganization Plan that is inconsistent with CSRA is superseded, and CSRA did not affect transfer of ADEA enforcement; such transfer does not involve such serious constitutional problems that ratification cannot be inferred without explicit action by lawmakers.

On motion by employer and its president for temporary restraining order or preliminary injunction prohibiting EEOC from requiring president to appear at deposition and produce documents in compliance with subpoena. Motion for preliminary injunction denied.

Stephen H. Biller (Heiskell, Donelson, Bearman, Adams, Williams & Kirsch), Memphis, Tenn., for plaintiffs.

Daniel M. Williams, Jr., Washington, D.C., and Lawrence J. Kamenetzky, Acting Regional Attorney, and Zelma P. Brown, Trial Attorney, Memphis, Tenn., for defendant.

Full Text of Opinion

HORTON, District Judge: — Plaintiffs Muller Optical Company and its president, Robert E. Long, seek a temporary restraining order or preliminary injunction prohibiting the defendant, Equal Employment Opportunity Commission (EEOC), from requiring Long to appear at a deposition and produce documents in compliance with a subpoena issued by the EEOC. The Court held a hearing on this matter, and, after a full review of the record and careful consideration of the issues involved, enters this Order DENYING plaintiffs' motion.

This action is the culmination of a controversy that began when plaintiffs' former employee, Vera Marie Adkins, filed a charge with the EEOC contending that Muller had discharged her because of her age and her sex. After Muller resisted the EEOC's several attempts to investigate Adkins' charge, the EEOC issued a subpoena, pursuant to the Age Discrimination in Employment Act, ordering Long to appear at the EEOC's office on October 14, 1983. The subpoena required Long to bring specified records and testify before EEOC personnel. In an effort to avoid complying with this subpoena, the plaintiffs filed this action. The plaintiffs contend the EEOC lacks ju-

risdiction under the Age Discrimination in Employment Act (ADEA) to investigate Adkins' charge.

Plaintiffs' Contentions:

To understand plaintiffs' contention that the EEOC is without authority to investigate an age discrimination charge, it is necessary to look at the underlying legislation. Under Reorganization Plan No. 1 of 1978, the statutory responsibility for administering and enforcing the Age Discrimination in Employment Act was transferred from the Secretary of Labor to the EEOC effective July 1, 1979. This Reorganization Plan was enacted pursuant to the Reorganization Act of 1977, 5 U.S.C. 901 et seq. Through this Reorganization Act, Congress gave the President of the United States authority to restructure and reorganize the executive branch and its agencies. 5 U.S.C. §§901, 903. The President was empowered to prepare reorganization plans and submit such plans to both Houses of Congress. 5 U.S.C. §903. If during the sixty days after a plan was transmitted to Congress, neither house passed "a resolution stating in substance that the House does not favor the reorganization plan," then the reorganization plan became effective. 5 U.S.C. §906(a). Thus, the Reorganization Act included a legislative veto provision.

The plaintiffs here contend that the presence of a legislative veto provision in the Reorganization Act that authorized the transfer of responsibility for administering and enforcing the ADEA from the Secretary of Labor to the EEOC renders that transfer void. The plaintiffs base their argument on the recent United States Supreme Court decision Immigration and Naturalization Service v. Chadha, 103 S.Ct. 2764 (1983). In Chadha the Supreme Court held unconstitutional a section of the Immigration and Nationality Act authorizing either House of Congress to invalidate the Attorney General's decision to allow a particular deportable alien to remain in the United States. Id. at 2788. The Court held in Chadha that the House of Representative's veto of the Attorney General's decision violated the constitutional requirement that legislative acts be passed by *both* Houses of Congress and presented to the President. Because the one House veto exercised by the House of Representatives failed to comply with these constitutional requirements of bicameralism and presentment, the Court severed the legislative veto provision of the Immigration and Nationality Act and declared the severed provision unconstitutional.

The plaintiffs contend that the presence of the legislative veto within the Reorganization Act serves to invalidate the reorganization plans implemented under the Act. In the plaintiffs' view, there has been no valid statutory grant of authority empowering the EEOC to enforce the ADEA, and therefore, the EEOC has no jurisdiction to subpoena plaintiff Long as a part of an investigation of Adkins' age discrimination charge.

DEFENDANT'S CONTENTIONS:

The EEOC agrees that the Reorganization Act, which authorized the President to transfer the administration of the ADEA from the Secretary of Labor to the EEOC via a reorganization plan, does contain a one House veto provision similar to the one found unconstitutional in Chadha. The EEOC, however, advances several arguments to support its contentions that plaintiffs have not established that they are entitled to injunctive relief, nor have they established that the EEOC lacks jurisdiction to investigate Adkins' age discrimination charge. The EEOC's arguments may be summarized as follows:

1. Plaintiffs have not demonstrated that they are entitled to injunctive relief by showing: (a) there is a substantial likelihood they will succeed on the merits; (b) they will suffer irreparable injury absent injunctive relief; (c) granting the injunction would cause no substantial harm to others; and (d) the public interest would be served by issuing injunctive relief.

2. Plaintiffs lack standing to challenge the validity of the legislative veto since plaintiffs have suffered no injury in fact as a result of the presence of the legislative veto in the Reorganization Act.

3. The Chadha decision is not applicable here since the transfer from the Secretary of Labor to the EEOC did not involve any unilateral action by only one House of Congress.

4. The Chadha decision is not applicable since here the effect of the challenged Reorganization Plan was merely to transfer the enforcement power from one executive agency to another; the transfer determined who enforced the substantive rights created under the ADEA, but it otherwise had no effect on those rights.

5. Congress would have passed the Reorganization Act even if the legislative veto had not been included in the Act. From this, it follows that the unconstitutional one House veto provision is severable from the remainder of the Reorganization Act.

6. In subsequent legislation that does meet the requirements of bicameralism and presentment, Congress has *ratified* the transfer of the administration and enforcement of the ADEA from the Secretary of Labor to the EEOC.

7. Even if Chadha does dictate that the Reorganization Act be held unconstitutional and even if Congress has not subsequently ratified the transfer challenged here, the ruling of unconstitutionality should not be applied retroactively.

8. Irreparable harm has not been shown because plaintiffs failed to demonstrate that the EEOC is handling Adkins' age discrimination charge any differently than would the Department of Labor had enforcement not been transferred.

STANDING:

The EEOC argues that the plaintiffs lack standing to challenge the EEOC's jurisdiction over age discrimination charges. Article III of the Constitution "requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' Gladstone, Relators v. Village of Bellwood, 441 U.S. 91, 99 ... (1979), and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision,' Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41 ... (1976)." Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 102 S.Ct. 752, 758 (1982) (footnote omitted).

The EEOC contends that in order to challenge the legislative veto provision of the Reorganization Act the plaintiffs must demonstrate they have suffered injury *in fact* stemming from the one House veto provision they attack. Since neither the House of Representatives nor the Senate exercised its legislative veto under the Reorganization Act to prevent the ADEA transfer, EEOC contends that the plaintiffs have suffered no injury in fact and therefore have no standing to challenge the EEOC's authority. The Court finds that the EEOC misperceives the nature of the injury in fact sufficient to confer standing. The plaintiffs do not contend that the failure of either House of Congress to exercise the legislative veto caused them injury. Rather, plaintiffs allege their injury arises from the EEOC's issuance of a subpoena that — in plaintiff's view — the EEOC is not constitutionally authorized to issue.

[1] The Court finds that plaintiffs have indeed suffered injury in fact sufficient to confer standing to challenge the defendant's authority to issue the subpoena. Plaintiffs have been subpoenaed to appear with books and records in hand before the EEOC. If plaintiffs comply with the subpoen and the EEOC is without authority t issue the subpoena, then plaintiff have been subjected to an intrusive an time consuming investigation by a go ernmental agency acting outside th law. On the other hand, if plaintiffs d not comply with the subpoena, the they may be subjected to court actio initiated by EEOC to enforce compl ance with the subpoena. 15 U.S.C. § 4 Failure to obey a court order enforcin the subpoena is punishable as co tempt and may also subject these plai tiffs to a fine and/or imprisonment. U.S.C. § 50. This threatened injury al qualifies as injury in fact sufficient confer standing. If plaintiffs succe and this action results in a decisi favorable to them, their injury can redressed by an injunction forbiddi the defendant from enforcing its su poena.

APPLICABILITY OF CHADHA:

[2] Plaintiffs contend that the S preme Court's decision in Chadha, s pra, invalidates the transfer of ADE administration and enforcement fro the Secretary of Labor to the EEO This Court is aware that, subsequent the Supreme Court's ruling in Chadh the constitutionality of provisions co taining legislative vetos is being ch lenged on many fronts. Because of t newness of the Chadha decision, t Court is sailing in largely unchart seas.[1] Nevertheless, after a careful re

[1] The Court is aware of only one published Chadha decision dealing with this issue. In EEO Allstate Ins. Co., 570 F.Supp. 1224, 32 Fair Em Prac. Cas. (BNA) 1337 (S.D. Miss. 1983), a fed district court found that the presence of a legisla veto in the Reorganization Act of 1977 invalida the entire Act. That court then held that Reorg zation Plan 1 of 1978, implemented under the was ineffective to transfer the power to enforce Equal Pay Act from the Secretary of Labo EEOC. That decision, of course, is not binding this Court. This Court does not concur in decision.

ing of Chadha the Court holds that t Supreme Court's reasoning and ho ing in Chadha do not necessitate ruling that the EEOC is without a thority to investigate an age discri nation charge under the ADEA.

There are significant distinctions l tween the exercise of the legislat veto held invalid in Chadha and t presence of the legislative veto in t Reorganization Act challenged he Chadha dealt with a situation whe through the Immigration and Nati ality Act, Congress had delegated the executive branch (specifically e Attorney General) "the authority allow deportable aliens to remain in is country in certain specified cir mstances." 103 S.Ct. at 2786, 2770 1. By unilaterally vetoing the Attor y General's decision allowing Mr. hadha to remain in the United States, ie House of Representatives "took tion that had the purpose and effect altering the legal rights, duties and lations of persons, including the At rney General, Executive Branch offi als and Chadha, all outside the legis tive branch." 103 S.Ct. at 2784. The upreme Court stated that once ongress has delegated its authority, ongress must abide by that delegation until that delegation is legislatively ltered or revoked." 103 S.Ct. 2786. nilateral action by only one House of ongress is constitutionally insuffi ient to effect such an alteration or evocation.

In contrast, the transfer from the ecretary of Labor to the EEOC of the uthority to administer and enforce he ADEA did not involve the exercise f a legislative veto. Either House of ongress could have halted the trans er by vetoing it within sixty days of he President's transmittal of the eorganization Plan to Congress. How ver, neither House took any veto ac ion. Furthermore, the legislation in olved in the ADEA transfer merely hifted from one administrative body to another the power to enforce legisla tion that had already been approved by both Houses of Congress and the Presi dent. Unlike in Chadha, where the House's veto would have resulted in the deportation of Mr. Chadha, Reorgani zation Plan 1 of 1978 did not affect any substantive rights.

Although the Supreme Court did find the one House veto constitutional ly deficient, Chadha is not read by this Court to hold that the mere presence of a one House veto provision in a legislative scheme will invalidate the entire legislative scheme. To the contrary, the Supreme Court, in Chadha, severed the offensive one House veto provision and left intact the remainder of the Immigration and Nationality Act. 103 S.Ct. at 2774-76, 2788. This Court then must address the issue whether the legislative veto is severable from the Reorganization Act of 1977.

SEVERABILITY:

The plaintiffs here contend that the Reorganization Act's one House veto provision is not severable, and, therefore, the entire Reorganization Act (and all reorganization plans implemented thereunder) must be invalidated. Defendant EEOC maintains that the one House legislative veto is severable from the remainder of the Reorganization Act of 1977 and that the reorganization plans implemented thereunder remain valid.

Because the Reorganization Act of 1977 does not contain a severability clause,[1] the Court must try to determine whether Congress would have enacted other portions of the statute in the absence of the invalidated legislative veto provision. Consumer Energy Council v. Federal Energy Regulatory Commission, 673 F.2d 425, 442 (D.C. Cir. 1982), aff'd, 51 LW 3935 (June 28, 1983). "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." Buckley v. Valeo, 424 U.S. 1, 109 (1976) (quoting Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 234 (1932)).

To determine whether Congress would have enacted the other provisions of the Reorganization Act of 1977 in the absence of the one House veto provision requires an examination of the Act and its legislative history, along with an unavoidable attempt at clairvoyance.

The practice of Congress' delegating to the President the authority to reorganize the executive branch via reorganization plans is not new; the first reorganization act gave this power to

[1] As the Supreme Court stated in United States v. Jackson, 390 U.S. 570 (1968), "whatever relevance such an explicit (severability) clause might have in creating a presumption of severability, the ultimate determination of severability will rarely turn on the presence or absence of such a clause." 390 U.S. at 585 n.27 (citations omitted).

President Hoover in 1932. H.R. Rep. No. 95-105, 95th Cong., 1st Sess., reprinted in 1977 U.S. Code Cong. & Ad. News 41, 44 (hereinafter House Report). Since the first reorganization act, Congress has from time to time renewed or modified the reorganization act to allow the President a specific time period in which to submit reorganization plans. The scope of authority granted the President and the manner by which reorganization plans must be approved has also varied. House Report at 44-46. The initial reorganization act provided for Congressional disapproval of reorganization plans by either House of Congress, and some form of one House veto has been included in most subsequent renewals or extensions of the act.

In ascertaining whether Congress would have enacted the balance of the Reorganization Act of 1977 in the absence of the legislative veto, it is necessary to look at the reasons Congress articulated for adopting the Act. The legislative history of the Act emphasizes that in our rapidly changing society "[f]unctions change, new methods are developed, bureaucratic structures become obsolete, new laws are passed." House Report at 43-44. To adapt to such changes modification of the government's organizational structure is needed. See 5 U.S.C. §901. Congress expected the Reorganization Act to bring about changes in the executive branch that would result in "cost reduction, improved management and better services to the public." House Report at 43.

Rather than employing the normal legislative process, Congress chose to use the legislative veto and thereby delegate the responsibility for such reorganization to the President; such delegation was chosen because it was speedier and more expeditious. House Report at 44; 5 U.S.C. §901(a)(b). The Act's legislative history clearly shows that in choosing this route Congress was aware of the questionable constitutionality of the legislative veto. House Report at 42-43, 49-57, 63-70. Despite this awareness, Congress did not omit the legislative veto provision but, instead, took several measures to "strengthen the role of Congress and help allay, in part, those fears of unconstitutionality." House Report at 43.

First, in an effort to lessen objections to the use of the legislative veto, Congress made several modifications in the procedure by which the reorganization plans were to be handled by Congress. To assure that Congress would have an opportunity to vote on every plan, the Act provided that each time a reorganization plan was transmitted to Congress, a resolution stating that the reorganization plan was disapproved was to be introduced in both the House and Senate. 5 U.S.C. §§909, 910. The disapproval resolution was then to be referred to designated committees in each House; and the committees were to make their recommendations to their respective House within forty-five days. 5 U.S.C. §910. If a committee did not report a resolution within the specified time, the committee was deemed discharged from further consideration of the resolution and the resolution was placed on the appropriate calendar of the House involved. 5 U.S.C. §911. Thereafter, any member of the respective House could move to proceed to reconsideration of the disapproval resolution. 5 U.S.C. §912. This plan was devised to "virtually guarantee a vote within the 60-day period in all cases and [guarantee] that Congress [would] have the opportunity to consider and act upon reorganization plans in a reasonable and expeditious manner." House Report at 48.

In addition to these procedural safeguards designed to insure a Congressional vote on each plan, Congress also included safeguards in the form of limitations on Presidential authority. Under the Reorganization Act of 1977, the President could not abolish enforcement functions or statutory programs, 5 U.S.C. §903(a)(2), nor could he abolish independent regulatory agencies or their functions or consolidate two or more such independent regulatory agencies, 5 U.S.C. §905(a)(1). These limitations had not been present in previous reorganization plans. House Report at 46, 47.

Having established that Congress was well aware that the presence of the legislative veto created "serious constitutional questions," House Report at 42, and that in light of such questions Congress adapted the Reorganization Act to increase Congressional involvement and lessen the authority delegated to the President, the Court is still faced with the problem of whether Congress would have enacted the Act absent the one House veto provision. Some evidence that Congress would not have done so can be found in Congressman Robert Drinan's separate views appended to the Act's legislative history. House Report at 66-70. Congressman Drinan questioned the neces-

sity of bypassing the normal legislative process and risking that the courts would hold the Act unconstitutional. He stated that the Act "intentionally does not contain a severability clause. The one House veto provision is deemed to be an integral and necessary part of the legislative scheme for reorganization. That is a proposition to which all agree." House Report at 69. Despite Congressman Drinan's assertion, there is no evidence in the Act or in the House Report that a severability clause was considered. Instead, the House Report shows that the committee rejected a proposal that would have

red the passage of a resolution by Houses before a reorganization could go into effect. Whether a ability clause was even considered ot mentioned in the Committee's ort.

Based on this review of the Reor- zation Act of 1977 and its legisla- history, the Court cannot say that evident that the legislature would ave enacted" the other provisions e Reorganization Act independent e legislative veto provision. Buck- supra, at 109. Congress was keenly e of the need for reorganization of executive branch and adopted the t expeditious means of accomplish- such a reorganization. Several reor- zation plans were implemented un- the Reorganization Act of 1977, and e plans made many changes in the nizational structure of the execu- branch of government. Nowhere is vident that Congress would not e enacted the mechanism for reor- ization of the executive branch ab- t the use of the legislative veto vision. Since, absent the one House provision, the remainder of the rganization Act "is fully operative law," the Court finds the invalid slative veto provision severable and s, the remainder of the Act valid.

ecause of the admitted difficulty in empting to divine post facto what ngress would have done, the Court is uctant to base its holding solely on severability of the one House veto. nsequently, the issue of Congressio- ratification will also be addressed.

NGRESSIONAL RATIFICATION:

The defendant EEOC argues that n if Reorganization Plan No. 1 of 8 lacked the constitutionally re- ired attributes of bicameralism and esentment, subsequent Congressio- l ratification of the Plan has cured ese problems.

When the President, by executive der, has taken action that he may not ve been authorized to take, ngress, in some situations, has the wer to ratify the President's action d thus legitimize any irregularity. brandtsen-Moller Co. v. United ates, 300 U.S. 139 (1937). Such Con- essional ratification may occur when th Houses of Congress either pass gislation appropriating funds to im- lement the executive order or make ference to the executive order in sub- quently passed legislation. Id at 147- 9. See also Fleming v. Mohawk Wreck- g & Lumber Co., 331 U.S. 111, 118-19 (1947); Ex parte Mitsuye Endo, 323 U.S. 283, 303 n.24 (1944); Swayne & Hoyt v. United States, 300 U.S. 297, 301-302 (1937).

An examination of the Isbrandtsen-Moller decision is instructive since the situation there is analogous to the case at bar. There, by executive order, the President had abolished the Shipping Board and transferred its functions to the Secretary of Commerce. Subsequently, the Secretary of Commerce issued an order requiring the plaintiff shipping company to file certain records with the Secretary; the plaintiff shipping company then brought an action to restrain the enforcement of the Secretary's order. 300 U.S. 140-44. In challenging the Secretary's authority to issue the order, the shipping company argued that Congress had not intended that the President abolish the Shipping Board and transfer the Board's functions to the Secretary of Commerce, and, thus, the Secretary was without authority to issue the order. The United States Supreme Court held that via subsequent appropriation acts, which made appropriations to the Department of Commerce for salaries and expenses to carry out the provisions of the Shipping Act and made reference to the executive order, "Congress appear[ed] to have recognized the validity of the transfer and ratified the President's action." 300 U.S. at 147. In addition to finding Congressional ratification in the appropriations acts, the Supreme Court relied on Congressional mention in the Merchant Marine Act of 1936 that the functions formerly performed by the Shipping Board were "now vested in the Department of Commerce pursuant to ... the President's Executive order." 300 U.S. at 148 (quoting 46 U.S.C.A. §1114(a). The Court found that Congress had ratified the action

taken by the President in his executive order.

[4] Here the EEOC contends that by subsequent legislative action Congress has ratified the transfer of administering and enforcing the ADEA from the Secretary of Labor to the EEOC. Two recent appropriations acts clearly indicate that money appropriated to the EEOC is to be used to enforce the Age Discrimination in Employment Act, as well as to enforce Title VII. Act of Dec. 21, 1982, Pub. L. No. 97-377, 96 Stat. 1830, 1974 (1982); Act of Dec. 15, 1981, Pub. L. No. 97-92, 95 Stat. 1183, 1192 (1981). Both of these bills were approved by both Houses of Congress and signed by the President. Additionally, Section 905 of the Civil Service Reform Act of 1978, 5 U.S.C. §1101 notes, provides that any provision of either Reorganization Plan Numbers 1 or 2 of 1978 that is inconsistent with the Civil Service Reform Act of 1978 is thereby superseded. The Civil Service Reform Act of 1978 did not affect Reorganization Plan 1's transfer of ADEA enforcement; therefore, the Court finds that Congress impliedly ratified the portions of the Reorganization Plan that transferred jurisdiction of the ADEA to the EEOC.

The Court is aware that in the same situation another district court did not find Congressional ratification of the Reorganization Act. See supra p.8 n.1. There is a line of cases standing for the proposition that when administrative action has raised "serious constitutional problems," specifically procedures of doubtful constitutionality affecting a person's due process rights to confrontation, the Supreme Court will look for "explicit action by lawmakers" and will not infer delegation or ratification without such explicit action. Greene v. McElroy, 360 U.S. 474, 506-08 (1959). The transfer of administrative functions from one governmental agency to another at issue here, however, does not involve such serious constitutional rights.

Under the reasoning of Isbrandtsen-Moller, the Court finds that through the appropriations acts and the Civil Service Reform Act of 1978, Congress has ratified the transfer of the administration and enforcement of the ADEA from the Secretary of Labor to the EEOC.

CONCLUSION

The Court finds, based on the severability of the one House veto provision from the remainder of the Reorganization Act and upon subsequent Congressional ratification of Reorganization Plan No. 1 of 1978, the Reorganization Plan validly transferred responsibility for the administration and enforcement of the Age Discrimination in Employment Act from the Secretary of Labor to the Equal Employment Opportunity Commission. Because of this conclusion, it is obvious that plaintiffs are not entitled to injunctive relief. Plaintiffs' ground for relief is based on the allegation that the EEOC lacks jurisdiction to investigate age discrimination charges. Having found that the EEOC does possess such jurisdiction, the Court hereby denies plaintiffs' motion for injunctive relief. Plaintiffs have no probability of success on the merits in this case. The EEOC is therefore authorized to proceed forthwith in its investigation of the charge against Muller Optical Company.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,

v.

ALLSTATE INSURANCE COMPANY, Defendant.

Civ. A. No. J82-0186(B).

United States District Court, S.D. Mississippi, Jackson Division.

Sept. 9, 1983.

Equal Employment Opportunity Commission brought Equal Pay Act action against employer. On employer's motion for summary judgment, the District Court, Barbour, J., held that: (1) one house veto provision of Reorganization Act which authorized president to transfer Equal Pay Act enforcement authority from the Department of Labor to the EEOC was unconstitutional; (2) employer had standing to raise the issue; (3) issue was ripe for adjudication; (4) one house veto provision was not severable from remainder of the Reorganization Act; and (5) decision was entitled to retroactive application.

Judgment for defendant.

1. Constitutional Law ⇐68

Congress may legislate and grant certain power but it may not revoke that power without legislating again.

2. Federal Civil Procedure ⇐103

Every defendant has standing to question the legal authority of the plaintiff to sue.

3. Constitutional Law ⇐42.1(5)

Employer which was being sued by EEOC for Equal Pay Act violations showed that it suffered actual injury from suit filed pursuant to allegedly unconstitutional statute and had standing to challenge constitutionality of statute which gave President authority to transfer to EEOC the power to enforce the Equal Pay Act; Fair Labor Standards Act of 1938, § 16(e), as amended, 29 U.S.C.A. § 216(e).

4. Constitutional Law ⇐68

Any use of legislative veto scheme which has the effect of enacting laws without complying with constitutional prescription for legislation is unconstitutional.

5. Constitutional Law ⇐68

Reorganization of the executive branch such as occurred when President was given power to transfer authority for enforcing Equal Pay Act from the Department of Labor to the EEOC was a legislative function. Fair Labor Standards Act of 1938, §§ 16(e), 17, as amended, 29 U.S.C.A. §§ 216(e), 217.

6. Constitutional Law ⇐68

Every use of the legislative veto is invalid.

7. Constitutional Law ⇐68

A retained one-house veto is unconstitutional even when that veto is not exercised.

8. Constitutional Law ⇐68
Labor Relations ⇐1238

One-house veto provision of Reorganization Act which gave president the power to transfer the authority for enforcing Equal Pay Act from the Department of Labor to the Equal Employment Opportunity Commission was unconstitutional. Fair Labor Standards Act of 1938, §§ 16, 17, as amended, 29 U.S.C.A. §§ 216, 217; Reorganization Plan No. 1 of 1978, § 1 et seq., 42 U.S.C.A. § 2000e-4 note; 5 U.S.C.A. § 901 et seq.; U.S.C.A. Const. Art. 1, § 1 et seq.

9. Constitutional Law ⇐46(1)

Issue of constitutionality of one-house veto provision of legislation which gave President power to transfer authority for enforcing the Equal Pay Act from the Department of Labor to the EEOC was ripe for decision even though Congress had not exercised the one-house veto power which it retained. Fair Labor Standards Act of 1938, §§ 16(e), 17, as amended, 29 U.S.C.A. §§ 216(e), 217; Reorganization Plan No. 1 of 1978, § 1 et seq., 42 U.S.C.A. § 2000e-4 note.

10. Statutes ⇐64(2)

One-house veto provision of legislation which authorized President to transfer responsibility for enforcement of the Equal Pay Act from the Department of Labor to the EEOC was not severable from the remainder of the authorizing legislation and the unconstitutionality of that provision required that the entire Reorganization Act be held unconstitutional. Fair Labor Standards Act of 1938, §§ 16(e), 17, as amended, 29 U.S.C.A. §§ 216(e), 217; Reorganization Plan No. 1 of 1978, § 1 et seq., 42 U.S.C.A. § 2000e-4 note.

11. Courts ⇐ 100(1)

Holding that one-house veto provision of Reorganization Act which authorized president to transfer authority for enforcing the Equal Pay Act from the Department of Labor to the EEOC was unconstitutional would be given retroactive application. Fair Labor Standards Act of 1938, §§ 16(c), 17, as amended, 29 U.S.C.A. §§ 216(c), 217; Reorganization Plan No. 1 of 1978, § 1 et seq., 42 U.S.C.A. § 2000e-4 note.

12. Constitutional Law ⇐ 93
United States ⇐ 122

Congress, by appropriating funds for the EEOC after President transferred authority for enforcement of the Equal Pay Act to the EEOC from the Department of Labor, did not ratify the presidential reorganization, so as to overcome constitutional objections to the one-house veto provision of the Reorganization Act which authorized the President to make the transfer. Fair Labor Standards Act of 1938, §§ 16(c), 17, as amended, 29 U.S.C.A. §§ 216(c), 217; Reorganization Plan No. 1 of 1978, § 1 et seq., 42 U.S.C.A. § 2000e-4 note.

Katie J. Monroe, Trial Atty., Jerome C. Hoke, Regional Atty., E.E.O.C., Birmingham, Ala., for plaintiff.

Winston B. Reynolds, Jr., Sisen, Reynolds, Dollahite & Currie, Jackson, Miss., Kalvin M. Grove, Fox & Grove, Chicago, Ill., for defendant.

MEMORANDUM OPINION

BARBOUR, District Judge.

On Friday, August 11, 1978, this Court issued a Summary Order granting summary judgment for the Defendant, Allstate Insurance Company. This Memorandum Opinion is written pursuant to that order and interpretes the same.

On April 14, 1982, the Equal Employment Opportunity Commission (hereafter EEOC) sued to enforce the Equal Pay Act. The EEOC alleged that it had authority to enforce the Equal Pay Act[1] pursuant to Section 1 of Reorganization Plan No. 1 of 1978, 92 Stat. 3781, which amended 29 U.S.C.A. §§ 216(c) and 217. Reorganization Plan No. 1 of 1978 was "enacted" pursuant to the Reorganization Act of 1977, 5 U.S.C.A. Section 901, *et seq.*

The present motion for summary judgment made by Allstate places before this Court the legal question of whether or not the EEOC has the authority to enforce the Equal Pay Act by the initiation of litigation.[2] There are no genuine issues of material fact with regard to the matters presented by this motion; therefore, it is appropriate to decide the issue of law by summary judgment.

ONE-HOUSE VETO

The basis of Allstate's motion for summary judgment relates to the one-house veto provision contained in the Reorganization Act of 1977. Under this Act the President was granted the authority to present reorganization plans to Congress which either House of Congress could veto by a resolution passed by a majority vote. Reorganization Plan No. 1 of 1978 was not objected to by either House and therefore was "enacted" into law. Section 1 of this Plan transferred the enforcement of the Equal Pay Act from the Labor Department to the EEOC. See 1978 *U.S.Code Cong. & Ad. News* 9799 (reprint of Reorganization Plan No. 1 of 1978).

In a recent United States Supreme Court decision the question of the constitutional validity of one-house veto provisions was decisively resolved. The motion before this Court for summary judgment is based on this decision and the determination of its effect under the facts presented here.

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1. 29 U.S.C.A. § 206.

2. The EEOC's authority to sue is alleged to exist by virtue of 29 U.S.C.A. §§ 216 and 217 whereby the Secretary of Labor may bring an action to enforce 29 U.S.C.A. § 206.

CHADHA

[1] On June 23, 1983, the United States Supreme Court announced its decision in *Immigration and Naturalization Service v. Chadha*, — U.S. —, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). *Chadha* held that the retention by Congress of the power to veto the act of the Attorney General suspending deportation proceedings violated the constitutional doctrines of separation of powers and the constitutional requirement that legislation be accomplished by action by both houses of Congress and by presentment to the President of the United States. *Chadha*, — U.S. at ——— ———, 103 S.Ct. at 2779–2788. The Supreme Court's exhaustive analysis of the history behind Article I and its limit on the exercise of legislative power are unnecessary to repeat.[3] Congress may *legislate* and grant certain power, but it may not *revoke* that power granted without *legislating* again.[4] In *Chadha* the Supreme Court found that the one-house veto provision not only violated the bicameralism and presentment requirements of the Constitution, but also infringed upon the doctrine of separation of powers.[5]

STANDING

The EEOC asserts a standing argument which, if sustained, would preclude summary judgment.

The EEOC alleges that Allstate does not have standing to challenge the constitutionality of the Reorganization Act of 1977 by claiming that Allstate was not injured by that Act, even if it is unconstitutional.

[2] It is beyond dispute that every defendant has standing to question the legal authority of the plaintiff to sue. The EEOC has attempted to turn Allstate's defense into an offensive weapon by questioning Allstate's standing to assert the alleged constitutional infirmity as a defense. Clearly Allstate has standing to challenge the plaintiff's legal right to sue, but assuming arguendo, that standing is not self-evident in this case this Court will address the merits of the EEOC's standing argument.

[3] The EEOC claims that Allstate has no injury such as may satisfy the standing requirements of Article III of the Constitution. The Article III requirement of standing was recently summarized by the Supreme Court in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982) as follows:

> At an irreducible minimum, Art. III requires the party who invokes the Court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 [99 S.Ct. 1601, 1607, 60 L.Ed.2d 66] (1979); and that the injury "fairly can be

3. The Supreme Court took great care to emphasize the difficulty of their decision in light of the efficiency and proliferation of the one-house veto as a tool of government. It is clear that their decision goes to the bedrock of our Constitution and examines the remedies for their limitations on the exercise of legislative power.

4. There are exceptions to the requirement that bills must be passed by both Houses and presented to the President:

> There are but four provisions in the Constitution, explicit and unambiguous, by which one House may act alone with the unreviewable force of law, not subject to the President's veto:
>
> (a) The House of Representatives alone was given the power to initiate impeachments. Art. I, § 2, cl. 6;
>
> (b) The Senate alone was given the power to conduct trials following impeachment on charges initiated by the House and to convict following trial. Art. I, § 3, cl. 5;
>
> (c) The Senate alone was given final unreviewable power to approve or to disapprove presidential appointments. Art. II, § 2, cl. 2;
>
> (d) The Senate alone was given unreviewable power to ratify treaties negotiated by the President. Art. II, § 2, cl. 2.
>
> Clearly, when the Draftsmen sought to confer special powers on one House, independent of the other House, or of the President, they did so in explicit, unambiguous terms.

Chadha, — U.S. at ——, 103 S.Ct. at 2786. Other limited exceptions were noted, *Id.* at n. 20.

5. *Id.* 103 S.Ct. at 2787.

traceable to the challenged action" and "is likely to be redressed by a favorable decision". *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 [96 S.Ct. 1917, 1924, 1926, 48 L.Ed.2d 450] (1976). In this manner does Art. III limit the federal judicial power "to those disputes which confine Federal Courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." (citations omitted).

Allstate has shown that it has personally suffered actual injury in that it has been subjected to a law suit filed pursuant to an unconstitutional statute. There is no doubt that a favorable decision by this Court would redress the injury of which Allstate complains. The identification of this injury to the allegedly unconstitutional passage of the Reorganization Plan No. 1 of 1978 is obvious insofar as the EEOC would have no legal authority to engage in litigation for the purpose of enforcing the provisions of the Equal Pay Act without a constitutional delegation of power from Congress. Therefore, the injury of Allstate in that it is subject to litigation[6] at the instance of a governmental agency whose authority to maintain such litigation is being questioned on constitutional grounds meets the Art. III requirements of injury in fact which is traceable to the alleged illegality and which will be redressed by a favorable decision.[7]

6. Allstate has submitted an unrefuted affidavit outlining the scope and effect which this suit has had on its operation as a business as well as the expenses it has incurred in its defense.

7. The EEOC has asserted that Allstate would have been subject to suit by the Labor Department if the responsibility for enforcing the Equal Pay Act had not been transferred to the EEOC. This is speculation on the part of the EEOC and there is no evidence which has been submitted to this Court to substantiate such allegations. This Court may not engage in speculation as to what the Department of Labor would do if it were charged with enforcing the Equal Pay Act.

UNCONSTITUTIONALITY OF THE ONE-HOUSE VETO

[4] Any use of a legislative veto scheme which has the effect of enacting laws without complying with the Constitutional prescription for legislation is unconstitutional.[8]

I.

[5] The first issue to decide is whether the action complained of here was "essentially legislative in purpose and effect." *Chadha*, ___ U.S. at ___, 103 S.Ct. at 2784. The reorganization accomplished under the Plan altered the legal status of agencies and of individuals, including Allstate, by transferring enforcement functions of the Equal Pay Act from the Department of Labor to the EEOC. Such reorganization of the Executive Branch is a legislative function.[9] The reorganization became published law just as though it had been introduced into Congress as a regular bill and thereafter passed by both Houses and not vetoed by the President.

This Court must conclude that the reorganization was essentially legislative in its purpose and effect.

II.

This conclusion takes us to the second issue: Does the fact that no veto was interposed alter the requirements of bicameralism and presentment?

8. The Constitution sets forth the "prescription for Legislative action: passage by a majority of both Houses and presentment to the President." *Chadha*, ___ U.S. at ___, 103 S.Ct. at 2787.

The EEOC urges that since both Houses of Congress rejected a veto of the Reorganization Plan, the "enactment" was constitutional. A resolution to disapprove the Plan was introduced in the House and defeated, but the Senate never acted on a similar resolution. *See* 124 Cong.Rec. 1136-37 (1978) (house vote to disapprove resolution objecting to plan); *S.Rec. No. 709*, 95th Cong., 2nd Sess. 1 (1978) (committee report approving plan; no vote on the floor was taken).

9. Representative Brooks noted that "[d]etermination of the organizational structure of the executive branch is a legislative function. Make no mistake about that." 124 *Cong.Rec.* 9344 (1977).

[6] The question presented by this case is not directly answered in *Chadha*. *Chadha* did emphasize the importance of preserving the separation of powers between the executive and legislative branches of government.[10] Moreover, the Court noted that "[t]o allow Congress to evade the strictures of the Constitution and to effect enact Executive proposals into law by mere silence cannot be squared with Art. I." *Chadha*, —— U.S. at —— n. 22, 103 S.Ct. at 2787 n. 22. It is evident from the opinion in *Chadha* that "every use of the legislative veto" is invalid.[11]

[7, 8] The fundamental problem with the legislative retention of veto power is that it places the executive in the position of legislating subject to a Congressional veto.[12] In this sense it stands Art. I of the Constitution on its head. Congress has various tools by which it may control its grant of power, but "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." *Id.* 103 S.Ct. at 2786. Because the Court in *Chadha* clearly sweeps with a broad stroke in its holding that the legislative one-house veto is unconstitutional, this Court must follow that precedent [13] by holding that a retained one-house veto is unconstitutional even when not exercised.

III.

[9] The EEOC has argued that the constitutional issue is not ripe for decision because no veto power was exercised by Congress. The EEOC cites *Clark v. Valeo*,[14] 559 F.2d 642 (D.C.Cir.1977) (*en banc*), a case in which no veto was exercised. The Court in *Clark v. Valeo* states that "[a] contention that there are no real considerations of ripeness here can rest on a view of the merits that a one-house veto is so patently unconstitutional that nothing more is needed to inform the judgment of this Court." *Id.* at 649.

The Court in *Clark v. Valeo* relied on Justice White's concurring opinion in *Buckley v. Valeo*, 424 U.S. 1, 257–86, 96 S.Ct. 612, 744–58, 46 L.Ed.2d 659 (1976) (White, J., concurring) where he concluded that the one-house veto provision was constitutional. The Court in its *per curiam* opinion in *Buckley v. Valeo*, did not reach the issue of the constitutionality of the unexercised one-house veto.[15] Justice White alone reached the one-house veto finding it constitutional.

10. "The bicameral requirement, the Presentment Clauses, the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by diffusing certain prescribed steps. To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded."
Chadha, —— U.S. at ——, 103 S.Ct. at 2787.

11. *Id.* (Powell, J. concurring). Justice Powell perceives that the *Chadha* decision is based on broad constitutional doctrines such that every use of the one-house veto is impermissible.

12. It has been noted that the presence of a one-house veto makes it necessary to defer to individuals in Congress in formulating proposals because of the increased power of a small minority to achieve a legislative result. *Clark v. Valeo*, 559 F.2d 642, 681 (D.C.Cir.1977) (en banc) (MacKinnon, J. dissenting).

13. *See Consumer Energy Council of America v. FERC*, 673 F.2d 425 (D.C.Cir.1982), aff'd, —— U.S. ——, 103 S.Ct. 3556, 77 L.Ed.2d 1402, 1403, 1413 (1983). The Supreme Court affirmed the Court of Appeals without opinion upholding the decision in *Chadha*.

14. *Clark v. Valeo* dismissed the constitutional attack on the one-house veto as unripe. The *Clark* Court held that there were two parts to the statutory scheme in question: first, the statute provided for a laying-over period which was found unconstitutional under *Sibbach v. Wilson & Co.*, 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed. 479 (1941); secondly there was a provision that the veto under the laying-over provision might be accomplished by the unicameral or one-house veto. *Clark*, 559 F.2d at 649. The Court determined that the second part of review provision had not come into play because Congress adjourned *sine die* two days prior to the running of the laying-over period during which the veto might have been interposed.
On this basis the constitutional attack on the one-house veto was dismissed as unripe. *Id.* at 650.

15. The Supreme Court cites *Buckley v. Valeo* in its *Chadha* decision but does so for general principles of constitutional adjudication and separation of powers, not in the context of addressing the validity *vel non* of the one-house veto.

Chadha has intervened at this juncture, and under the theory of the *Clark v. Valeo* court that an adjudication of the constitutionality of an unexercised one-house veto would be ripe only if it were patently unconstitutional, this Court today holds that *Chadha* must be read to say that "[t]o allow Congress to evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence cannot be squared with Art. I." [16] To rely on Justice White's concurring opinion in *Buckley v. Valeo* at this point would be suspect because Justice White was one of the two dissenters writing to uphold the one-house veto provision in *Chadha*, —— U.S. at ——, 103 S.Ct. at 2791.

This Court is bound by the Supreme Court's decision in *Chadha* and must follow its instruction. The reasons noted in *Clark v. Valeo* for not addressing the constitutional issues presented by the one-house veto, whether it is exercised or not, have evaporated.[17]

SEVERABILITY

The United States Supreme Court has recently restated the general rule that the invalid parts of a statute are to be severed "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." *Buckley v. Valeo*, 424 U.S. 1, 108, 96 S.Ct. 612, 677, 46 L.Ed.2d 659 (1976), quoting *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 234, 52 S.Ct. 559, 564, 76 L.Ed. 1062 (1932). There is no severability clause present in the Reorganization Act of 1977.[18] This Court must then "embark on that elusive inquiry", *Chadha*, —— U.S. at ——, 103 S.Ct. at 2774, to determine "whether Congress would have enacted other portions of the statute in the absence of the invalidated provision." *American Federation of Government Employees v. Pierce*, 697 F.2d 305, 307 (D.C.Cir.1982) quoting *Consumer Energy Council of America v. FERC*, 673 F.2d 425, 442 (D.C.Cir.1982). If the veto provision in Section 906(a) is severable from the rest of the Reorganization Act, then the President's proposal contained in Reorganization Plan No. 1 of 1978 would presumably be an exercise of executive authority delegated under legislative grant. The essential question which must be answered to determine this is whether or not Congress would have delegated such broad authority to the President without reserving for itself the review power which is contained in the one-house veto provision that has been found unconstitutional by this Court under the Supreme Court's decision in *Chadha*.

The Reorganization Act of 1977 re-established for a three year period the authority of the President to submit plans for the reorganization of the executive branch of the government.[19] Congress was aware that the one-house veto which was contained in the statute passed as the Reorganization Act of 1977 was of questionable constitutionality.[20] Although the Attorney

16. *Chadha*, —— U.S. at —— n. 22, 103 S.Ct. at 2768 n. 22.

17. *See Clark v. Valeo*, 559 F.2d at 650 n. 10 (reasons for not reaching the constitutional issue).

18. The absence of a severability clause suggests the inseverability of the provision, *see Carter v. Carter Coal Co.*, 298 U.S. 238, 312–13, 56 S.Ct. 855, 873, 80 L.Ed. 1160 (1936) (in absence of a severability clause, the presumption is against mutilation of the statute and that the statute was intended to be effective in its entirety).

19. H.R.Rep. No. 95–105, 95th Cong., 1st Sess. 2, reprinted in 1977 *U.S.Code Cong. & Ad. News*, 41.

20. The constitutional issues were discussed at length in the legislative history of this Act. This discussion includes the opinions of constitutional scholars and others. *See* 123 *Cong. Rec.* 2349 (1977) (statement of Rep. Levitas) (arguments against the bill are that it is unconstitutional because it violates the "presentation clause" of the Constitution and that it violates the separation of powers between the executive and legislative branches of government. The representative expressed the view that Justice White's concurring opinion in *Buckley v. Valeo* supports the constitutionality of the veto provision and sets forth other reasons why the veto provision should be upheld and included in the legislation.); H.R.Rep. No. 95–105, 95th Cong., 1st Sess. 9–17, reprinted in 1977 *U.S.Code Cong. & Ad.News*, 49–57 (discussion in legislative history of the constitutional issues in-

General had issued an opinion stating his belief that the veto provision is constitutional.[21] Congress had the benefit of credible advice to the contrary.

In light of these possible constitutional problems an amendment was proposed which purported to restrict the relief which a court might grant to the holding of a single plan unconstitutional instead of all plans which had been passed under that statute.[22] The discussion on this amendment did not even approach the question of whether the one-house veto should be severed from the Act but was focused on whether a court could or would be limited to invalidating one plan instead of all the plans which had been passed by virtue of the one-house veto provision.[23] Evidence that the one-house veto provision was essential to the Congress in enacting the Reorganization Act of 1977 is found in the steps taken by Congress to amend the previous reorganization act to assure that a vote could be taken on each and every plan proposed by the President.[24]

Representative Brooks, one of the sponsors of the Reorganization Act of 1977, stated during floor debate that while "[d]etermination of the organizational structure of the executive branch is a legislative function," the principal issue "to consider here today [is] how much authority the President should have, and what role Congress should play in the reorganization process."[25] Representative Brooks expressed concern over the constitutionality of the veto provision, even to the extent of introducing another bill which did not contain that provision. Representative Brooks explained his position as follows:

> I introduced a reorganization bill that would have met both the objectives of the President and the requirements of the Constitution. Unfortunately, the bill before us today takes a slightly different approach. I have chosen to support it, however, because I believe the new voting procedure—which was taken from my bill—and the limitations on the use of reorganization authority to which the committee agreed, will provide Congress with far more control over reorganization than would have been the case if the President's proposals had gone through unchallenged.[26]

Although not dispositive of the intent of Congress, the statements of one of the legislation's sponsors "deserves to be accorded substantial weight in interpreting the statute." *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 564, 96

volved in the one-house veto provision contained in the Act).

21. H.R.Rep. No. 95-105, 95th Cong., 1st Sess. 10, reprinted in 1977 *U.S.Code Cong. & Ad. News*, 50. The opinion states in part:

> [I]f the procedures provided in a given statute have no effect on the constitutional distribution of power between the legislative and the executive—that is, the power of Presidential veto is effectively preserved and the principle of bicameralism is respected—*the fact that the procedure is not explicitly authorized by the language of Art. I is not enough to render the statute unconstitutional.* I am of the opinion that the procedure provided in the reorganization statute for congressional disapproval of a reorganization plan submitted by the President satisfies this test and, therefore, is constitutional. (emphasis added).

22. 123 *Cong.Rec.* 9363–9365 (1977).

23. *Id.* at 9364.

24. "A major objective of the sponsors of this legislation was to develop a procedure under which an opportunity for a vote by Congress will be assured on each plan." H.R.Rep. No. 95–105, 95th Cong., 1st. Sess. 8, reprinted in 1977 *U.S.Code Cong. & Ad.News*, 48.

25. 123 *Cong.Rec.* 9344.

26. *Id.* The voting procedure to which Rep. Brooks referred is the procedure codified at 5 U.S.C.A. §§ 908 through 912. The procedure is designed to assure that each house will vote on every plan submitted. Essentially, it involved the automatic introduction of a resolution disfavoring the plan and also that such should be sent to the appropriate committee for consideration and if not reported out of committee after forty-five days it would be placed on the appropriate calendar of the House involved. This procedure is designed to guarantee a vote within the sixty day period which Congress has to consider a reorganization plan. *See* H.R.Rep. No. 95–105, 95th Cong., 1st Sess. 8–9, reprinted in 1977 *U.S.Code Cong. & Ad.News* 48.

S.Ct. 2296, 2304, 49 L.Ed.2d 49 (1976). Representative Brooks expression that Congress wishes to retain control over the President's activities is almost a foregone conclusion. This is obviously the reason Congress inserted the one-house veto provision in the Act and certainly it would not be suggested that the intent of Congress was to allow the one-house veto provision to be severed giving the President free reign to propose and enact whatever reorganization he desired within the framework of the delegation of power contained in the other sections of the Act.[27] Interestingly enough, the amendment which was proposed including a severability provision was introduced for the purpose of limiting the scope of judicial review to any one plan which might come before a court; this amendment was not introduced to in any way sever the one house veto provision from the remaining parts of the Act.[28]

[16] In summary, there is no doubt that Congress intended the one-house veto provision to be an integral and inseparable part of the entire Act such that it would limit the power of the President to propose and enact reorganization plans. Congress expressed without equivocation its desire to restrict the President's power to reorganize the executive branch. Pursuant to this, the entire Act must be held unconstitutional in that the one-house veto provision was enacted as an integral and inseparable part of the grant of power to the President. It is, of course, unfortunate that Congress chose an unconstitutional means by which to review and restrict the exercise of the authority which it granted to the President.

RETROACTIVE APPLICATION

[11] The Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) addressed the doctrine of non-retroactivity and its appropriate applications. In that case the Court stated:

> [W]e have recognized the doctrine of nonretroactivity outside the criminal area many times, in both constitutional and nonconstitutional cases. (citations omitted)
>
> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied non-retroactively must establish a new principal of law, either by over-ruling clear past precedent on which litigants may have relied, ..., or by deciding an issue of first impression whose resolution was not clearly foreshadowed, ... Second, it has been stressed that "we must ... weigh the merits and demerits of each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." (citation omitted) Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity" (citation omitted)

Chevron Oil Co. v. Huson, 404 U.S. at 106–07, 92 S.Ct. at 355–56.

To determine whether a decision should be given only prospective application often involves a determination of the interpretation to be placed on statutes under a given set of circumstances.[29] This Court is bound by the recent Supreme Court decision in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, — U.S. —, 102 S.Ct. 2858, 2880, 73 L.Ed.2d 598 (1982). In *Marathon* the Supreme Court invalidated the broad grant of jurisdiction given the bank-

27. See 5 U.S.C.A. §§ 904 and 905 (setting out parameters within which the President must act in submitting reorganization plans).

28. *See supra* notes 22 & 23 and accompanying text.

29. *E.g. Valencia v. Anderson Bros. Ford*, 617 F.2d 1278, 1288–90 (7th Cir.1980) *rev'd on other grounds* 452 U.S. 205, 101 S.Ct. 2266, 68 L.Ed.2d 783 (1981) (analyzing decisions which bore on the question of the construction of the Truth in Lending Act).

ruptcy courts by statute.[30] In deciding whether the invalidation of this jurisdiction should be applied retroactively, the Court stated "[i]t is plain that Congress' broad grant of judicial power to non-Art. III bankruptcy judges presents an *unprecedented question of interpretation* of Art. III." (emphasis added).[31] The Court also noted the substantial injustice and hardship which would be visited upon those who had relied on the statutory grant of power to the bankruptcy courts.

Marathon represented an extreme case where the Supreme Court not only determined that the application of its holding should apply prospectively and not retroactively, but also that it should take effect at a later date. Consistent with that holding they stayed their judgment until October 4, 1982, almost four months after the decision.[32]

It is clear that the decision to deny retroactive application in *Marathon* was based on the pervasive and far-reaching effects of that decision. In contrast, by holding that the Reorganization Act of 1977 is unconstitutional thereby undercutting EEOC's authority to sue, which clearly must rest on a statutory grant of power, this Court decides a narrow and isolated issue, one which is required of it by the United States Supreme Court's decision in *Chadha*.

The three considerations set forth in *Chevron Oil Co. v. Huson* must be decided against prospective-only application of the decision of this Court.

First, this is not a case of first impression and the decision of this Court was definitely foreshadowed by prior events. Not only has the Supreme Court acted in *Chadha*, but it has been obvious in a review of the legislative history that Congress was well aware that such a decision might ultimately invalidate their use of the one-house veto scheme.[33]

Secondly, retrospective operation of this holding will not retard the application of *Chadha* which was clearly envisioned by the Supreme Court in its decision in that case. In fact, to deny retroactive application would encourage the EEOC to pursue other similar suits in spite of its lack of a constitutionally sound grant of statutory authority to do so. The fundamental issue must be addressed by Congress which may vest in the EEOC the statutory authority to sue by appropriate *legislative* action.

Thirdly, there are no individual cases in which retroactive application of this decision would produce inequitable results. The Equal Pay Act includes a provision for individuals to sue in their own right.[34] In spite of the United States Supreme Court's obvious recognition that their decision in *Chadha* would have far-reaching effect, the Court engaged in no discussion and gave no indication that *Chadha* should not be applied retroactively. While their silence on this issue is not dispositive, it is persuasive.

CONGRESSIONAL RATIFICATION

[12] The EEOC argues that Congress has ratified the transfer of the enforcement function under the Equal Pay Act to the EEOC by its appropriation of funds and other statutory references that have been passed in compliance with the constitutional requirements of bicameralism and presentment. In *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1960) the Supreme Court held that Congressional ratification of security clearance procedures which were promulgated by the Secretary of Defense without express authorization of either the President or Congress could not be implied from the continued appropriation of funds to finance the program fash-

30. — U.S. at —, 102 S.Ct. at 2880.

31. *Id.*

32. *Id.*

33. *See supra* notes 20 through 23 and accompanying text. (Legislative history clearly indicates the continuing concern of many members of Congress over the constitutionality of the one-house veto provision and the advice of legal scholars that such provision would be held unconstitutional).

34. 29 U.S.C.A. § 216(b) (Supp.1982).

issued by the Department of Defense. In its opinion the Supreme Court stated:

> If acquiescence or implied ratification were enough to show delegation of authority to take actions within the area of questionable constitutionality, we might agree with respondents that delegation has been shown here. In many circumstances, where the Government's freedom to act is clear, and the Congress or the President has provided general standards of action and has acquiesced in administrative interpretation, delegation may be inferred.... Before we are asked to judge whether, in the context of security clearance cases, a person may be deprived to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. *Cf. Watkins v. United States*, 354 U.S. 178 [77 S.Ct. 1173, 1 L.Ed.2d 1273]; *Scull v. Virginia*, 359 U.S. 344 [79 S.Ct. 838, 3 L.Ed.2d 865]. *Such decisions cannot be assumed by acquiescence or non-action. Kent v. Dulles*, 357 U.S. 116 [78 S.Ct. 1113, 2 L.Ed.2d 1204]; *Peters v. Hobby*, 349 U.S. 331 [75 S.Ct. 790, 99 L.Ed. 1129]; *Ex parte Endo*, 323 U.S. 283, 301–302 [65 S.Ct. 208, 218, 89 L.Ed. 243]. They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, *See Peters v. Hobby, supra*, but also *because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws.* Without explicit action by law makers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them. (emphasis added).

Green v. McElroy, 360 U.S. at 506–07, 79 S.Ct. at 1418–19.

Although there is no doubt that Congress has the authority to enact legislation which would vest the power to enforce the Equal Pay Act in the EEOC, "... [i]t must be recognized that there is more than a passing distinction between substantive legislation and appropriation bills." *Pacific Legal Foundation v. Goyan*, 664 F.2d 1221, 1226 (4th Cir.1981). *See Andrus v. Sierra Club*, 442 U.S. 347, 355–65, 99 S.Ct. 2335, 2339–44, 60 L.Ed.2d 943 (1979) (analysis of the "careful distinction Congress has maintained between appropriation and legislation". *Id.* at 364, 99 S.Ct. at 2344, holding that appropriation requests do not constitute proposals for legislation); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189–93, 98 S.Ct. 2279, 2299–2301, 57 L.Ed.2d 117 (1978) (argument that subsequent appropriations measures which funded the construction of a facility in violation of the Endangered Species Act did not impliedly exempt that specific project from coverage of the Act; a contrary policy would violate express rules of both Houses of Congress providing that appropriation measures may not change existing substantive law).

From the foregoing it is clear that by appropriating funds for the EEOC, Congress has done nothing to directly enact legislation which would address the substantive issue of the EEOC's authority to institute litigation for enforcement of the Equal Pay Act.

CONCLUSION

Although this decision will have far-reaching ramifications, it is one that is demanded under the clear terms of the decision of the Supreme Court in *Chadha*.

In light of the foregoing discussion of the technical legal principles, this court must conclude that the Reorganization Act of 1977 is unconstitutional. It necessarily follows that the Reorganizational Plan 1 of 1978, which contains the provision allowing the EEOC to enforce the Equal Pay Act, is unconstitutional since the Plan was adopted pursuant to the Act. Finally, it follows that the EEOC has no authority to act as Plaintiff in this cause and that Defendant's motion for summary judgment must be sustained.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD V. ALLEN, et al., Plaintiffs v. GERALD P. CARMEN, Administrator of General Services Administration, et al., Defendants	Civil Action No. 83-3099

FILED
DEC 30 1983
JAMES F. DAVEY, Clerk

OPINION

I. INTRODUCTION

The twenty-nine plaintiffs in this suit held White House Staff, Cabinet or policy-making agency positions in the federal government during the Nixon Administration. The defendants are Gerald P. Carmen, the Administrator ("the Administrator") of the General Services Administration ("GSA"), and Robert M. Warner, the Archivist ("the Archivist") of the United States.

Pursuant to the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2107 Note (1976) ("the Act"), the Administrator is authorized to receive, retain or make reasonable efforts to obtain complete possession and control of documents and other materials which constitute the Presidential historical materials of Richard M. Nixon, covering the period beginning January 20, 1969 and ending August 9, 1974. By virtue of the Act, materials related to Watergate were received as well as documents and other materials created by these plaintiffs relevant to their specific positions. Pursuant to regulations promulgated by the Administrator under the Act, employees of the Archives reviewed and categorized certain materials and prepared them for public access. As administered by the National Archives, public access includes permission to have copies made of the material with no restrictions on the use of those copies.

One of the categories of material reviewed and ready for release to the public are the "White House Special Files." The

Special Files were established during the last three years of the Nixon Administration to contain sensitive material. They are a subset of the White House general correspondence files, known as the "Central Files." See Nixon v. Administrator, 408 F. Supp. 321, 330 n.1 (D.D.C. 1976), aff'd, 433 U.S. 425 (1977) and Plaintiffs' Exhibit K to their Cross-Motion for Summary Judgment. The Special Files contain approximately 1.5 million pages of material but represent less than 4% of the entire collection of the Nixon Presidential Materials. See Defendants' Responses to Plaintiffs' First Set of Requests for Admission, numbers 16 and 18.

Plaintiffs do not seek to delay the release of Watergate-related material. Rather, because of alleged constitutionally infirm regulations, they seek to prevent the public's access to the Special Files at this time. They claim the documents contained therein are substantially comparable to the materials of the staffs of all other Presidents. They allege that Congress exerted improper influence over the creation and modification of the public access regulations by providing for and extensively exercising the legislative veto provided it under the Act.[1/] They urge that Section 104 of the Act and the regulations promulgated thereunder must be struck down in light of the Supreme Court's recent decision in

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1/ Section 104(b), which refers to the legislative veto, provides:

> [T]he regulations proposed by the Administrator in the report required by subsection (a) shall take effect upon the expiration of ninety legislative days after the submission of such report, unless such regulations are disapproved by a resolution adopted by either House of the Congress during such period.
> (2) The Administrator may not issue any regulation or make any change in a regulation if such regulation or change is disapproved by either House of the Congress under this subsection.
> (3) The provisions of this subsection shall apply to any change in the regulations proposed by the Administrator in the report required by subsection (a). Any proposed change shall take into account the factors described in paragraph (1) through paragraph (7) of subsection (a), and such proposed change shall be submitted by the Administrator in the same manner as the report required by subsection (a).

Congress' exercise of the legislative veto over the proposed regulations is described in II. A, infra.

Immigration and Naturalization Service v. Chadha, 103 S.Ct. 2764 (1983), which declared the one-house veto unconstitutional. The GSA has set January 3, 1984 as the date on which the public will have access to materials at issue. Defendants have asserted six defenses to this action. Additionally, amici curiae, several writers and other individuals interested in the documents to be released, have sought to dismiss this action.

The case has been presented to the Court on cross-motions for summary judgment and defendants' motion to dismiss. On December 16, 1983, the Court heard oral argument on those motions and on plaintiffs' motion for preliminary injunction. The Act requires this case take priority over all others and it has been so treated by all concerned on an expedited basis. For the reasons set forth below, the Court finds that the defenses asserted by the defendant do not deprive this Court of jurisdiction and that, as a matter of law, plaintiffs are entitled to summary judgment that Chadha should be applied retroactively with the result that the regulations must fall.2/ On the issue of severability, the Court concludes that the one-house veto provision is severable and thereby rules in defendants' favor on that issue. Based on these rulings, the Court decides it need not reach the issue of improper Congressional influence.

2/ This case calls to mind the precepts laid out over 160 years ago by Chief Justice John Marshall who reaches across the centuries to instruct this Court. Justice Marshall wrote:

> It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur, which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.

II. BACKGROUND

A. History of the Public Access Regulations

The Presidential Recordings and Materials Preservation Act was enacted by Congress in December, 1974, largely to nullify an agreement of September 8, 1974 between former President Nixon and then Administrator Arthur Sampson so as to protect and preserve the "Watergate" materials. Under the Nixon-Sampson agreement, all materials in the White House on August 9, 1974 would be deposited temporarily with GSA but the former President would be allowed to have access to them and eventually to withdraw or direct the destruction of materials. Additionally, upon his death, the tapes were to be destroyed immediately. 10 Weekly Comp. of Pres. Doc. 1104 (1974). The Act put an end to this questionable agreement and created, for the first time, strict controls over Presidential materials.

Section 104(a) of the Act provides that the Administrator shall, within ninety days after the date of enactment of this title submit to each House of Congress a report proposing and explaining regulations that would provide public access to the tape recordings and other materials,3/ referred to in section 101. Such regulations shall take into account the following factors:

> (1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term "Watergate";
>
> (2) the need to make such recordings and materials available for use in judicial proceedings;
>
> (3) the need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings, to information relating to the Nation's security;
>
> (4) the need to protect every individual's right to a fair and impartial trial;
>
> (5) the need to protect any party's opportunity to assert any legally or

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Cohens v. Virginia, 19 U.S. 264, 403 (1821).

3/ Under the Act and proposed regulations, four categories of materials were identified: Presidential historical materials, private or personal materials, those relating to abuses of governmental power popularly identified under the generic term "Watergate" and those of general historical significance. See 41 C.F.R. § 105-63.104.

> constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials;
>
> (6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and
>
> (7) the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in paragraph (1) and are not otherwise of general historical significance.

44 U.S.C. § 104(a).

As required, on March 19, 1975, Arthur Sampson reported to Congress a set of proposed public access regulations. The Senate Committee on Government Operations found that many of the regulations complied with the Act but also determined that there were a significant number of provisions which were not consistent and should be disapproved. S. Res. 244, 94th Cong., 1st Sess. (1975). Since there was no provision for revising or amending the proposed regulations in part, and GSA contended that it would be difficult to implement the remaining, approved regulations, the Committee concluded that it should recommend disapproval of all the regulations to prevent the unacceptable provisions from becoming effective.[4] / S. Rep. No. 368, 94th Cong., 1st Sess. 3 (1975).

In particular, the Committee disapproved of the proposed regulation which read:

> The Administrator may restrict access to portions of materials determined to relate to abuses of governmental power when the release of those portions would tend to embarrass, damage or harass living persons, and the deletion of those portions will not distort, and their retention is not essential to an understanding of, the substantive content of the materials.

Proposed Reg. § 105-63.402-1 (March 19, 1975). The proposed regulations would also have authorized the Administrator to restrict access to materials of general historical significance

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4/ For a history of Congressional control exerted over the writing of these regulations, See Bruff & Gellhorn, Congressional Control of Administrative Regulation: A Study of Legislative Vetoes, 90 Harvard L.J. 1369, 1397-1402 (1977).

unrelated to abuses of governmental power when the release of the materials would "tend to embarrass, damage, or harass living persons." Proposed Reg. § 105-63.402-2 (March 19, 1975).

The Senate Committee found Proposed Reg. 105-63.402-1 unacceptable and commented,

> The intent of this restriction is understandable and acceptable: to protect the reputations of living persons from unnecessary embarrassment. To the extent that such concern is legitimate, this regulation seems largely superfluous. Any purely personal items would automatically be exempt from disclosure and perhaps even retention by GSA. (See sections 105-63.104(b); 105-63.104-5.)
>
> Even if it were not superfluous, the provision would still be objectionable. Almost by definition, the Watergate affairs are embarrassing to those who were associated with them. Therefore, virtually all of the Watergate materials, could, conceivably, be subject to this restriction.
>
> The additional qualification does not remedy the situation. It states only that embarrassing materials will not be withheld if their deletion will not "distort" the Watergate history and if their retention is not "essential" to an understanding of that history. But Congress did not direct that only the "essential" of the Watergate affairs be made public. Congress directed that "the full truth" be made public. This provision would undermine that congressional purpose.
>
> Another problem with the provision is that the Administrator has total, unfettered discretion to determine whether personal matter included within the Watergate materials should be withheld. If the material is personal and not necessary to understand an abuse, the Administrator should be required to restrict access.
>
> To remedy this problem, this subsection should be amended as follows:
>
> (b) The Administrator [may] will restrict access to any portions of materials determined to relate to [abuses of governmental power when the release of those portions would tend to embarrass, damage or harass living persons, and the deletion of those portions will not distort, and their retention is not essential to an understanding of the substantive content of the materials] an individual's personal affairs, such as personnel and medical files, if after being given a reasonable opportunity to review the materials, the individual involved expresses, in writing, a desire to withhold such portions from public access: Provided, That if material relating to an abuse of governmental power refers to, involves or

> incorporates such personal information, the Administrator will make available such personal information, or portions thereof, if such personal information, or portion thereof, is essential to an understanding of the abuse of governmental power.

S. Rep. No. 368, 94th Cong. 1st Sess., pp. 9-10 (1975). The Committee found that the "tend to embarrass, damage, or harass" language in both proposed regulations was vague and that there were sufficient exemptions under the Act to prevent disclosure of personal information. Id. at 11.

In response to the veto, the Administrator submitted a second set of proposed regulations to Congress on October 15, 1975. In place of the provision containing the "tend to embarrass, damage or harass" language, the proposed regulation provided,

> The Administrator will restrict access to any portion of materials determined to relate to relate to abuses of governmental power when the release of those portions would constitute a clearly unwarranted invasion of personal privacy or result in the defamation of a living person: Provided, that if materials relating to an abuse of governmental power refers to, involves or incorporates such personal information, the Administrataor will make available such personal information, if such personal information, or portions thereof, is essential to an understanding of the abuse of governmental power.

Proposed Reg. § 105-63.402-1(b) (October 15, 1975). With regard to materials of general historical significance unrelated to abuses of governmental power, the proposed regulations provided, in pertinent part, that the Administrator will restrict access when the release of the materials would:

> . . . constitute a clearly unwarranted invasion of personal privacy or result in the defamation of a living person; . . .

Proposed Reg. § 105-63.402-2(b)(2) (October 15, 1975).

By letter dated January 21, 1976, Jack Eckerd, Administrator of GSA, explained to the Senate that at the time the proposed regulations were submitted to the Congress, the Government was in the midst of defending a judicial challenge to the constitutionality of the Act.[5/] Although the three-judge

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5/ The Administrator was referring to Nixon v. Administrator, 408 F. Supp. 321 (D.D.C. 1976), aff'd, 433 U.S. 425 (1977). See discussion at Section II B, infra.

panel upheld the facial constitutionality of the Act, the Assistant Attorney General determined that the opinion necessitated his further reviewing the constitutionality of at least several of the proposed regulations submitted on October 15, 1975.

On January 22, 1976, Representative Brademas conducted a hearing before the Subcommittee on Printing of the Committee on House Administration, at which Mr. Eckerd, Mr. Rhoads, Archivist of the United States, Donald P. Young, Acting General Counsel of GSA, and Steven Garfinkel, Chief Counsel for Records and Archives, as well as others, testified. Hearing Before the Subcomm. on Printing of the Comm. on House Administration: "Regulations to Implement Title I, Public Law 193-256, the Presidential Recordings and Materials Preservation Act," 94th Cong., 2d Sess. (Jan. 22, 1976) ("The Brademas hearing") (unpublished transcript) (attached as Exhibit B to Plaintiff's Opp. to Defendants' Motion to Dismiss). In that hearing, Representative Brademas and Mr. Young debated whether the regulations under the Act and certain House and Senate rules authorized GSA to withdraw the proposed regulations so that GSA could reevaluate them in light of the intervening court opinion.

During the hearing, Mr. Young expressed his concern that regulations which might later be declared unconstitutional not be presented to Congress at all. Both he and the Solicitor General feared that if they were approved by Congress but subsequently invalidated as a result of litigation, the whole process would be wasteful. Id. at 26-28. It was Representative Brademas' position that neither the regulations nor Congressional rules provided for GSA to withdraw the regulations. In his opinion, the appropriate course would be for GSA to advise Congress of its legitimate concerns about the constitutionality of the proposed regulations, while keeping those regulations before Congress. Id. at 27-31. At the hearing, he further remarked,

> "In other words, why should we, on this subcommittee, have any more confidence in your capacity to take into account constitutionality of regulations during efforts in 1976 than in

> efforts in 1975? What have you been doing on the public payroll all this last year? I mean why should we assume that chronology will improve your understanding of your problem?" Id. at 31-32.

By letter dated February 5, 1976, the Committee on Government Operations, through Senators Ribicoff and Percy and Representative Brademas, advised that the only action authorized, following submission of proposed public access regulations, and during the 90 legislative day period, was disapproval by either the Senate or the House of Representatives and that there was no provision for withdrawal. On April 8, 1976, once again the Senate disapproved those regulations which provided for restricting access to materials relating to the abuse of governmental power and those of general historical significance. S. Res. 428, 94th Cong., 2d Sess. (1976); see S. Rep. No. 94-748, 94th Cong., 2d Sess. (1978).

On April 13, 1976, Administrator Eckerd proposed a third set of public access regulations. The House then exercised its veto with respect to certain of these regulations. H. Res. 1505, 94th Cong., 2d Sess. (1976); see H.R. Rep. No. 94-1485, 94th Cong., 2d Sess (1976). Of the six proposed regulations disapproved by the House, two of the provisions dealt with the standards under which the Administrator could limit public access to those materials relating to the abuses of governmental power and those of general historical significance. With regard to materials related to abuses of governmental power, the part of the regulations proposed and disapproved provided,

> . . . The Administrator will restrict access to any portion of materials determined to relate to abuses of governmental power when the release of those portions would constitute a clearly unwarranted invasion of personal privacy or constitute libel or slander of a living person: Provided, that if material related to an abuse of governmental power refers to, involves or incorporates such personal information, the Administrator will make available such personal information, or portions thereof, if such personal information, or portions thereof, is essential to an understanding of the abuses of governmental power.

Proposed Reg. § 105-63.402-1(b) (April 13, 1976). With regard to materials of general historical significance unrelated to

abuses of governmental power, the regulations proposed and disapproved provided, in pertinent part,

> . . . The Administrator will restrict access to materials of general historical significance, but not related to abuses of governmental power, when the release of these materials would:
>
> . . .
>
> (2) constitute a clearly unwarranted invasion of personal privacy or constitute libel or slander of a living person; . . .

Proposed Reg. § 105-63.402-2(a)(2).

On June 2, 1977, Administrator Joel W. Solomon submitted a fourth set of regulations which neither House vetoed; these became effective on December 16, 1977. See 42 Fed. Reg. 63626-29 (1977) (attached as Appendix I to this Opinion). Shortly after the regulations became effective, former President Nixon challenged their validity on several grounds, including the claim that Section 104 of the Act unconstitutionally permits a one-house veto. Nixon v. Freeman, C.A. 77-1395 (D.D.C. January 31, 1978), aff'd, 670 F.2d 346 (D.C. Cir.), cert. denied, 103 S.Ct. 455 (1982).

In exchange for certain revisions in the regulations, former President Nixon withdrew several of the claims presented to the District Court, including the issue of the constitutionality of the one-house veto.6/ Pursuant to the settlement of those claims, a fifth set of regulations was proposed to Congress. These were not vetoed by either house of Congress and became effective on March 7, 1980. See 45 Fed. Reg. 14855-60 (1980) (to be codified at 41 C.F.R. §§ 105-63.1, 63.4) (attached as Appendix II to this Opinion). Under this set of regulations, the Administrator was authorized to restrict access to Watergate materials and those of general historical significance when release would "constitute a clearly unwarranted invasion of personal privacy or constitute libel of a living person." 41 C.F.R. §§ 105-63.402-1. With respect to the Watergate materials, the fifth set of regulations contained the proviso, as had the fourth set of regulations, that authorized the Administrator to make available personal

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6/ See discussion at II B, infra.

information that was essential to an understanding of the abuses of governmental power.

The fifth set of regulations revised the definition of "private or personal materials". Under the new definition, materials relating to a person's family or other non-governmental activities, including private political associations were included but the materials of Mr. Nixon or his staff related to the constitutional or statutory powers or duties as President or as a member of the President's staff were excluded. 45 Fed. Reg. 14856 (March 7, 1980). This set of regulations also provided that the Administrator would give priority to the processing and return of private and personal materials and in the initial archival processing to materials relating to abuses of governmental power. Id. at 14857.

Pursuant to the regulations[7] promulgated under the Act, persons[8] were entitled to notice of the proposed opening of those materials. On August 12, 1983, a Federal Register notice advised that anyone having a legally or constitutionally based claim that would prevent or limit public access to the material should file that claim by September 12, 1983. 48 Fed. Reg. 36655 (Aug. 12, 1983). The deadline subsequently was extended to November 10, 1983. 48 Fed. Reg. 40561 (Sept. 18, 1983) and to January 3, 1984. 48 Fed. Reg. 51533 (November 9, 1983).

7/ 41 C.F.R. § 105-63.401(b) provides:

> (b) Within 30 days following publication of the notice prescribed in § 105-63.401(b), officers of any Federal, State or local court and other persons who believe that public access to any of the materials may jeopardize an individual's right to a fair and impartial trial should petition the Administrator setting forth the relevant circumstances that warrant withholding specified materials. The Administrator will notify the petitioner by certified mail, return receipt requested, of his decision regarding public access to the pertinent materials. If that decision is adverse to the petitioner, the Administrator will refrain from providing public access to the pertinent materials for at least 30 calendar days from receipt by the petitioner of such notice.

8/ At oral argument, counsel represented to the Court that only 19 of the 29 plaintiffs had received such a notice.

II B. REVIEW OF DECISIONS IN THE NIXON SUITS

A brief overview of the prior litigation under the Act will serve to bring into sharper focus the issues presented in this case. In Nixon v. Administrator, 408 F. Supp. 321 (D.D.C. 1976), former President Nixon challenged the constitutionality of the Presidential Recordings and Materials Preservation Act before a three-judge panel. At the outset of its analysis that court emphasized that the issue before it was narrow. Nixon, supra, 408 F. Supp. at 334. The Court framed the issue as whether "the regulatory scheme enacted by Congress was unconstitutional without reference to the content of any conceivable set of regulations falling within the scope of the Administrator's authority under section 104(a)." Id. at 334-35. Since at the time the case was presented to the Court the initial set of regulations had been disapproved by the Senate and no other set of regulations had yet become effective, the Court had no set of regulations which presented the basis for a live and concrete controversy. Judge McGowan opined however that, "[w]hen regulations finally become effective, however, they could, if drafted with careful attention to the directive of subsection 104(a)(5)[9/] eliminate the basis for some of the allegations raised by Mr. Nixon that his rights will be infringed." Id. at 335. The Court concluded that only the constitutionality of the process of reviewing and classifying the materials was properly before it. Id. at 339. The Court therefore ruled it would only discuss "questions directed toward the statute on its face and aspects of the screening process that, in their broadest outlines, [. . .] will necessarily be included in any processing conducted under a valid set of regulations." Id. at 340.

Former President Nixon challenged the Act on separation of powers, presidential privilege, right of privacy and other

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9/ That section provides for the rights of individuals to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials. See discussions of this requirement at Section III B, III C, infra.

grounds. The first three grounds are relevant to this litigation. With regard to the first two claims, the former President contended that the Act represented an unconstitutional invasion of the executive sphere by Congress and infringed the presidential privilege to protect the "generalized interest in free and candid communication to the President in the formulation of Executive Policy." Id. at 343.[10/] After balancing the intrusion of archival screening on the former President with the objectives of the Act, the Court concluded that intrusion would be minimal. Id. at 346.

With regard to Mr. Nixon's claim that the process of screening violated his right to privacy, the Court concluded that Mr. Nixon's privacy claim could not be sustained. Id. at 364. The Court found that he had no reasonable privacy expectation in most of the documents and conversations and that a very high percentage of them would be related to government interests served by the Act. Without fully considering the issue the Court did note that the second set of proposed regulations (which established the "clearly unwarranted invasion of personal privacy, or defamation of a living person" standard for limiting access) would "provide not insignificant protection of personal privacy." Id. at 358 n.52. Resolution of Mr. Nixon's privacy claims was more difficult than those regarding the presidential privilege. The Court explained that,

> [o]n balance, we believe the congressional act here is a reasonable response to the difficult problem caused by the mingling of personal and private documents and conversations in the midst of a vastly greater number of non-private documents and materials related to government objectives. The processing contemplated by the Act - at least as narrowed by carefully tailored regulations - represents the least intrusive manner in which to provide an adequate level of promotion of government interests of overriding importance.

Id. at 367. Former President Nixon also asserted that the Act invades the "private formulation of political thought

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10/ The Court noted that it had no occasion to consider any common law privilege protecting executive confidentiality encompassed in confidential communications involving executive officials other than the President. Nixon, supra at 343 n.25.

critical to free speech and association." Id. at 367-68. The Court rejected this claim as well finding that countervailing governmental interests prevailed over these concerns insofar as screening of the documents was concerned. Id. at 368. Again, the Court commented in a footnote that the public access regulations provided for restrictions on materials implicating "personal privacy," and speculated that "it is entirely possible to read personal privacy so as to include the privacy in political association protected by the First Amendment, and, if this were the case, then these regulations would be inconsistent with plaintiff's assumption." Id. at 368 n.65.

The Supreme Court affirmed the three-judge court decision in Nixon v. Administrator, 433 U.S. 425 (1977), both in terms of the lower court's delineation of the narrow issue presented and its rulings on each of the constitutional issues presented thereunder. The Supreme Court also endorsed the lower court's view that proper public access regulations could adequately protect those interests of concern to the former President. See e.g., Nixon, supra at 450 (regarding executive confidentiality). In his concurring opinion, Justice Powell expressed similar views. Nixon, supra at 502 n.5. With vision spanning six years and with this litigation surely in mind, Justice Powell concluded,

> Today's decision is limited to the facial validity of the Act's provisions for retention and screening of the materials. The Court's discussion of the interests served by those provisions should not foreclose in any way the search that must yet be undertaken for means of assuring eventual access to important historical records without infringing individual rights protected by the First, Fourth, and Fifth Amendments.

Id. at 504.

Shortly after the fourth set of regulations became effective, former President Nixon amended his complaint in Nixon v. Solomon, Civil Action No. 77-1395 (D.,D.C. 1978)[11/]

11/ The action filed in 1977 challenged regulations promulgated earlier. His second amended complaint, filed January 31, 1978, contains several of the challenges presented here. The caption of this case later changed to Nixon v. Freeman. The case shall be referred to by both captions throughout this opinion.

to challenge, as plaintiffs have challenged here, the constitutionality of the one-house legislative veto provision and the exercise of Congressional influence over the promulgation of the regulations. In settlement of part of that case, those claims were dismissed.

The settlement agreement provided for certain amendments to the regulations and for the priority processing of private or personal materials. The settlement agreement reflected that the President would not "contend that the regulations are unconstitutional or void because promulgated subject to the one-house veto provision of the Act and in exchange the defendants [will] not contend that congressional acceptance of the regulations supports their validity." Settlement Agreement, § 5. The agreement provided that former President Nixon would not be barred from challenging, on any grounds, regulations which were deleted, amended or newly promulgated. Id. at § 6. The agreement was not to operate as a bar to any party "from presenting any and all claims, defenses or arguments there may be to sustain the validity of the challenged regulations or to invalidate the regulations as subsequently modified in response to a successful challenge thereto." Id. at § 6.

The District Court granted summary judgment for the defendants on other grounds and the Court of Appeals affirmed that decision in Nixon v. Freeman, 670 F.2d 346 (D.C. Cir. 1982). The Court of Appeals for the District of Columbia Circuit held that the public access regulations could not be invalidated on the grounds that they invaded former President Nixon's right of privacy. The Court reasoned that expectation of privacy could attach to "diaries or other communications respecting personal matters unrelated to his public duties, but not in materials relating to the conduct and official duties of the Presidency." Id. at 354.

III. ANALYSIS

Defendants have moved to dismiss this case on the grounds that plaintiffs are barred by laches, lack standing and have failed to exhaust their administrative remedies. Amici

unreasonably delayed in challenging defendant's action and that the defendant has been prejudiced by the delay. Independent Bankers Ass'n v. Heimann, 627 F.2d 486, 488 (D.C. Cir. 1980) (per curiam); Environmental Defense Fund v. Alexander, 614 F.2d 474, 478 (5th Cir.), cert. denied, 449 U.S. 919 (1980). This Circuit has also explained that "laches does not depend solely on the time that has elapsed between the alleged wrong and the institution of suit; it is 'principally a question of the inequity of permitting the claim to be enforced -an inequity founded upon some change in the condition or relations of the property or the parties,' Gull Airborne Instruments, Inc. v. Weinberger, 694 F.2d 838, 843 (D.C. Cir. 1982), citing; Gallaher v. Caldwell, 145 U.S. 368, 373 (1892). And in Randall v. Mayor & City Council of Baltimore, 512 F. Supp. 150 (D. Md. 1981), the District Court for Maryland explained, "[i]n the end, the court weighs the excuse, or absence of excuse, against the actual or reasonably anticipated injury." Id. at 152, quoting, Giddens v. Isbrandtsen Co., 355 F.2d 125, 128-29.

When government action is challenged, the element of plaintiff's knowledge must be closely analyzed. "When government action is involved, members of the public are entitled to assume that public officials will act in accordance with the law," Save Our Wetlands, Inc. v. U.S. Army Corps of Engineers, 549 F.2d 1021 (5th Cir.), cert. denied. 434 U.S. 836 (1977). The Fifth Circuit Court of Appeals found in Environmental Defense Fund that "the government must show that those whom it seeks to bar by invoking laches were or should have been aware of the questionable nature of the government activity." Environmental Defense Fund, supra at 479. In City of Davis v. Coleman, 521 F.2d 661, 677 (9th Cir. 1975), the Ninth Circuit recognized that where the law on plaintiff's claims is so complex or uncertain, it should be reluctant to charge the plaintiff with the knowledge that would impose a duty to act. "An indispensible element of the lack of diligence is knowledge, or reason to know, of the legal right, assertion of which is "delayed." Id. at 677.

The Court has before it the affidavits of many of the plaintiffs. Without exception they state that until August of 1983 they were unaware of the nature of the documents scheduled to be opened. Additionally, while some of them knew, through various forms of media that former President Nixon was litigating his claims to Watergate and other documents, they were not specifically aware of the legal bases for the claims asserted including the challenge to the legislative veto. Defendants argue that the Court is not presented with unsophisticated plaintiffs here. The Court could not agree more. Defendants urge that, since most of the plaintiffs had served in prior administrations, they should have been more attentive to the treatment of their papers. For precisely that reason the Court finds persuasive plaintiffs' affidavits which indicate that they expected the documents they prepared, as staff members during the Nixon administration, to be treated no differently than they had been during other administrations. On the record before the Court, plaintiffs acted diligently once they became aware of how their papers would be treated. The recent decision by the Supreme Court in Chadha was the first time the Supreme Court had definitively decided the one-house veto question. This Court is reluctant to charge the plaintiffs with laches when the law has been so unsettled and complex.

The second element a defendant must demonstrate to succeed on the laches defense is that it has been prejudiced due to plaintiff's delay. Assuming for the purposes of discussion that plaintiffs have delayed, which the Court has not found, was there prejudice to the defendant and was it suffered as a result of plaintiff's inaction? On the element of prejudice, the Court must balance "the expenditures made by the defendants against the benefits claimed if their efforts were halted," Environmental Defense Fund, supra at 479. In Concerned About Trident v. Schlesinger, 400 F. Supp. 454, 478 (D.D.C. 1975), Judge Hart explained that there are two types of prejudice that a defendant may suffer when a plaintiff delays unreasonably in presenting a claim. A defendant may suffer

because there is a loss of evidence supporting defendant's position or because he has changed his position in a manner that would not have occurred but for plaintiff's delay. While the amounts expended by the defendant may be large, this does not tilt the scales if it represents a small percentage of the total expenditures anticipated. Environmental Defense Fund, supra at 480. In Environmental Defense Fund, the Court found that a laches defense would be supported if defendant demonstrated that what it had done would have to be undone. Conversely, where the acts performed by a defendant up to the time of plaintiff's challenge have utility independent of the remainder of a project, prejudice will be more difficult to demonstrate. See e.g., Committee to Stop Route 7 v. Volpe, 346 F. Supp. 731, 739 (D. Conn. 1972).

Defendants have presented two declarations of Robert M. Warner indicating that the government has expended approximately $1,674,200 and 166,400 hours in processing the Special Files. Defendants assert that because those files, as an entity, have been processed, there is no processing left to be completed with respect to plaintiffs' interests asserted here. The relevant ratio, the Court finds is that of the Special Files to all of President Nixon's files. The Special Files segment represents only 4%. The Court does not minimize the time and money spent by the government in processing the files. The plaintiffs' challenge here is to the presentation, under the current regulations, to the public of those documents, not to the method by which they were processed. Indeed, plaintiffs would be precluded from challenging the processing of the documents since that issue has been decided by the three-judge district court and the Supreme Court opinions. Defendants have offered no concrete credible evidence that the processing which has taken place would have no independent utility in the event that plaintiffs prevail on their claims. Viewing the facts in a light most favorable to the plaintiffs, as it must on a motion to dismiss, the Court finds that plaintiffs are not barred by laches from presenting their constitutional claims.

B. STANDING

Defendants claim that plaintiffs lack standing because their injuries are only speculative and not related to the alleged illegal action of the defendants. They urge that, until objections presented by these plaintiffs have been overruled and release is imminent, plaintiffs' allegations, derivative as they are, will be premature. Amicicontend that plaintiffs have no privacy interest in the non-Watergate-related materials at issue in this case and that the nature of the materials exceeds any privacy interest claimed by plaintiffs. These arguments miss the point. Plaintiffs are not seeking to relitigate the rights of former President Nixon which the Courts have already considered. They are clearly seeking to protect their own rights, recognized in the Act and all regulations promulgated thereunder, which allowed them to assert any privacy or constitutional claims. The Courts who have ruled on former President Nixon's claims have, as well, recognized that other individuals had interests to be protected. See e.g., Nixon v. Administrator, 408 F. Supp. 321, 343 n.25; Nixon v. Administrator, 433 U.S. 425, 502 n.5 (Powell, J., concurring). Clearly, the Act and regulations have contemplated their protection. Capital Legal Foundation v. Commodity Credit Corp., 711 F.2d 253, 259 (D.C. Cir. 1983); accord Gull Airborne Instruments v. Weinberger, 694 F.2d 838 (D.C. Cir. 1982). It is also clear that plaintiffs have standing to vindicate threatened injury. Valley Force Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 475. As individuals sought to be protected by the Act and recognized as having protectable rights under the Act, by earlier courts, these plaintiffs have standing.

C. EXHAUSTION OF ADMINISTRATIVE REMEDIES

Defendants contend that this Court is barred from hearing this suit since plaintiffs have not followed the administrative procedure set forth in the Act for asserting their privacy or constitutional claims. Plaintiffs argue they should not be forced to comply with illegal procedures developed

by a Congress which exerted pressure via the unconstitutional legislative veto. They seek to have this Court rule on the constitutionality of the regulations; if the regulations are invalidated, they will not be required to comply with the administrative procedure established thereunder.

There are three purposes served by requiring exhaustion of administrative remedies: 1) it allows the agency to apply its expertise and to exercise its discretion in appropriate circumstances; 2) it aids the court by allowing the agency to make a factual record; 3) it prohibits repeated interruption of the agency proceeding and increases the possibility that an individual's rights may ultimately be vindicted at the agency level. Athlone Industries v. Consumer Product Safety Commission, 707 F.2d 1485 (D.C. Cir. 1983). This Circuit has recently explained that "[W]hen the reasons supporting the doctrine [of exhausting administrative remedies] are found inapplicable, the doctrine should not be blindly applied." Athlone Industries, supra, at 1488, citing, Committee for GI Rights v. Callaway, 518 F.2d 466, 474 (D.C. Cir 1975). Not only must the purposes of the doctrine be considered but there must be a consideration of the particular administrative scheme involved. McKart v. United States, 395 U.S. 185 (1969). It is also true that one of the recognized exceptions to the general rule requiring exhaustion of administrative remedies is when resort to the nonjudicial remedy would "clearly and unambiguously violate statutory or constitutional rights." Republic Industries, Inc. v. Central Pennsylvania Teamsters Pension Fund, 693 F.2d 290, 293 (3rd Cir. 1982). This is the gravamen of plaintiffs' complaint. The Act's administrative scheme permits the agency to rule on an individuals' claim that release of certain documents will infringe his or her constitutional rights. This is not the type of claim presented to this Court and therefore there is not a need to defer to the agency for purposes of its developing an adequate record. Plaintiffs challenge the effect which the exercise of the legislative veto had on the promulgation of regulations. This

is a far different claim than would or could be presented before the GSA. Plaintiffs' position is buttressed by the statute's express provision in Section 105(a) for this Court's jurisdiction to hear challenges to the constitutionality of the Act or its regulations.

A distinction made by the Third Circuit Court of Appeals in Republic Industries, supra, is relevant. There the Court discussed the type of constitutional tasks delegated to an agency and those delegated to the courts. "[While] we commit to administrative agencies the power to determine constitutional applicability, [but] we do not commit to administrative agencies the power to determine constitutionality of legislation." Id. at 2951, citing, 3 K. Davis, Administrative Law Treatise § 20.04 at 74 (1958). In this case, the agency would be asked to determine whether the release of specific documents would violate certain privacy or constitutional rights. The agency's expertise does not extend, however, to determining the constitutionality of the Act or its regulations.

While reluctant to jump into the briarpatch of constitutional questions, this Court believes that a ruling on the constitutionality of these regulations, in light of plaintiffs' claims, is necessary to the proper disposition of the case. Harmon v. Brucker, 355 U.S. 579 (1958). The fact that there is a possibility of alternative relief does not detract from this Court's decision. See Immigration and Naturalization Service v. Chadha, 103 S.Ct. 2764 (1983). Furthermore there would be no purpose served by delaying consideration of this issue. Cf. Griffin v. County Sch. Bd., 377 U.S. 218, 229 (1964); Lister v. Lucey, 575 F.2d 1325, 1331 (7th Cir.); cert. denied, 439 U.S. 865 (1978).

The Courts' ruling that plaintiffs need not first exhaust their administrative remedies is not inconsistent with Nixon v. Sampson, 580 F.2d 514 (D.C. Cir. 1978), a case cited by defendant in support of its position. In that case the Court of Appeals considered the district court's granting of a summary judgment in favor of Rose Mary Woods who sought solely to recover her personal materials and papers collected from the

White House. Chief Judge Bazelon explained that since there was an elaborate regulatory scheme that would provide her with access to her papers that she should follow that scheme and not bypass it by initially bringing suit in the District Court. Id. at 520 n.11. The distinction between the basis of Ms. Wood's suit and this suit needs no further elaboration.

RETROACTIVITY

Plaintiff seek to have this Court apply Immigration and Naturalization Service v. Chadha, 103 S.Ct. 2673 (1983), retroactively to invalidate the one-house veto provision and the public access regulations promulgated thereunder. In Chadha, the Supreme Court held that Section 244(c)(2) of the Immigration and Nationality Act was unconstitutional. Pursuant to that section, either house of Congress could pass a resolution stating that it did not favor suspending the deportation of an alien. By exercising a legislative veto in this manner it could overrule the Attorney General's recommendation that deportation be suspended. The Supreme Court held that the provision for a one-house legislative veto violated the presentment clauses and the bicameral requiremenets found in Article I of the Constitution. Because the Supreme Court was silent on whether its ruling should be applied retroactively, and because the Constitution neither prohibits nor requires retrospective relief, Linkletter v. Walker, 381 U.S. 618, 629 (1965) each court must make that determination based on an analysis of the case and statute before it.

Generally, a court must evaluate three factors when it considers whether to apply a rule retroactively. Chevron Oil v. Huson, 404 U.S. 97, 106-110 (1971). The first of these considerations is whether the decision has announced a new principle of law. Chevron Oil, supra at 106. A new principle of law has been announced when there "is such an abrupt and fundamental shift in doctrine so as to constitute an entirely new rule which in effect replaced an older one." Hanover Shoe Inc., v. United Shoe Machinery Corp., 392 U.S. 481, 498-99 (1966). Similarly, a new rule is announced when a

court decides an issue of first impression whose resolution was not clearly foreshadowed. Chevron Oil, supra at 106.

Applying the first factor, the Court finds that although Chadha was undoubtedly a controversial decision with far-reaching consequences, it was not the type of decision that constituted an entire break with the past or one that was not foreshadowed. As the Supreme Court recognized and the parties conceded, the validity of the one-house veto has long been debated among lawyers. Those who expressed concern over its validity before Chadha did so for precisely the same reasons on which the Supreme Court relied in ruling it unconstitutional. See e.g. American Fed. of Gov. Employees v. Pierce, 697 F.2d 303 (D.C. Cir. 1982) (per curiam); Consumer Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982), aff'd sub nom. Process Gas Consumers Group v. Consumer Energy Council of America, 103 S.Ct. 3556 (1983).

Plaintiffs urge that this Circuit's decision in Zweibon v. Mitchell, 606 F.2d 1172 (D.C. Cir. 1979), cert. denied, 453 U.S. 912 (1981) should control the analysis on this factor. In that case, members of the Jewish Defense League who had protested the Vietnam War, sued for damages they sustained from the warrantless wiretapping of their offices. The District Court failed to apply the rule announced in United States v. United States District Court (Keith), 407 U.S. 297 (1972) retroactively to the suit and thereby precluded plaintiffs from relief. In Keith, the Supreme Court held that the requirement of a warrant to conduct a wiretap was not excused because the government sought to protect national security. The United States Court of Appeals for the District of Columbia reversed the District Court. The Court of Appeals did not consider that Keith announced a new rule; rather it only extended the consitutional warrant requirement to national security situations. Zweibon, supra, at 1179. The Keith decision did not represent a new application of a requirement that was not already clear from the four corners of the Constitution. Rather, it announced a rule that had been explained by many decisions interpreting the same requirement. Clearly, while the

Keith decision addressed an issue of first impression, it was not one whose resolution was not clearly foreshadowed under Chevron Oil supra, nor one that constituted an abrupt and fundamental shift in doctrine so as to constitute an entirely new rule under Hanover Shoe. Therefore, the Zweibon decision is not totally analogous to this case where there is a mandate from the four corners of the Constitution but a paucity of subsequent but pre-Chadha decisions interpreting that requirement to invalidate portions of statutes containing a one-house veto provision. However, the distinction between the application of the Keith rule in the Zweibon case from the Chadha rule in this case on the grounds that there were intervening judicial decisions anticipating Keith does not counsel a different result. In this case there is a statute which on its face, directly contradicts the presentment and bicameral requirements of the Constitution. Legal scholars had long advanced this position. Intervening decisions could only have served to underscore what was already apparent from a comparison of the constitutional requirements and the terms of the statute. For this reason, the Court cannot find that Chadha really represents new law. In place of judicial decisions holding that the legislative veto was unconstitutional, there had been sufficient discussion well known to the defendants of precisely those considerations that the Supreme Court found persuasive in deciding Chadha.

Under Chevron Oil, a court must secondly consider whether applying a rule retroactively would further the purpose of the rule. Defendants suggest that this Court examine the Supreme Court's recent, far-reaching decision in Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982), in which the Supreme Court held that bankruptcy courts are unconstitutionally organized but declined to apply its ruling retroactively to invalidate prior decisions of the bankruptcy courts. The Court instead held that its ruling should only apply prospectively. The Court agrees with plaintiff that Northern Pipeline is not particularly instructive.

First, it is clear that the Supreme Court was very concerned about the substantial inequitable result that retroactive application of its holding in Northern Pipeline would generate. Under Chevron Oil, the effect of retroactive application is a separate factor to consider and one which the Court will address infra. Second, in Chadha, the Supreme Court did not discuss whether its ruling would be applied either retroactively or prospectively; it was silent. From this silence this Court infers that the Supreme Court intended that the decision of whether to apply Chadha retroactively should be made on a case-by-case basis. The Court finds that in the context of these particular proceedings, a retroactive application of the Chadha decision would further its purposes.

The Court is presented here with a case in which exercise of the one-house veto was considerably more pervasive than it had been in Chadha. In this case, over the course of five years, regulations proposed by the Administrator underwent revisions directly as a result of the exercise of the veto and Congressional direction during the agency's preparation of the regulations. Anyone who even briefly reviews the legislative record filed by the defendants and supplemented by the plaintiffs cannot conclude otherwise. In essence, Congress through the action of one house or the other, continually rewrote the regulations at issue here. While the one-house veto provision undoubtedly was useful in allowing Congressional oversight to ensure that the purposes of the Act were furthered, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." Chadha, at 103 S.Ct. 2780.

The Court's finding on this factor is bolstered by its consideration of the third Chevron Oil factor. For the Court to find that there would be substantial inequitable results from applying Chadha retroactively, it would have to ignore the prior challenge to this Act by former President Nixon in Nixon v. Freemam. During the discovery phase of that case, GSA

essentially admitted that the one-house veto provision was unconstitutional. Additionally, it admitted that the content of the regulations were influenced by the House of Representatives members and House staff members and that the fourth set of regulations were, "in part or in whole," the product of the exercise of the Congressional one-house veto provided by Section 104(b) of the Act. See, Fed. Defendants' Response to Plaintiffs First Request for Admissions, Nixon v. Solomon, Civ. No. 77-1395 and Answer, paragraphs #13-15; Plaintiffs' Exhibits on Cross-Motions for Summary Judgment A, D and E respectively. Despite its acknowledgment, it nevertheless continued to process materials under the Act. Additionally, the Court has earlier found that there is no credible evidence presented by the defendants that if the regulations were invalidated, completed screening and processing would have to be undone. For this reason, the Supreme Court's analysis of the prejudice from its decision in Northern Pipeline is distinguishable. Based on this Court's ruling, what will have to be revamped are the regulations themselves unfettered by any untoward Congressional influence because of the one-house veto provision.

IV SEVERABILITY

A. Vitality of the Regulations

Defendants contend that regulations promulgated under Section 104 are not constitutionally void because the legislative veto provision is severable from the Act. While the Court finds that the one-house veto provision is severable from the Act, see IV B, infra, this finding does not save the regulations which were thrice revised by virtue of the exercise of that unconstitutional provision.

As the Court has previously mentioned in its discussion of retroactivity, GSA has admitted in Nixon v. Solomon, supra, that the different sets of regulations had been influenced by Congress and that the fourth set of regulations were "in part or in whole" the product of the exercise of the one-house veto.

Defendants have in this case admitted that Congress had an in-put into the modification of the regulations. See Defendants' Responses to Plaintiffs' First Set of Requests for Admission, numbers 6, 8, and 13. As in Chadha, the actions of the House and the Senate regarding the public access regulations had the "purpose and effect of altering legal rights, duties and relations of persons, . . .all outside the legislative branch." Chadha, 103 S.Ct. at 2784. In the absence of the repeated exercise of the legislative veto, the regulations would not have undergone the changes they did. Indeed, Congress clearly intended to retain complete control over the writing of the regulations. Congressman Brademus stated prior to passage,

> . . . it is precisely because we shared that apprehension that those regulations would not go into effect without an opportunity for both the House and Senate to review the regulations and to exercise a veto if we disapprove of them.

See 120 Cong. Rec. 37903.

The repeated exercise of the one-house veto provision, which is apparent from the legislative record submitted by the parties, distinguishes this case from EEOC v. Allstate Ins. Co., 570 F. Supp. 1224 (S.D. Miss. 1983). In that case, the District Court invalidated a statute which reorganized Executive Branch responsibilities because it contained a one-house veto provision, even though the one-house veto was never exercised. This case involves a continued and deliberate exercise of the power to redraft regulations in much the same way that legislation would be molded. The exercise of the veto has tainted all sets of regulations. Since the method by which they were modified is void, the by-product must as well be invalidated.

B. Severability of Section 104(b)

When one provision of a statute is declared invalid, a court must determine whether that provision is severable from the remainder of the statute. The Supreme Court has announced that "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be

dropped if what is left is fully operative as a law." Buckley v. Valeo, 424 U.S. 1 (1976), citing, Champlin Refining Co. v. Corporation Commission, 286 U.S. 210 (1932).

The Supreme Court has stated that where a statute contains a severability provision "[t]hat discusses an intention to make the Act divisible and creates a presumption that, eliminating invalid parts, the legislature would have been satisfied with what remained. . ." Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 235 (1932). The Supreme Court applied the same analysis in Electric Bond and Share Co. v. SEC, 303 U.S. 419 (1938) when it was asked to review a challenge to an injunction entered pursuant to two sections of the Public Utility Holding Act of 1935, 49 Stat. 803. One section of that Act required holding companies to file a detailed registration statement; pursuant to the other section, holding companies that failed to register were prohibited from using the mails and instrumentalities of interstate commerce. In that case, petitioners had argued to the Court that these two sections were "purely auxiliary" to other "control" provisions or the Act the intent of which was to simplify and eliminate holding company systems; they therefore urged that the entire Act be invalidated. The Supreme Court found that Congress had expressed its intent regarding separability by including such a provision of the Act. It explained,

> Congress has thus said that the statute is not an integrated whole, which as such must be sustained or held invalid. On the contrary, when validity is in question, divisibility and integration is the guiding principle. Invalid parts are to be excised and the remainder enforced. When we are seeking to ascertain the congressional purpose, we must give heed to this explicit declaration.

Id. at 434. Furthermore, the Court found that "invalidity should not extend to the remaining parts if by reason of their nature and as a practical matter they could be separately sustained and enforced." Id. at 439. Reasoning that Sections 4 and 5 would serve a purpose independently of other provisions in the Act and that they could be enforced, the Court sustained the injunction entered by the District Court and reserved a decision

on the validity of the remaining provisions which had not yet been challenged.

In Chadha, the Supreme Court found that it need not "embark on the elusive inquiry" set forth in Buckley v. Valeo since there was a serverability provision in the Immigration and Nationality Act. Chadha , 103 S.Ct. at 2774. Nevertheless, it did consider the legislative history and concluded that, "[a]lthough it may be that Congress was reluctant to delegate final authority over cancellation of deportations, such reluctance is not sufficient to overcome the presumption of severability raised by § 406." Id. at 2774.

The District of Columbia Circuit has recognized that the presence of a severability provision, "makes it extremely difficult for a party to demonstrate inseverability." Consumer Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982), aff'd sub nom. Process Gas Consumers Group v. Consumer Energy Council of America, 103 S.Ct. 3556 (1983). Although the Court found that using presumptions would not help resolve the issue, 673 F.2d at 442, that distinction would not have been helpful in any event since it was analyzing a statute which contained no severability clause. Despite the presence of a severability clause, this Circuit in American Federation of Government Employees v. Pierce, 697 F.2d 303 (D.C. Cir. 1982) refused to sever an invalid clause to leave the valid portion in effect. There the Court considered whether a provision that conditioned the disbursement of HUD funds was severable from a clause which required the approval of the Committee on Appropriation. The Court held that the clause requiring prior approval was invalid. Pursuant to Buckley and Champlin the Court considered whether Congress intended that which remained, the prevention of the disbursement of funds. Since it found that Congress did not intend to prevent the unconditional disbursement of funds, it struck that clause as well.

The Act in issue here contains a severability clause. It provides, in pertinent part,

> If, . . ., a judicial decision is rendered that a particular provision of this title or a particular regulation issued under the authority

> granted by this title, is unconstitutional or otherwise invalid, such decision shall not affect in any way the validity or enforcement of any other provision of this title or any regulation issued under the authority granted by this title.

the Act at§ 105(b). A severability provision creates a presumption that Congress would have been satisfied with those sections which remain after the invalidated ones are dropped. The Court does not rely solely on the presence of this clause in finding the invalid section severable, however. Plaintiffs assert that the entire Section 104 must be invalidated. This would gut the statute. The Court has examined the legislative history of the Act, as a whole, and the legislative history of the veto provision itself. The Court recognizes that both contain heated statements by various members of both Houses of Congress concerning whether they should trust the agency with control of the documents and how they might supervise the process leading to public access. Those intentions were subsequently realized when Congress exercised the veto it had authorized itself under the Act. The Court has also considered plaintiffs' argument that the one-house veto provision is quite detailed and demonstrates that Congress was preoccupied with exactly how it would exercise its power. The fact remains, however, that Congress was also concerned that a judicial decision, such as this one, which declares the one-house veto provision invalid, not drag the remainder of the statute down with it. The Court has not ignored the atmosphere in which the Act was created; rather, it concludes that emotional remarks exchanged by Congressmen in creating emergency legislation cannot compel it to invalidate the remainder of the section which allows the Administator to promulgate regulations, taking into account certain enumerated considerations. The Court has decided that Section 104(b) in its entirety is unconstitutional and that because of the legislative history and the repeated exercise of the one-house veto the present regulations promulgated thereunder are invalid.

Although the issue of severability was not before the three judge district Court in Nixon v. Administrator, with

Dickensonian prescience of things yet to come, Judge McGowan anticipated the severability question now before this Court. He wrote,

> For if a reviewing court were to hold that a set of regulations, whose content was due in part to exercise of the power to disapprove delegated to a single House of Congress, were constitutionally defective, the Administrator at that point would presumably be free to draft regulations more protective of constitutional rights, ignoring any activity of a single House if a court had already found such activity to render regulations unconstitutional.

Nixon v. Administrator, 408 F. Supp. at 338 n.17. His comments highlight the desirability of saving the provision and leaving a workable statute. Section 104(a) still provides a viable framework for the Administrator to promulgate new regulations.

In determining severability, the Supreme Court has instructed that, "a provision is further presumed severable if what remains after severance is fully operative as a law." Chadha , supra, at 2775, quoting, Champlin Refining Co. , 286 U.S. at 234. Once the one-house veto provision is struck from the Act, and with it all of the past sets of regulations, the rule-making authority of the Administrator under Section 104(a) remains. In reaching this conclusion, the Court disagrees with defendants that sections 104(b)(1) and (3) would remain. Those sections respectively provide that the regulations shall take effect within ninety legislative days and that changes in the regulations proposed by the Administrator shall be subject to the same provisions. Section 104(a), standing alone, is comparable in design and effect to Section 244(c)(1) of the Immigration and Nationality Act left remaining after the Supreme Court invalidated the one-house veto provision in Chadha. See Chadha, 103 S.Ct. at 2775-76. Under the Act, as here, a report will continue to be made to Congress. As such it will resemble the "report and wait" provision discussed in Chadha, supra at 2777 n.9. Pursuant to this decision, the Administrator will have to promulgate appropriate new public access

regulations by normal procedures which will become effective absent intervening corrective legislation.

The Court has found that Chadha should be applied retroactively to invalidate Section 104(b) of the Act and the regulations promulgated thereunder but that the rule-making authority delegated to the Administrator under Section 104(a) is an independent, fully operative, valid provision intended to be severable from Section 104(b). A necessary ingredient to this decision has been the factor of Congressional influence, which defendants have conceded and which the Court has seen and referred to throughout this opinion. The Court will not address this as a separate ground on which plaintiffs also seek judgment for it would not militate a different result; furthermore, a consideration of this alternative basis is not necessary in light of the Court's decision.

Often Courts are asked to decide cases that are significant only to the parties before it. Since it only writes an opinion for an audience that is all too familiar with the history of the case and the legal principles involved, it can phrase its opinion accordingly. This is not such a case and for this reason the Court wishes to caveat its decision. The decision rendered herein will not mean that the public will be foreclosed indefinitely or permanently from access to the materials authored by these plaintiffs. It will only mean that the access will be delayed as it has been in the past. Its decision is aimed at the process of providing for access not at the result of access itself. The public should learn about the Watergate era; the process should not create further unfairness. This Court has today held invalid much work. The risk that what was well intended will one day be undone faces all branches of government, including district courts. While it has invalidated the regulations thereby delaying the fruit of several years of work, it has also found that much may be preserved.

If the Administrator or Congress works swiftly, then appropriately promulgated regulations may become effective in the relatively near future assuring public access to the materials with due regard to individual rights.

An appropriate order accompanies this Opinion.

Thomas F. Hogan

THOMAS F. HOGAN
UNITED STATES DISTRICT JUDGE

DATED: December 30th, 1983

CITY OF ALEXANDRIA, Plaintiff,

v.

The UNITED STATES, Defendant.

No. 568-82L.

United States Claims Court.

Oct. 20, 1983.

As Corrected Nov. 2, 1983.

On Motion For Rehearing Dec. 1, 1983.

City brought action alleging breach of contract. The Claims Court, Nettesheim, J., held that: (1) practice of committee of House of Representatives of intervening and stopping negotiated sales of surplus property proposed by General Services Administration is an unconstitutional invasion of separation of powers; thus, GSA was bound to a contract implied in fact to convey property to city, and (2) city could not succeed on its claim that Government was equitably estopped from denying existence of contract.

Ordered accordingly.

1. United States ⇐58(4)

Unequivocal manifestations that offer was being made by city for purchase of surplus government property, which was signed by authorized city officials, precluded transforming that offer into an offer by the General Services Administration that was accepted by city, and fact that regional office had authority to contract did not change result.

2. United States ⇐59

In law of government contracts, no contract can be created binding government absent actual authority of government's agents to bind government.

3. United States ⇐58(5)

Regional office of General Services Administration did not have authority to contract with city for sale of surplus land where acting administrator did not sign and was not authorized to sign offer to purchase as required by regulation. Federal Property and Administrative Services Act, § 203(e)(6), as amended, 40 U.S.C.A. § 484(e)(6).

4. Contracts ⇐27

District court will recognize as an implied-in-fact contract one founded on requisite meeting of minds which is inferred from parties' conduct in light of surrounding circumstances.

5. United States ⇐58(5)

Implied-in-fact contract did not exist for sale of surplus government property where government agent lacked authority to contract and parties were chargeable with knowledge of additional actions that had to be accomplished before contract could come into existence.

6. Constitutional Law ⇐58
United States ⇐58(4)

Practice of committee of House of Representatives of intervening and stopping negotiated sales of surplus property proposed by General Services Administration was an unconstitutional invasion of separation of powers; thus, GSA was bound to a contract implied in fact to convey property to city. U.S.C.A. Const. Art. 1, § 7, cls. 2, 3.

7. Estoppel ⇐62.2(3)

In order to estop government, conduct or representations relied upon must be made by government officers acting within scope of their authority.

8. Estoppel ⇐52.15

Elements necessary for equitable estoppel are that party to be estopped must know facts, he must intend that his conduct shall be acted on or must so act that party asserting estoppel has a right to believe it is so intended, latter must be ignorant of true facts, and he must rely on former's conduct to his injury.

9. Estoppel ⇐62.2(4)

No detriment was suffered by city because of uncertainty of receiving congressional approval for sale of government surplus property to city and because lost use of earnest money deposit and loss of contract

did not constitute sufficient detriment; therefore, city could not succeed on its claim that Government was estopped from denying existence of a contract for sale of property.

On Motion For Rehearing

10. United States ⇐=86

Unlawful condition precedent to formation of public contract could not have legal effect.

11. United States ⇐=58(1)

Federal contract for sale of property did not have to be in writing.

12. United States ⇐=58(3)

If writing were required to memorialize terms of public contract for sale of land, sufficient writing existed in memorandum of acting administrator of the Federal Property Resources Service directing preparation of explanatory statement to be forwarded into Congress regarding sale.

Kenneth L. Adams, Washington, D.C., for plaintiff. Judith E. Schaeffer, Dickstein, Shapiro & Morin, Washington, D.C., and Cyril D. Calley, City of Alexandria, Alexandria, Va., of counsel.

Lynn Rubinstein, Washington, D.C., with whom was Acting Asst. Atty. Gen. F. Henry Habicht, III, Washington, D.C., for defendant. Terry Hart Lee, General Services Administration, and Pauline H. Miller, Dept. of Justice, Washington, D.C., of counsel.

OPINION

NETTESHEIM, Judge.

In this breach of contract action, plaintiff, the City of Alexandria ("plaintiff" or the "City"), seeks the difference between the price it paid for a parcel of surplus government real property and a lesser price allegedly agreed upon under a prior contract of sale for the same parcel. Although arguing that this claim is not appropriate for summary disposition due to contested issues of material fact, the City takes the position that if the case proceeds on summary judgment the Government should be estopped from denying the existence of the earlier contract or of an intervening contract, also for a lesser price than the City finally paid. As a final alternative, the City seeks interest on an earnest money deposit given for the first contract.

This case is now before the court after argument on defendant's motion for summary judgment on the issue of the existence of an express contract, as opposed by plaintiff, and on plaintiff's motion for summary judgment on the issue of estoppel, as opposed by defendant. Defendant cross-moved on this issue in oral argument. Plaintiff also moved orally, over opposition, for summary judgment based on a contract implied in fact.

FACTS

In its opposition to defendant's motion for summary judgment, the City identified twelve issues of allegedly disputed facts which precluded summary judgment. Although, as defendant argues, most of these issues are either conceded or immaterial, the following recitation considers all salient facts in the light most favorable to the City, the non-moving party, and resolves all doubts against the Government, as the movant. *See Lehner v. United States*, 1 Cl.Ct. 408, 412 (1983) (NETTESHEIM, J.) (citing cases).

The Invitation To Offer at $925,000

On November 8, 1977, the General Services Administration ("GSA") determined the King's Warehouse site ("the lot") in Old Town Alexandria, Virginia, to be surplus government property. Section 203(a) of the Federal Property and Administrative Services Act of 1949, 63 Stat. 385 (1949) (codified as amended at 40 U.S.C. § 484(a) (1976)), empowers the Administrator of GSA to supervise and direct sales of such property. The Administrator's authority to dispose of surplus real property has been delegated to the Federal Property Resources Service ("FPRS"), part of GSA's central office, which, in turn, has delegated its authority to the regional administrators.

After an unsuccessful attempt to acquire the lot by a historic preservation grant, the City informed GSA, on November 17, 1978, of its desire to purchase the lot by negotiated sale pursuant to 40 U.S.C. § 484(e)(3)(H).[1] Carlton Brooks ("Brooks"), Director, Real Property Division of the FPRS, replied on November 30 informing plaintiff that "negotiated sales of surplus Federal real property are based on the property's market value and subject to Congressional review. We are proceeding to obtain the necessary clearances within GSA and will send the City an offer as soon as possible."

The clearances included both the GSA Administrator's and the FPRS's approval of the National Capital Region's (the "Regional Office") disposal plan for the lot. On May 16, 1979, the FPRS authorized the Regional Office to negotiate a sale of the lot to the City at not less than the lot's appraised value of $790,000. If such a price could be negotiated, an explanatory statement was to be prepared for the Administrator of GSA to submit to the Senate Committee on Governmental Affairs and the House Committee on Government Operations (the congressional oversight committees), as required by 40 U.S.C. § 484(e)(6).[2] According to plaintiff, these advance clearances prove that if the contract subsequently negotiated had been submitted to the FPRS for review, it would have been approved.

On June 22, 1979, Regional Administrator Walter V. Kallaur ("Kallaur") sent the City an invitation to offer, pursuant to 41 C.F.R. § 101-47.304-4 (1978), on a form styled "Offer For Purchase" ("OFP"). The OFP identified the City as the "offeror" in the transaction and recited both that the offeror offered to purchase the lot for $925,000 cash and that the "Offer for Purchase of Government Property" was subject to the "General Terms Applicable to Negotiated Sales" in the attached GSA Form 2041 and to special terms set forth in the OFP. Form 2041 contained a "Rescission" clause, which provided in part:

> b. An explanatory statement ... will be submitted to the appropriate committees of the Congress ... and the offer probably will not be accepted by the Government until after the proposed disposal has been considered by such committees ....
>
> c. Any rescission, [sic] pursuant to a or b, above, will be without liability on the part of the Government other than to return the earnest money deposit without interest.

In his June 22, 1979 cover letter, Regional Administrator Kallaur requested that the City "review the Offer and, if it is acceptable to you, return two executed copies together with the necessary resolutions and a 10 per cent earnest money deposit." The City has characterized the cover letter and the OFP as an offer by GSA to sell the lot to plaintiff.

Negotiation of the Sale

On August 6, 1979, a meeting took place between Kallaur and Brooks and city officials. At this meeting Kallaur agreed to give plaintiff sufficient time to respond to the OFP so that it could gain the City Council's approval at the next council meeting on September 11. The City expressed a desire to file another application to acquire the lot free under a historic preservation grant. Kallaur agreed by letter dated August 7, 1979, that if the application were

1. Section 484(e)(3) provides in pertinent part:
> Disposals and contracts for disposal may be negotiated ... [without public advertising for bids] ... if
>
> ... (H) the disposal will be to States, Territories, possessions, political subdivisions thereof, or tax-supported agencies therein, and the estimated fair market value of the property and other satisfactory terms of disposal are obtained by negotiation ....

2. Section 484(e)(6) provides in pertinent part:
> [A]n explanatory statement of the circumstances of each disposal by negotiation of any real or personal property having a fair market value in excess of $1,000 shall be prepared. Each such statement shall be transmitted to the appropriate committees of the Congress in advance of such disposal.

successful "or if the City wishes to withdraw its offer before December 31, 1979, we will allow the withdrawal. Otherwise, I will proceed with the sale of the property to the City." Kallaur stated in deposition that he did not mean that he would wait until December 31 to process the offer. "We would process it any time prior to that date whenever they submitted it, if that is what they indicated to us that that is what they wanted to do."

GSA's Handbook for Disposal of Surplus Property, which contains instructions and procedures for the disposal of surplus real property, provides in part:

> If at the time of the submission of the explanatory statement to the committees the appraisal of the property would be more than nine months old, the regional office shall have that appraisal updated
>
> . . . .

PBS P. 4000.1–113e (Apr. 19, 1977). This handbook was not in the public domain. The appraisal on which the $925,000 price was based was due to expire on December 16, 1979, under this guideline. At the meeting on August 6, 1979, city officials were not told that the offer at $925,000 no longer would be viable if the explanatory statement had not been submitted to Congress by December 16. The GSA officials, however, did advise city officials that the current appraisal would expire in December and the price might then go up, but that if plaintiff submitted the OFP before the deadline the property would be sold to the City for $925,000. The GSA officials stated that the sale was subject to congressional review, although this was a routine formality.

At the conclusion of the August 6 meeting, Kallaur said that he had been pleased to make a deal (a statement defendant terms unauthorized), and both sides left with the understanding that a deal had been made subject only to the City's compliance with GSA's formalities. A city official requested confirmation by letter that if the City Council approved the purchase the property would be sold for $925,000. Kallaur supplied the requested letter on August 7. Defendant disputes plaintiff's statement that the letter was reviewed by the FPR without negative comment; but states that this is immaterial, because the Regional Office's disposal plan had been approved. The City contends that Kallaur's August 7 letter and representations at the August 6 meeting provide one basis to estop the Government from denying a contract at $925,000.

On September 11, 1979, the City Council passed a resolution "That the . . . [OFP] . . . whereby the *City* offers to purchase . . . [the lot] . . . is hereby approved . . ." and "That Mr. Douglas Harman . . . is hereby authorized to execute said *Offer* on behalf of the City . . . ." (Emphasis added). On October 9, 1979, the City delivered to GSA Real Property Division Director Brooks the signed OFP, the earnest money deposit of $92,500, and a copy of the City Council's resolution, together with a cover letter from City Manager Douglas Harman requesting credit terms. City official Howard C. Garrity ("Garrity") told Brooks however, that the City would buy the property regardless of whether credit were extended and that plaintiff had decided not to reapply for a historic preservation grant. Brooks assured Harman that the lot would be conveyed to plaintiff for $925,000 since the City had done everything it was supposed to do (the authorization to give such an assurance presenting a legal question, according to defendant). The acceptance page of the OFP is unsigned,[4] though GSA cashed plaintiff's check for $92,500.

3. The City's motion is treated as so arguing.

4. This section of the OFP reads in full:

> ACCEPTANCE BY THE GOVERNMENT
> The foregoing "Offer for Purchase of Government Property" is hereby ACCEPTED by and on behalf of the UNITED STATES OF AMERICA this _____ day of _____, 19____.
> UNITED STATES OF AMERICA
> Acting by and through the
> ADMINISTRATOR OF GENERAL SERVICES
> By
> D. CARLTON BROOKS
> Director, Real Property Division
> Federal Property Resources Service

Mishandling of the $925,000 Sale

A dispute lingers as to what, if anything, was done about processing plaintiff's offer during the year between its submission in October 1979 and November 1980. Following the City's version of the facts, the court finds that GSA failed altogether to process the offer and was negligent, as stated by Kallaur in his December 5, 1980 letter accompanying his explanatory statement submitted to the FPRS. The record contains documentation that some action was taken in 1980 to obtain FAA and flood plain clearances. This action appears, however, to have been merely preparatory to sending the City a new OFP based on an updated appraisal. City official Garrity avers that in November 1980 GSA's real estate specialist Jack Burrows told him that the paperwork on the sale had been misfiled, a version of events corroborated by Brooks. Nonetheless, it is undisputed that nothing was done to process the sale before the first appraisal expired in December 1979 and that Burrows was reprimanded for his negligence.

City officials claim without contest from the Government that they frequently contacted both Brooks and Burrows throughout this period from October 1979 to November 1980 and were assured repeatedly that there was no problem, that the sale was being processed, and that the lot would be conveyed to the City for $925,000. Although Brooks testified that he did not recall any such communications, defendant concedes that Burrows and Brooks assured the City that the sale was being processed. Garrity avers that had the City been informed that the GSA was not processing the offer, City officials "would have taken any and all steps necessary to correct that situation." This claim of reliance on assurances from GSA that the sale was being processed forms a second basis of plaintiff's claim that the Government should be estopped to deny a sale at $925,000.

The $1,875,000 OFP

On November 19, 1980, at real estate specialist Burrows' instigation, Kallaur sent the City a new OFP inviting an offer to purchase the lot for $1,875,000 based on an updated appraisal. Kallaur acted under the misapprehension that the City had never returned the first OFP, although defendant contends that Kallaur correctly stated in his cover letter, "During the period between the submission of your original offer and your decision not to seek to acquire the property under historic preservation covenants, it became necessary to update the appraisal upon which the original offer was made. . . ." Defendant elsewhere admits that plaintiff informed GSA that it had decided not to reapply for the historic preservation grant at the same time that it delivered the first OFP on October 9, 1979.

When plaintiff received the second OFP and Kallaur's November 19, 1980 cover letter, city official Garrity telephoned GSA's Burrows to ask what was going on. Defendant disputes Garrity's averment that Burrows told him the first OFP had been misfiled, yet admits that Garrity went to see Burrows and delivered another copy of the OFP. On November 21 Burrows wrote on a transmittal slip attached to the second OFP, "*Inoperative*—Hold action until further notice from this office." Defendant questions whether that note was legally authorized as a matter of law.

The matter was then brought to the attention of FPRS Director Brooks and Regional Administrator Kallaur. Kallaur testified in deposition that he decided

> that this had been an administrative error, a grotesque error, on the part of the Regional Office, that we had failed to discharge our responsibilities properly and that we were obligated to follow through under the terms of the original agreement and to advise [the FPRS and the Administrator] that we had made this mistake and proceed to forward an explanatory statement capturing the error and our proposed correction.

Kallaur and Brooks decided that GSA could and should process the sale at $925,000 and thus ratified Burrows' putting a hold on the second OFP. Again, defendant challenges the authority of Kallaur and Brooks to make such a decision.

On December 5, 1980, Kallaur sent an explanatory statement, pursuant to 41 C.F.R. § 101–47.304–12(a), (d),[5] to the FPRS explaining what had happened. Kallaur advanced his belief that the original offer was still valid and recommended a sale at $925,000. Attached was a GSA form signed by Kallaur requiring the signature of the GSA Administrator below the legend,

> Authority granted to accept the offer on or after 35 days from the date of the letters [sent to the Chairmen of the Senate and House Committees on Government Operations] and thereafter to consummate the negotiated sale, unless otherwise instructed or antitrust clearance is required.

Defendant considers this form decisive on the issue of the Regional Office's authority to accept the City's offer and also interprets 41 C.F.R. § 101–47.304–12(d), *see supra* note 5, to require the Administrator's approval before an offer may be accepted.[6]

Several days after the matter was brought to the attention of Brooks and Kallaur, Brooks told the City's Garrity that the second OFP (covered by Kallaur's November 19 letter) had been sent by mistake, and assured him the $925,000 sale would be "put back on track." Defendant, however, deems Brooks' authority to give such assurance a question of law. Moreover, defendant disputes plaintiff's contention that no one from GSA informed the City that a $925,000 sale would violate statute or internal GSA rules. Defendant cites the November 19 letter, which stated that between October 9, 1979, when the offer was submitted, and "your decision not to seek to acquire the property under historic preservations covenants" (also on October 1979), "it became necessary to update the appraisal upon which the original offer was made...." Of course, this was the November 19 letter that GSA's Brooks told City official Garrity had been sent by mistake. Defendant also argues that the statutory requirement for sale at fair market value was a matter of public notice and that the alleged illegality of a sale based on an expired appraisal rendered immaterial GSA's alleged failure to inform plaintiff that such a sale was illegal. In any event, it is undisputed that GSA told plaintiff not to take action on the second OFP. This forms the basis of plaintiff's attempt to estop the Government from denying the existence of a contract to sell at $1,275,00

Failure of the $925,000 Sale

During 1980–81 the FPRS was headed by Commissioner Roy Mathes ("Markes"), who had approved the original disposal plan in May 1979. This official refused to forward Regional Administrator Kallaur's December 5, 1980 explanatory statement to Congress on the ground that it was based on an expired appraisal. Defendant adds that the statement also lacked the required clearances. Kallaur defended his view to GSA Acting Administrator Raymond A. Kline, who after receiving advice from General Counsel, agreed with Kallaur on March 20, 1981, ordered an explanatory statement to be prepared proposing to sell the lot for $925,000 and providing a rationale for deviating from the requirement of GSA's internal guidelines that appraisal statements be based on updated appraisals

5. 41 C.F.R. § 101–47.304–12 (1982), provides, as it did in 1979–81, in pertinent part:

> (a) Subject to the exceptions stated in § 101–47.304–12(b), the disposal agency shall prepare an explanatory statement, as required by section 203(e)(6) of the Act, of the circumstances of each proposed disposal by negotiation.
>
> (d) Each explanatory statement when prepared shall be submitted to the Administrator of General Services for review and transmittal by the Administrator of General Services by letter to the Committee on Government Operations....
>
> (f) In the absence of adverse comment[s] by an appropriate committee [on the proposed negotiated disposal, the disposal agency may consummate the sale on or after days from the date of the submission of the explanatory statement]....

6. Although the Regional Office had authority over the disposal of surplus real property, PBS 4000.1–11a, provided in part: "No negotiated offer requiring the submission of an explanatory statement to the appropriate committees of the Congress shall be accepted without the prior approval of the Central Office.

Markon renewed his attempts to convert Kline to his viewpoint. On May 7, 1981, Kline discussed the case with the Chairman of the House Committee on Government Operations and a staff member. The staff member later contacted Kline, after having reviewed the file and, according to Kline's deposition testimony, expressed doubt that the committee would approve the sale if it were submitted for review because the appraisal period had expired. Kline then abandoned his plan to waive the internal guidelines, concluding that the House committee would obstruct a $925,000 sale.[7] By June 1981 Gerald B. Carmen ("Carmen") had assumed office as Administrator of GSA, but he directed Kline to continue handling the sale of the lot. After again contemplating in late June 1981 submission of an explanatory statement based on the $925,000 price, despite the likelihood of congressional opposition, on August 3, 1981, Kline finally ordered Markon to conduct the sale based on a current appraisal according to the guidelines.

On August 25, 1981, City officials met with Administrator Carmen and argued for a sale at the original price. The GSA did not disclose its earlier decision not to proceed with a sale at $925,000. During a November 18, 1981 meeting, GSA informed the City that it would not convey the lot for $925,000. GSA returned plaintiff's deposit without interest on November 20 and sent plaintiff a new OFP for $1.5 million on February 24, 1982. The City purchased the property at that price, having first filed a suit in federal district court seeking specific performance of the $925,000 contract. The suit was transferred to this court in November 1982.

DISCUSSION

The Express Contract Issue

Plaintiff argues that GSA had made the City an offer to sell the property, based on instances in which GSA personnel referred to the Government's invitations to offer as "offers", and that at the August 6, 1979 meeting the parties achieved the requisite meeting of the minds. Defendant erects as barriers to formation of a contract arguments that the OFP was an offer by the City, so that it was not capable of acceptance by the City, and that the GSA officials lacked authority to agree to a binding contract. According to defendant, no contract came into existence because, absent congressional review, GSA's offer could not be accepted. The City contends that although 41 C.F.R. § 101-47.304-4 "does state that the GSA issues 'invitations to make an offer,' this procedure is not required by statute and, we submit, was not as a matter of fact and substance followed in this case." Pl's Reply at 19 (emphasis in original).

The regulatory scheme for disposals of surplus property by negotiation is designed to give the greatest protection to the public coffers from disadvantageous bargains struck by GSA. The quoted regulation does more than state that the GSA issues such invitations, but prescribes: "In *all* advertised and negotiated disposals, the disposal agency *shall* prepare and furnish . . . written invitations to make an offer, which shall contain . . . all the terms and conditions under which the property is offered for disposal . . . ." (Emphasis added.)

[1] Although the City presents several indications that GSA made an offer, both the OFP and the City Council resolution specified that the City was making an offer. These unequivocal manifestations that an offer was being made by the City, which were signed by authorized city officials, preclude transforming that offer into an offer by GSA that was accepted by the City.[8] In *Russell Corp. v. United States*, 210 Ct.Cl. 506, 537 F.2d 474 (1976) (per

7. Kline testified, "After they reviewed the file and it was communicated back to me what their conclusion was, it was at that point that I thought it would be useless to go up there and be shot down anyway."

8. The discussion concerning lack of authority, see *infra* at pp. 12-13, disposes of plaintiff's argument that representations by GSA officials could convert the OFP to an offer by the GSA.

curiam), cert. *denied*, 429 U.S. 1078, 97 S.Ct. 811, 50 L.Ed.2d 791 (1977), the Court of Claims held that a contract did not come into existence in circumstances similar to this case. The GSA Administrator in *Russell Corp.* had approved the sale, but no representative of the Government had executed the acceptance page. That the offer was not accepted by the authorized signature defeated a claim based on express contract. 210 Ct.Cl. at 608, 537 F.2d at 481–82; *see Kellerblock v. United States*, 219 Ct.Cl. 608, 611, 618 F.2d 119 (1979). *See also Prevado Village Partnership, Etc. v. United States*, 3 Cl.Ct. 219, at 224 n. 3 (1983) (LYDON, J.).

[2] Plaintiff's argument that the Regional Office, per Kallaur, had authority to contract does not change the result. In the law of government contracts, no contract can be created binding the Government absent actual authority of the Government's agents to bind the Government. *Federal Crop Insurance Co. v. Merrill*, 332 U.S. 380, 384, 68 S.Ct. 1, 3, 92 L.Ed. 10 (1947); accord, *Prestex Inc. v. United States*, 3 Cl.Ct. 873, at 877 (1983) (LYDON, J.) (citing cases). Thus, the factual issues alleged by plaintiff as to the parties' intentions, states of mind, and understandings do not present themselves if the lack of authority defense prevails.

[3] Two impediments exist to a finding of authority here. The first is that the applicable regulation, 41 C.F.R. § 101-47.304–12(d), quoted *supra* note 5, requires that the Administrator review and transmit the explanatory statement to the congressional oversight committees.[9] After Kallaur approved the sale at $925,000, Acting Administrator Kline never transmitted the explanatory statements; nor did he sign, or authorize to be signed, the OFP or Kallaur's request for authority to accept the OFP. Thus, Kallaur lacked authority to bind the Government. Although Kline had authority to commit GSA, after his rebuff by the House Committee Kline withdrew his assent by declining to execute Kallaur's request or to continue processing the $925,000 OFP. *See Russell Corp.*, 210 Ct.Cl. at 608, 537 F.2d 474.

The second impediment to an authorized acceptance is the requirement of congressional review itself. Congressional consent is not a ministerial act, merely part of the mechanics of processing the offer. The legislative history cited by defendant reveals numerous instances wherein proposed negotiated sales were stopped and prices revised after congressional intervention. *See* H.Rep. No. 1763, *reprinted in* 1968 U.S. Code Cong. & Ad.News 2961, 2963–63. Although the City is correct that congressional approval is not required—at least technically—notice to Congress is required both by statute, 40 U.S.C. § 484(e)(5), quoted *supra* note 2, and by regulation, 41 C.F.R. § 101–47–304–12, (a), (d), quoted *supra* note 5. Congressional review is referred to explicitly in Form 2941, which accompanied the OFP, although Form 2941 stated only that acceptance "probably" would not occur until after consideration by Congress. Under the procedure for contracting in this case, as prescribed by statute and regulation, congressional review is a step that must be completed before acceptance. *Empressa Electronicas Walker, Inc. v. United States*, 223 Ct.Cl. [illegible], 620 F.2d [illegible] (1980); *Russell Corp.*, 210 Ct.Cl. at 608, 537 F.2d at 482.

The Implied-in-fact Contract Issue

[4] In its briefs, and fairly noticed in the complaint, the City advanced a claim based on contract implied in fact. Judge Harkins has provided a full current discussion of the parameters of this court's jurisdiction to entertain such a claim. *Pacific Gas & Electric Co. v. U.S.*, 3 Cl.Ct. 329, at 332–333 nn. 5–11 (1983) (citing cases); *see Hargrove v. United States*, 1 Cl.Ct. 225, 230 (1983) (MILLER, J.). In brief, this court will recognize an implied-in-fact contract [illegible]

[illegible] approval for acceptance, FPR 101-[illegible], quoted *supra* note 6, is unauthorized [illegible] not diminish the chargeable notice [illegible]

9. This regulation is sufficient to charge the City with notice of Kallaur's lack of authority finally to bind the GSA. That GSA's more explicit requirement of the Administrator's prior ap-

founded on the requisite meeting of the minds, which is inferred from the parties' conduct in light of the surrounding circumstances.

[5] Although in an implied-in-fact contract the presence of a manifestation of assent is the overriding factor, two defects preclude a conclusion that a contract implied in fact existed in the circumstances of this case. The first is Kallaur's lack of authority, which has been treated previously. *See Prestex, Inc.*, 3 Cl.Ct. at 377 (citing cases); *Hargrove v. United States*, 1 Cl.Ct. at 230. The second is that the parties were chargeable with knowledge of additional actions under statute and regulation that had to be accomplished before a contract could come into existence. *See Prevado Village Partnership, Etc.*, 3 Cl.Ct. at 223–225; *Russell Corp.*, 210 Ct.Cl. at 512, 537 F.2d at 488.

Plaintiff has failed to adduce any facts that would require a trial on the existence of a contract implied in fact.

The Constitutional Issue

Incident to oral argument, the court requested that the parties address the applicability of *INS v. Chadha*, —— U.S. ——, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), to the case at bar. The statute held unconstitutional in *Chadha* authorized a unicameral veto of the Attorney General's decision, upon delegated authority from Congress, to allow deportable aliens to remain in the United States. *Chadha* already has been extended to invalidate legislative vetoes of agency rulemaking. *Consumers Union of the United States, Inc. v. FTC*, 691 F.2d 575 (D.C.Cir.1982) (per curiam), *aff'd mem.*, —— U.S. ——, 103 S.Ct. 3556, 77 L.Ed.2d 1403 (1983); *Consumer Energy Council of America v. FERC*, 673 F.2d 425 (D.C.Cir.1982), *aff'd mem.*, —— U.S. ——, 103 S.Ct. 3556, 77 L.Ed.2d 1403 (1983).

The pertinence of *Chadha* to this case is that defendant has argued that because the congressional review procedure was not undertaken, consummation of a contract was never authorized. On the other hand, Kline, GSA's Acting Administrator, by ordering preparation of an explanatory statement waiving the requirement of a current appraisal, as recommended by Kallaur, manifested assent to the formation of a contract at $925,000. Kline thereby ratified Kallaur's decision, communicated to the City by Brooks, to proceed with consummating the sale. *See Thomson v. United States*, 174 Ct.Cl. 780, 357 F.2d 683 (1966). Alternatively, Kline was authorized to approve the explanatory statement and thereby assent directly, not as a ratifier. Kline was inhibited from submitting the explanatory statement and expressly authorizing acceptance only by his expectation of congressional disapproval. The question then becomes whether congressional review was a valid prerequisite for contract formation.

Involved in *Chadha* was section 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1254(c)(2) (1976), which derived from Congress' authority under U.S. CONST. art. I, § 8, cl. 4 "To establish an uniform Rule of Naturalization." Section 244(c)(2) in substance allowed either House of Congress to disagree by resolution with the decision of the Attorney General not to deport an alien and bound the Attorney General to the decision of either House.

In this case the statute in question, 40 U.S.C. § 484(e)(6), quoted *supra* note 2, derives from Congress' plenary authority over public lands in art. IV, § 3, cl. 2, and merely provides that prior to disposal by negotiation of certain real property an explanatory statement must be transmitted to the appropriate committees of Congress. The implementing regulation, 41 C.F.R. § 101–47.304–12(a), (d), (f), quoted *supra* note 5, requires submission of the explanatory statement and permits GSA to consummate a sale in the absence of adverse comment by an appropriate congressional committee or subcommittee. This case thus does not involve an explicit veto by one House of Congress; rather, a procedure established by statute, regulation, and practice is presented whereby one committee of one House of Congress can intervene in and stop a decision of the Executive Branch to contract.

Compelling similarities between this case and *Chadha*, however, are apparent. Here, GSA was required to submit for congressional review a contract for a negotiated sale of surplus property prior to consummating the transaction. In practice, as GSA's then-acting administrator Kline testified, the proposed sale would not be consummated without receiving the approval of the House oversight committee. As Kline put it, after having received a preview of disapproval from a committee staff member, "I thought it would be useless to go up there and be shot down anyway." The Acting Administrator deemed himself bound by the requirement of submitting a proposed sale for congressional review to defer to the committee's decision, and GSA's regulations so restricted him. 41 C.F.R. § 101-47.304-12(f) (quoted *supra* note 5).

Assuming, however, that another GSA Administrator were of a different view and regarded the comment of the House committee as purely advisory, Congress would not countenance GSA's going forward. The legislative history to the 1958 amendments to the Federal Property Administrative Services Act of 1949 reveals a number of instances wherein Congress demonstrably viewed its role as one of intervention for the purpose of objecting to proposed sales, primarily due to disagreement with appraisal values. H.Rep. No. 1788, 1958 U.S.Code Cong. & Ad.News at 2968-69.[10] Congress' objections were honored in these instances, and higher sales prices were obtained. Defendant also admits that GSA defers to the congressional recommendation. Def's Reply at 12, 14. Finally, Kline testified plausibly that the spectre of oversight hearings dissuades independent action by the agency when congressional approval is withheld. In practice, then, one House of Congress, by committee, can veto a proposed sale by the Executive Branch to which Congress, pursuant to art. IV, § 3, cl. 2 of the Constitution, has delegated its authority to dispose of public property.

On September 22, 1983, the Department of Justice filed a brief through its Land and Natural Resources Division, the same arm of defendant involved in the case at bar, in *National Wildlife Federation v. Watt*, 571 F.Supp. 1145 (D.D.C.1983). Plaintiff sought to enjoin the Secretary of the Interior from issuing certain coal leases after Congress, pursuant to section 204(e) of the Federal Land Policy and Management Act of 1976, Pub.L. No. 94-579, 90 Stat. 2753 (codified at 43 U.S.C.A. § 1714(e) (West Supp.1983)),[11] requested that the leases be withheld temporarily. The statute requires the Secretary to withdraw a proposed lease upon notification from a designated committee of either House of Congress that an emergency exists and that

10. The House Report also characterized the requirement to report thusly:

> Reporting is viewed merely as a procedure for informing Congress of deviation from the customary method of publicity advertised competitive disposal. The function of the committee has not been one of approving or disapproving each negotiated sale submitted to Congress, but rather has been one of general review and of registering objection when it seems apparent that the proposed sale is not in the best interest of the Government.

Id. at 2967. The preceding portions of the House Report to which citation is made in the text are in marked opposition to the quoted language.

11. 43 U.S.C. § 1714(e) provides in full:

> Emergency withdrawals; procedure applicable; duration
>
> When the Secretary determines, or when the Committee on Interior and Insular Affairs of either the House of Representatives or the Senate notifies the Secretary, that an emergency situation exists and that extraordinary measures must be taken to preserve values that would otherwise be lost, the Secretary notwithstanding the provisions of subsections (c)(1) and (d) of this section, shall immediately make a withdrawal and file notice of such emergency withdrawal with the Committees on Interior and Insular Affairs of the Senate and House of Representatives. Such emergency withdrawal shall be effective when made but shall last only for a period not to exceed three years and may not be extended except under the provisions of subsection (c)(1) or (d) of this section, whichever is applicable, and (b)(1) of this section. The information required in subsection (c)(2) of this subsection shall be furnished the committees within three months after filing such notice.

extraordinary measures must be taken to preserve values that otherwise would be lost. The provision is similar to the statute, regulation, and practice in this case, because it allows Congress to study a proposed action before final commitment ensues.[12]

In *National Wildlife Federation*, the Government put forth a position to which this court deems it bound in arguing the constitutionality of review procedure in this case: "The *Chadha* decision . . . requires that a provision purporting to authorize a mere congressional committee to alter the duties of the Executive . . . be held unconstitutional, even more so than it required the invalidation of a one-House veto provision . . . ." Govt's Suppl.Br., filed Sept. 26, 1983, at 6. The Government attacked the decision of the district court in *Pacific Legal Foundation v. Watt*, 529 F.Supp. 982, 1004 (D.Mont.1982), that the Secretary of the Interior's discretion to modify the committee's action by dictating the scope and duration of a lease withdrawal saved the constitutionality of the veto provision. The Government argued that *Pacific Legal Foundation* is invalid after *Chadha*: The Supreme Court's decision "does not leave any room for such leger-demain in statutory construction." Gov't Br., filed Sept. 23, 1983, at 23. The Supreme Court in *Chadha* held that the bicameral and presentment requirements of art. I, § 1, § 7, cls. 2, 3 applied to Congress' exercise of its authority under art. I, § 3 to establish a uniform rule of naturalization. Defendant argued that the rationale is applicable equally to Congress' exercise of its article IV powers. The court agrees with the Government's position in *National Wildlife Federation*.

Moreover, the Supreme Court's opinion in *Chadha* certainly did not bless the practice of unicameral intervention in sales of surplus government property by refusal to review a proposed sale or disapproval or withhold approval of such a sale:

> The Constitution provides Congress with abundant means to oversee and control its administrative creatures. Beyond the obvious fact that Congress ultimately controls administrative agencies in the legislation that creates them, other means of control, such as durational limits or authorizations and formal reporting requirements, lie well within Congress' constitutional power.

103 S.Ct. at 2786 n. 19. One of the two authorities cited for this proposition, Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U.L.Rev. 455, 462 (1977), specifically discusses reports to Congress after an action has been taken:

> Methods such as reporting requirements and congressional committee investigations allow Congress to scrutinize the exercise of delegated lawmaking authority, but they do not permit Congress to retain any part of that authority once it has been delegated. *None of these methods effectively enables Congress to review executive proposals before they take effect; none affords the opportunity for ongoing and binding expressions of congressional intent.*

Javits & Klein, *supra*, at 461–62 (emphasis added). Kaiser, *Congressional Action To Overturn Agency Rules: Alternatives to the 'Legislative Veto,'* 32 Ad.L.Rev. 667 (1980), is to the same effect.

The Supreme Court in *Chadha*, however, did sanction traditional "report and wait" provisions whereby Congress reserves to itself the opportunity to review proposed action before it becomes effective and to pass legislation barring its effectiveness if the proposal is found objectionable. 103 S.Ct. at 2776 n. 9 (citing *Sibbach v. Wilson*, 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed. 479 (1941)).

12. Judge Oberdorfer granted preliminary injunctive relief in *National Wildlife Federation* on nonconstitutional grounds and distinguished *Chadha* as not reaching the exercise under art. IV of Congress' allegedly proprietary, as opposed to legislative, role with respect to public lands. *National Wildlife Federation*, 571 F.Supp. 1145 (D.D.C.1983) (order granting preliminary injunction). This distinction would exempt legislation under art. IV, § 3, cl. 2 from the requirements of bicameralism and presentment because Congress is deemed a custodian of all public lands.

The statute, regulation, and congressional and agency practice in this case do not simply reserve to Congress an opportunity to pass legislation barring the proposed sale. What is reserved is the power to disapprove or to withhold approval without passing legislation. The statute, regulation, and practice are not tantamount to a "report and wait" provision or practice.

This constitutional inquiry becomes pivotal because Acting Administrator Kline testified that, if the City's offer had not been waylaid before the first appraisal expired, the proposed contract would have been processed in the normal fashion and been approved administratively. Kline has also testified that he would have approved an explanatory statement recommending that the resurrected offer be accepted. Hence, the sale, but for Kline's being advised that the House committee would not approve it, would have gone forward. Because the requirement of review by Congress is unlawful, the obstacle to contract formation disappears. Kline, the decision maker who had authority to bind GSA, is no longer inhibited by the need for congressional review and has manifested his assent, thereby ratifying Brooks' advice to the City. The contract, implied in fact, then can be enforced by the court.

[6] The court has considered carefully defendant's arguments [12] and holds that the practice of a committee of the House of Representatives of intervening in and stopping negotiated sales of surplus property proposed by the GSA is an unconstitutional invasion of the separation of powers. Without intervening and stopping a proposed sale, the only way Congress could override the GSA disposal decision would be by enacting further legislation. The action of the House Committee on Government Operations essentially was legislative in purpose and effect and thus was subject to the procedural requirements of art. I, § 7, cls. 2–3 of the Constitution—passage by a majority of both Houses with presentment to the President. As a result of the foregoing, the court holds that GSA is bound to a contract implied in fact to convey the subject property to the City for $925,000.

Reaching the constitutional question is unavoidable. The court is required to address the issue only because the City fails in its claims based on express contract, implied in fact contract, not impacted by constitutionality, and estoppel. *See New York City Transit Authority v. Beazer*, 440 U.S. 568, 582, 99 S.Ct. 1355, 1364, 59 L.Ed.2d 587 (1979); *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105, 65 S.Ct. 152, 154, 89 L.Ed. 101 (1944). The court's disposition of the estoppel claims follows.

The Estoppel Issues

Plaintiff grounds its claim to estop defendant to deny the existence of a $925,000 contract on two representations by the Government: 1) Kallam's letter of August 7, 1979, and related representations advising the city that if it submitted the necessary documents he would proceed with the sale, *see supra* note 2; and 2) Brooks' and Burrows' representations to city officials during the period October 1979 to November 1980 that the $925,000 OFP was being processed. Estoppel as to the $1,375,000

12. The Chairman of the House Committee on Government Operations did not seek to intervene in these proceedings after the court directed the parties to address the applicability of *Chadha* in argument. The Chairman of the House Committee on Interior and Insular Affairs intervened in the *National Wildlife* litigation because the Justice Department argued that 43 U.S.C. § 1714(a) was unconstitutional. Although the Department of Justice's interest was adverse to that of Congress with respect to the statutes and regulations in the *Chadha* and *National Wildlife Chase*, the Department views the practice under the statute and regulation in this case as not constitutionally offensive.

Interestingly, the Chairman, as intervenor in *National Wildlife*, argued: "[I]f Section 204(a) were viewed as a means of sharing the administration of the wilderness and public lands with the executive on an ongoing basis, the Ninth Circuit's *Chadha* decision would mandate a finding that section 204(a) was unconstitutional...." Intervenor's Memo in Support of Summary Judgment, filed Sept. 27, 1983, at 7. A shared administration of the disposal by negotiated sale of surplus government property is a precise description of Congress' and the GSA's interaction in this case.

contract is based on realty specialist Burrows' advice to the City, endorsed by Brooks and Kallaur, not to take any further action to complete and submit the second OFP because the $925,000 OFP was still viable.

[7] The doctrine of equitable estoppel also has been explicated recently by Judge Harkins in *Pacific Gas & Electric Co.*, 3 Cl.Ct. at 340–341 & nn. 12–15 (citing cases); *see Biagioli v. United States*, 2 Cl.Ct. 304, 308 (1983) (NETTESHEIM, J.). In order to estop the Government, the conduct or representations relied upon must be made by government officers acting within the scope of their authority. *Jackson v. United States*, 216 Ct.Cl. 35, 41, 573 F.2d 1189, 1197 (1978); *Emeco Industries, Inc. v. United States*, 202 Ct.Cl. 1006, 1015, 485 F.2d 652, 657 (1973) (citing cases). Kallaur's lack of authority, which was fatal to plaintiff's claim for a contract implied in fact, similarly dooms any estoppel to deny that GSA accepted the City's offer or that a contract otherwise existed based on his letter and other representations of similar effect. *E.g., Prestex, Inc.*, 3 Cl.Ct. at 379; *see Pacific Gas & Electric Co.*, 3 Cl.Ct. at 340–341. In *Manloading & Management Associates, Inc. v. United States*, 196 Ct.Cl. 628, 635, 451 F.2d 1299, 1302 (1972), relied on by plaintiff, the contracting officer was authorized expressly to bind the Government in the manner that plaintiff sought to bind it by estoppel.

As to the other leg of the estoppel claim on the $925,000 OFP—the misrepresentations concerning ongoing processing—defendant has conceded that the representations were authorized. As to the estoppel based on Burrows' instruction not to proceed on the $1,375,000 OFP, defendant has failed to adduce any evidence that the instruction was unauthorized.[14] Although Burrows was not authorized to accept or reject an OFP, he had implied authority to give the City instructions regarding the formalities and paperwork involved in concluding the transaction. Such authority was inherent in his job as the agent responsible for processing the transaction. The authority question evaporates because Brooks and Kallaur, Burrows' superiors, determined to press forward with the $925,000 OFP when they learned why the $1,375,000 OFP had been sent, and Brooks informed the City of this decision. These officials were authorized, at a minimum, to sponsor (as opposed to accept) an OFP, even one flawed by an expired appraisal.

[8] Four additional elements are necessary for equitable estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. *Emeco Industries, Inc.*, 202 Ct.Cl. at 1015, 485 F.2d at 657. The second element is sometimes expressed as a requirement that the party asserting estoppel have changed his position in reliance on the conduct or acquiescence of government officers, *see Russell Corp.*, 210 Ct.Cl. at 614, 537 F.2d at 485, or have had a reasonable right to act in reliance on defendant's actions or inactions. *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 98 (9th Cir.1970); *Emeco Industries, Inc.*, 202 Ct.Cl. at 1017, 485 F.2d at 658.

An inquiry therefore must be made whether plaintiff, having shown the requisite authority, satisfies the other four requirements to perfect an estoppel as to either the $925,000 or $1,375,000 OFP.

With respect to the $925,000 OFP, the City has failed to show that it acted to its injury based on the representations of Brooks and Burrows that the OFP was being processed. The City, as the party urging estoppel, must show that it reasonably relied on the representations to its detriment in order to satisfy the fourth element.

14. Because an estoppel based on representations by Kallaur is defeated by lack of authority, it becomes unnecessary to consider the City's argument that it acted in reliance thereon and suffered detriment by submitting the OFP and digest and later believing the Brooks/Burrows representations that the OFP was being processed. The court considers these ingredients to be sufficiently dealt with by the discussion infra at pp. 680–82.

Because city officials were misinformed that the offer was being processed, the City argues that it forfeited the opportunity to telephone the GSA officials and have the processing of the OFP put back on track before the first appraisal expired in mid-December 1979 or to institute a lawsuit under the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (1976), to require the GSA to act within a reasonable time. The City also claims loss of the use of its $92,500 earnest money deposit, as well as the lost opportunity to purchase at $925,000, as a consequence of defendant's representations.

The first two alleged detrimental consequences are speculative. Even assuming, arguendo, that the City could have prodded GSA or secured judicial relief through legal action before the appraisal expired, speculation is invited as to the OFP's fate in the congressional review process. The record is replete with GSA officials' best guesses that congressional review based on a current appraisal would be a mere formality. These opinions qualify as neither admissions nor expert opinions. Congressional action in this case simply is not capable of prediction, even if it could be shown that Congress has acted habitually in a certain fashion. The House Report itself demonstrates that Congress does not always deem current appraisals of estimated fair market value to be reliable.

As to the $92,500 earnest money deposit, *Russell Corp.* gives some comfort to plaintiff regarding the claim based on the failure to return the deposit "promptly after it was recognized that the deal could not go forward." *See* 210 Ct.Cl. at 614, 537 F.2d at 485. Defendant rejoins that the City insisted, after learning the fate of the $925,000 OFP in November 1979, that its offer at that figure continue to be considered and therefore should not be heard to complain. Suffice it to say that the City's deposit was not returned promptly when the GSA efforts to reinstitute the original OFP foundered. [illegible]

use of this sum is not considered a detriment because an earnest money deposit implies by its purpose uncertainty as to whether there will be a contract at all and acceptance of the concomitant risk that one may lose the use of one's money.

Finally, loss of "a good piece of business" does not constitute detriment. *Russell Corp.*, 210 Ct.Cl. at 614, 537 F.2d at 485. The City apparently contends that the loss of the more favorable contract at $1,075,000 constitutes detriment on that claim. This claim fails for the same reason.

In most of the cases cited by plaintiff, the parties incurred considerable expenses acting in reliance on government conduct. *See Broad Avenue Laundry & Tailoring v. United States*, 681 F.2d 745 (Fed.Cir.1982) (increased wages paid to employees by contractor); *United States v. Georgia-Pacific Co.*, 421 F.2d 92 (plaintiff improved forest land relying on Government's abandonment of claim thereto); *Merchants National Bank v. United States*, 699 F.2d 131 (Ct.Cl. 1982) (bank financed sale of buoys to Government, relying on buoys having passed government inspection); *Ensco Industries, Inc.*, 202 Ct.Cl. 1006, 485 F.2d 552 (expenses incurred preparatory to performance under contracts with Government); *Dana Corp. v. United States*, 209 Ct.Cl. 500, 476 F.2d 1032 (1972) (extra expenses incurred in packaging equipment furnished Government); *Manloading & Management Associates, Inc. v. United States*, 198 Ct.Cl. 628, 461 F.2d 1290 (same as *Ensco*); *Pacific Far East Lines v. United States*, 184 Ct.Cl. 189, 394 F.2d 990 (1968) (unprofitable contract entered into in reliance on Government's previous inclusion of such contracts in excess profit calculations under subsidy contract with Government); *Branch Banking & Trust Co. v. United States*, 120 Ct.Cl. 72, 98 F.Supp. 737, cert. denied, 342 U.S. 868, 72 S.Ct. 109, 96 L.Ed. 649 (1951) (contract performed fully).

[illegible]

and because the lost use of the earnest money deposit and the loss of the contract do not constitute sufficient detriment in the circumstances of this case. The City therefore cannot succeed on its claims for equitable estoppel.

CONCLUSION

Defendant's motion for summary judgment on the existence of an express contract is granted, but is moot; plaintiff's motion for summary judgment based on estoppel is denied, and defendant's cross-motion is granted, but is moot. Plaintiff's oral motion for summary judgment based on a contract implied in fact is granted, and the Clerk of the Court shall enter judgment for plaintiff in the amount of $975,000.[11]

IT IS SO ORDERED.

Costs to the prevailing party.[12]

ORDER

On Motion For Rehearing

NETTESHEIM, Judge.

Pursuant to RUSCC 59(a)(1), (e), defendant has moved, over plaintiff's objection, for a rehearing or an amendment of the judgment entered on October 21, 1983, upon this court's opinion granting summary judgment in favor of plaintiff based on a contract implied in fact for the purchase of real property.

Defendant contends that the court found an implied in fact contract where none in fact could exist; that the court found a constitutional impediment to the sale of the real property when the court had no occasion to reach the issue and when in any case no such impediment existed; and that the court ruled on issues which the parties were never given an opportunity to brief and which have far-reaching implications. Lastly, defendant requests reconsideration of the award of costs to plaintiff. The third and fourth points previously were addressed in the court's order of November 2, 1983, which, *inter alia*, allowed defendant to file its Rule 59 motion out of time.[1]

In cases such as the one at bar, this court has been directed by its predecessor court "to consider motions for rehearing with ex-

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manifest injustice as a consequence of the Government's conduct. Although Wharton has superficial credibility on the facts, plaintiffs there stand to lose the farm on which they had lived for 30 years. The City ultimately lost only a prospective acquisition. As shown by the cases discussed in the text, the Court of Claims adopted a more stringent standard for detrimental reliance to which this court deems itself bound. *See Rogich*, 2 Cl.Ct. at 388.

10. Plaintiff's claim for interest on the earnest money deposit must fall before the prohibition of 28 U.S.C. § 2516(a) (1982). *See Pacific Coast Medical Enters., Inc. v. United States*, 3 Cl.Ct. 140, 145 (1983) (NETTESHEIM, J.) (collecting cases), *appeal docketed*, No. 83-1428 (Fed. Cir. Sept. 27, 1983).

11. By its amended complaint, the City did not ask for attorneys' fees. Although this court does not intend to foreclose plaintiff from making an application pursuant to 28 U.S.C. § 2412(d) (Supp. V 1981), assuming that plaintiff qualifies, the foregoing strongly indicates that the Government's litigating position was reasonable in light of all the pertinent facts. *See Gavette v. United States*, 694 F.2d 812, 1982 (Fed.Cir.1982). The dispositive Supreme Court decision was brought to the parties' attention only after briefing was completed.

12. Defendant claims that it was not given an opportunity to brief the constitutional issue before decision (defendant previously had briefed the issue of a contract implied in fact). In *General Electric Co. v. United States*, 189 Ct.Cl. 816, 817–76, 416 F.2d 1230, 1231–32 (1969) (*en banc per curiam*), the Court of Claims stated:

> Where a new and separate issue is raised for the *first time* in the court's opinion and there decided, a petition for reconsideration (or other post-decision relief) addressed to that question will be approached favorably because the parties may not have had a fair opportunity to argue or brief the point. But where a party adversely affected by the court's decision on the issue has had fair notice that the question may well be in the case, has had a fair chance to present its position, has failed to do so, and gives no sufficient excuse for its failure, a demand for post-decision relief will normally be rejected. We point out specifically that a new issue or subject can be raised by motion from the bench, and counsel should be alert to this particularly if the question was suggested or mentioned. A party who feels that the record or its briefing on any issue inadequately represents his position on that matter should so inform the court at the argument or promptly thereafter; at the argument he can

ceptional care." *Carter v. United States*, 207 Ct.Cl. 816, 818, 518 F.2d 1190 (1975) (per curiam) (citing *General Electric Co. v. United States*, 189 Ct.Cl. 116, 117, 416 F.2d 1320, 1321 (1969) (en banc per curiam)). Two ancient cases establish the tenor for examining a Rule 59 motion based on alleged legal error, as in this case. The Court of Claims stated in *Roche v. District of Columbia*, 18 Ct.Cl. 289, 290 (1883), on a motion for a new trial:

> The reargument of cases cannot be permitted upon the sole ground that one side or the other is dissatisfied with the conclusions reached by the court, otherwise the losing party would generally, if not always, try his case a second time, and litigation would be unnecessarily prolonged, with no more satisfactory results, as there would still be a losing party in the end.

The court in *Roche* referred to *Calhoun v. United States*, 14 Ct.Cl. 198 (1878), as to the circumstances for granting a motion for new trial:

> [W]e apprehend that he [counsel] imagines that our decision was made, not under a mistake of fact, but under a mistake of law. When such a mistake appears in the record, a party may take advantage of it on appeal, when the case is appealable; but when it does not appear in the record, his remedy lies in a motion for review.

14 Ct.Cl. at 198.

Essentially, defendant argues that the court erred as a matter of law with respect to the constitutional issue and as to the legal conclusions drawn based on the evidence of record with respect to the constitutional and contract issues. Were this other than a case wherein defendant may have misperceived its opportunity to brief the constitutional issue prior to decision, see *supra* note 1, the motion would be denied summarily because it is directed solely to legal issues in the record.

Each of defendant's arguments has been considered with great care by the court, deprived as it is of plaintiff's comments on the new and revised arguments set forth in defendant's reply.

With respect to the constitutional issue, defendant argues that the statute in question is a "report and wait" provision and does not bear the stigmatizing veto provision that would render it unconstitutional on its face under the Supreme Court's decision in *INS v. Chadha*, ___ U.S. ___, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). Defendant contends, "The clear purpose . . . [of the statute] is to permit the appropriate committees to prepare any necessary legislation to govern the disposal and to attempt to enact that legislation by constitutional means—through bicameral passage and presentment. . . ." Def.'s Reply at 2; *see id.* at 5.

Putting aside the fact that the implementing regulation stipulates that a proposed sale may be consummated if it is not disapproved, a key problem with defendant's view is that it has not been shared by Congress. The legislative history referred to in the court's opinion reveals that the oversight subcommittee utilizes the review procedure to register objection to a proposed negotiated sale of public property. While it is true that the legislative history contains an assertion, cited to by defendant, that the review procedure has also been perceived by Congress as a monitoring device, the language is at odds with the previous discussion of the many instances in

also ask, if he desires, for leave to file a post-argument memorandum, or promptly after the argument he can file a motion for leave to present such a memorandum. If such a new subject is clearly brought into the case by questions from the bench at the argument, it is not proper practice to wait until after the decision. The court has a right to know before it decides whether the parties have anything further to present.

(Citation omitted; emphasis in original.)

Although the court gave the parties notice in advance of oral argument to be prepared to address the constitutional issue, so that the issue was not "raised by queries from the bench," the court infers that defense counsel may not have realized that the pre-argument notice entitled it to ask for leave to file briefs. To the end of creating a full record on the significant constitutional issue, defendant's Rule 59 motion was permitted to be filed out of time.

which the subcommittee utilized the review period to stop proposed sales. In fact, the language, quoted in the opinion, describes the oversight subcommittee's function as a dual one "of general review and of registering objection when it seems apparent that the proposed sale is not in the best interest of the Government." *City of Alexandria v. United States*, 3 Cl.Ct. 667 at 676 n. 10 (1983).

The legislative history reveals that Congress did not adopt a 30-day advance notice requirement, or a prior approval requirement, because the General Services Administration (the "GSA") had been cooperative in agreeing to more time when required. The explanatory statement was retained in the current statute because it afforded Congress an adequate opportunity for review, including objecting to a proposed sale. The legislative history therefore does not support defendant's contention that Congress itself envisioned the review period as enabling Congress to enact responsive or corrective legislation. Although the statute may be facially inoffensive, in conjunction with the regulation and congressional and agency practice, a *de facto* practice of congressional veto of proposed sales is present.

Defendant also contends that, assuming *arguendo* the unconstitutionality of the statute, regulation, and congressional and agency practice with respect to these proposed sales, no contract could have been formed because the acting administrator lacked authority to approve acceptance, because he did not approve acceptance, because his approval was not communicated to plaintiff (*but see, Thomson v. United States*, 194 Ct.Cl. 780, 357 F.2d 663 (1966)), and because the offer dictated a manner of acceptance—in writing—which obviously did not occur in the circumstances of this case. Defendant argues that the acting administrator lacked authority to waive the requirement of appraisal based on fair market value at the time the proposed sale was transmitted to Congress. It must be remembered, however, that the statute does not prescribe the stage of the contracting process at which fair market value must be determined; nor does the regulation. Only the internal procedure, cited in the court's opinion, requires the appraisal to be current as of the time of submission of the explanatory statement. On advice of agency counsel, the acting administrator determined that this internal guideline could and should be waived.

[10] Defendant's remaining arguments devolve to the theory that an unlawful condition precedent to contract formation can have legal effect. The veto resulting from the statute, regulation, and practice in this case forestalled the act that would have resulted in acceptance, *i.e.*, a contract signed on behalf of the GSA. The party who seeks to avail itself of the unlawful condition precedent, defendant would argue, thus can elude contract formation by relying on the non-occurrence of subsequent steps, such as manifestation of assent in the manner dictated by the offeror, which did not occur simply because the unlawful condition precedent intervened. Defendant's argument would call for an illogical result and is contrary to basic contract principles. *See* J. Calamari & J. Perillo, *The Law of Contracts* § 11-31 (2d ed. 1977).

[11, 12] Finally, defendant argues that the Government can avail itself of the law of the state of Virginia with respect to the statute of frauds. Examination of that law, however, is foreclosed to this court by *Penn-Ohio Steel Corp. v. United States*, 173 Ct.Cl. 1064, 1069-90, 354 F.2d 264, 269 (1965), in which the Court of Claims held that federal contracts need not be in writing. This case is binding precedent under General Order No. 1, 1 Cl.Ct. Rule 2.21 (1982). Even assuming, however, that this court could reexamine *Penn-Ohio*, as defendant urges, and that this court were to conclude that a writing were required, a sufficient writing to memorialize the terms of the sale of land exists in the acting administrator's March 19, 1981 memorandum directing the preparation of an explanatory statement to be forwarded to Congress.

Based on the foregoing,

IT IS ORDERED, as follows:

Defendant's motion for rehearing or to amend judgment is denied.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WILDLIFE FEDERATION, et al.,

Plaintiffs,

v.

WILLIAM P. CLARK,

Defendant.

Civil Action No. 83-2648

FILED
JAN 9 1984
JAMES F. DAVEY, Clerk

MEMORANDUM ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Defendant is under a preliminary injunction, entered against his predecessor, which restrains him from issuing leases to certain coal lands in Montana and North Dakota, pending decisions on cross-motions for summary judgment.1/ Those motions are now before the Court.

One of the plaintiffs, Chairman Udall of the House Interior and Insular Affairs Committee, suggests that the controversy is mooted by recent legislation which bars further lease sales in the area subject to the preliminary injunction until 90 days after Congress receives the report of the so-called Linowes Commission. Pub. L. No. 98-146, § 108, November 4, 1983. Indeed, Chairman Udall suggests that his very standing to sue was based on his statutory right to have the Secretary stay implementation of the lease offers until Congress could have an opportunity to act. Chairman Udall's Suggestion of Mootness and Opposition to Defendant's Motion for Summary Judgment at 3 n.2. In the alternative Chairman Udall urges the Court to hold this case until the so-called moratorium expires or Congress enacts some other law on the subject. Plaintiffs National Wildlife Federation and The Wilderness Society join in the request for a stay but do not support the suggestion that the controversy is moot.

1/ See National Wildlife Federation v. Watt, 571 F. Supp. 1145 (D.D.C. 1983) (granting preliminary injunction).

Defendant, however, vigorously challenges the suggestion of mootness and presses for decision on the merits. Defendant points out that the House Committee has not rescinded the withdrawal ordered by its Resolution adopted pursuant to section 204(e) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1714(e), and that the injunction sought by plaintiffs would enforce what is in effect a moratorium for up to three years.[2/] In contrast, the moratorium recently legislated in anticipation of the Commission's report will expire in a few months at the latest. Moreover, defendant has made no commitment which would eliminate the prospect of a continuing violation of the Resolution once the latter moratorium expires. Therefore, neither "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). The possibility that the Committee may rescind the Resolution or that Congress may pass a new law which could moot the controversy is necessarily speculative. Compare Iron Arrow Honor Society v. Heckler, 104 S. Ct. 373 (1983). Accordingly, the suggestion of mootness must be rejected.

The plaintiffs' suggestion that the Court stay the action pending the report of the Commission and further action by Congress in order to avoid decision on the constitutionality of an Act of Congress has considerable appeal.[3/] But the Court is persuaded that it is not necessary to reach "the nerve-center Constitutional questions." See Chairman Udall's Suggestion of Mootness at 4. The solution more fully described below will require the Secretary to honor his own regulation unless and

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[2/] At a hearing on the pending motions on Dec. 16, 1983, counsel for Chairman Udall indicated that the Committee was unlikely to meet before Congress reconvenes on Jan. 23, 1984, so that the Resolution could not be reconsidered before that time. There was a hint, but no commitment, that the Committee would withdraw the Resolution.

[3/] Defendant vigorously urges that section 204(e) is unconstitutional, so that continuing the preliminary injunction in force pending congressional action is to continue an invalid order. But defendant overlooks the fact that the preliminary injunction has been reviewable by appeal since it was expeditiously entered on Sept. 28, 1983, just so defendant could seek appellate review.

until he has rescinded or amended it after an appropriate rulemaking proceeding, or until the Committee has vacated its Resolution, and therefore does not require a judicial decision on the constitutional issue, at least until the rulemaking process is complete.

For these reasons the Court has proceeded to a decision on the merits after carefully considering the briefs filed by the parties on the merits and the additional oral argument. This decision is based substantially on the rationale for the decision granting the plaintiffs' motion for preliminary injunction and more fully stated in the Memorandum with Respect to Preliminary Injunction, National Wildlife Federation v. Watt, 571 F. Supp. at 1156-58.

Defendant persists in his predecessor's claim that he was not required to conduct a rulemaking before deciding whether the Chadha [4/] decision invalidated section 204(e) and the parallel regulation adopted to implement that statute, 43 C.F.R. § 2310.5. He invokes in support of this position a Supreme Court decision holding that the National Labor Relations Board (NLRB) had a discretionary choice between ad hoc litigation and rulemaking as a means of determining whether particular employees were "managerial employees" within the meaning of the National Labor Relations Act as interpreted by the Supreme Court. NLRB v. Bell Aerospace Co., 416 U.S. 267, 291-93 (1974). The defendant concedes that if in the present case the Secretary had chosen to rescind the regulation, informal rulemaking would have been required. Statement of Points and Authorities in Support of Defendant's Motion for Summary Judgment at 30 n.6. Here, however, the argument is that such a requirement applies only with respect to "validly prescribed" regulations. See Service v. Dulles, 354 U.S. 363, 372 (1957). Since this regulation was prescribed in deference to a provision of section 204(e), which the Secretary has determined to be invalidated by Chadha, it is, according to the Secretary, not "validly prescribed" and is a

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4/ INS v. Chadha, 103 S. Ct. 2764 (1983).

proper subject of rejection by him "on an ad hoc basis." Defendant's Statement at 34.

Defendant's claim cannot withstand the cold light of the language of the Administrative Procedure Act (APA) or the rising number of appellate decisions condemning ad hoc actions by Department heads who fail to apply to changes in regulations the statutory requirements routinely followed in their creation. Section 551 of the APA defines rulemaking as the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). Section 553 fixes minimal requirements of notice and comment for such rulemaking. Congress made these provisions specifically applicable to the Federal Land Policy and Management Act of 1976, and specifically invited judicial review of the Secretary's administration of that Act such as is available by judicial review of administrative rulemaking under the APA. See 43 U.S.C. §§ 1701(6), 1740. The Supreme Court and our Court of Appeals have repeatedly set aside department and agency attempts to amend or rescind outstanding regulations without strict adherence to a process of reasoning on the record with the benefit of informed suggestions from those affected by the proposed rescission or amendment. See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 103 S. Ct. 2856, 2871 (1983); Environmental Defense Fund, Inc. v. Environmental Protection Agency, 716 F.2d 915, 920-21 (D.C. Cir. 1983); International Ladies' Garment Workers' Union v. Donovan, No. 82-2133 (D.C. Cir. Nov. 29, 1983). Defendant has not effectively answered plaintiffs' contention that these decisions govern this case.

In the context of these decisions, defendant's reliance on NLRB v. Bell Aerospace Co. is misplaced. In that case, the NLRB had a disciplined choice: it could start a judicially reviewable process either by a rulemaking or by an enforcement proceeding. In either event, the Board had to take a judicially reviewable initiative. Here, by contrast, defendant's failure to proceed by rulemaking opened up for him an opportunity to escape judicial review of his constitutional law decision entirely. Unlike the NLRB, the defendant did not require any court action to implement

his decision. The defendant's action would have "made law," unless it was challenged. In fact, there was no certainty that the decision would or could be challenged in court; the wrong committed, if there was one, injured the public in general more (and more directly) than it injured any person likely to react with a timely court challenge. Indeed, when the original plaintiffs here did rise to challenge defendant's action, he resisted their challenge on standing grounds. See Statement of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction at 12-16.

The statute which defendant declared to be, in part, unconstitutional specifically emphasized the importance of administrative process and judicial review of the defendant's decisions on the leases at issue here. See 43 U.S.C. §§ 1701(6), 1740. Yet so far as defendant was concerned, his action was unreviewable. He was prepared to decide by himself an original constitutional question affecting the public's property contrary to what some (possibly including Congress) considered to be the public interest. And he embarked on this course without affording the public any opportunity for notice and comment, or, so far as he was concerned, without opportunity for judicial review - all in reliance on the ex parte legal opinion of his General Counsel and informal advice from the Department of Justice. When the Supreme Court gave the NLRB a choice between rulemaking and ad hoc litigation to test its interpretation of a Supreme Court decision, that Court did not intend to give an agency or department the option between judicially reviewable rulemaking and ad hoc decisions which it could protect from effective judicial review. This is not to disparage the professional ability of the General Counsel or the staff of the Department of Justice. However, an agency or department head deciding an important and original constitutional question will "benefit from outside suggestions" as much or more than courts, including the Supreme Court, who are required by due process and common sense to hear both sides of a constitutional issue before they decide it. See Environmental Defense Fund, Inc. v. Environmental Protection Agency, 716 F.2d at 920.

This further examination of the problem confirms the rationale of the preliminary injunction that the defendant was bound by 43 C.F.R. § 2310.5 to honor the Committee Resolution, unless and until he rescinded the regulation after notice and comment as prescribed by the APA, 5 U.S.C. § 553, or the Committee rescinded its Resolution. See National Wildlife Federation v. Watt, 571 F. Supp. at 1158.

Accordingly, the accompanying Order will grant plaintiffs' motion for summary judgment, deny defendant's cross-motion, and enjoin the defendant to honor the Committee Resolution as required by 43 C.F.R. § 2310.5, unless and until the defendant has complied with the rulemaking requirements of APA and exposed the result to judicial review as contemplated by that Act, or the Committee has rescinded the Resolution.

Date: January 9, 1984

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WILDLIFE FEDERATION, et al.,

Plaintiffs,

v.

WILLIAM P. CLARK,

Defendant.

Civil Action No. 83-2648

FILED

JAN 9 1984

JAMES F. DAVEY, Clerk

ORDER

For reasons more fully stated in an accompanying Memorandum and a Memorandum filed September 28, 1983, it is this 9th day of January, 1984, hereby

ORDERED: that plaintiffs' motion for summary judgment is GRANTED; and it is further

ORDERED: that defendant's motion for summary judgment is DENIED; and it is further

ORDERED: that the defendants, their agents, servants, employees, attorneys, and representatives shall be stayed, enjoined, and restrained from issuing to, entering into, or otherwise vesting in any person rights to coal leases for tracts in the Fort Union Coal Region, unless and until (1) the House Interior and Insular Affairs Committee has effectively revoked the Committee Resolution of August 3, 1983; (2) defendant has, after notice and rulemaking in accordance with the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq., rescinded the second clause of the first sentence of 43 U.S.C. § 2310.5(a); or (3) Congress has repealed, superceded or otherwise effectively rescinded the second clause of 43 U.S.C. § 1714(e). Nothing herein shall prevent the defendants from proceeding with emergency leasing pursuant to 43 C.F.R. § 3425.1-4.

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

UNITED STATES	)	
V.	)	CRIMINAL NO. F-3666-82
WADE A. LANGLEY	)	

MEMORANDUM OPINION

This matter comes before the court upon defendant's motion, through counsel, to arrest judgment, and the government's opposition thereto. Defendant challenges the validity of the statutes under which he was indicted, tried, and convicted.

On September 7, 1983, defendant was indicted and charged with two counts of rape under D.C. Code § 22-2801, one count of assault with intent to commit rape under D.C. Code §§ 22-2801, 22-503, and two counts of assault with intent to commit sodomy under D.C. Code §§ 22-3502, 22-503. On September 20, 1983, defendant was arraigned, and on February 9, 1984, following a jury trial, defendant was convicted of two counts of rape and one count of assault with intent to commit sodomy.

Defendant now argues that the statutes under which he was convicted were repealed by an act of the District of Columbia City Council on July 14, 1981.[1]

On July 14, 1981, the City Council passed by unanimous vote the District of Columbia Sexual Assault Reform Act of 1981. Bill No. 4-122. On July 21, 1981, this Bill was signed by the Mayor, and the Sexual Assault Reform Act, D.C. Act 4-69, was published in the D.C. Register for July 13,

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1 Defendant made a similar oral challenge to the indictment at the close of his case. That motion was denied by the court.

in the margin.

The Act as passed by the Council and signed by the Mayor repealed the rape and sodomy provisions of D.C. Code §§ 22-2801, 22-3502. In place of the repealed provisions, the Act provided, in pertinent part, as follows:

> Sec. 3. Sexual Assault in the First Degree. Whoever compels a person to participate in or submit to a sexual act:
> (a) by actual physical force;
> (b) by threatening or placing the victim in reasonable fear that any person will be subjected to death, kidnapping, or bodily injury...
> commits an offense and upon conviction shall be imprisoned for a term not exceeding twenty (20) years.
>
> Sec. 2. Definitions.
> (7) "Sexual act" means conduct consisting of contact: (a) between the penis and the vulva, anus, or mouth ... .

Under the District of Columbia Self-Government and Governmental Reorganization Act of 1973 (hereinafter Self-Government Act), specifically D.C. Code § 1-233(c)(2), acts of the City Council with respect to any act codified in Title 22, 23, or 24, shall take effect at the end of a thirty-day period beginning on the day such act is transmitted by the Chairman to the Speaker of the House of Representatives and the President of the Senate only if during such thirty-day period one House of Congress does not adopt a resolution disapproving such act. On September 9, 1981, consistent with its authority under the Self-Government Act, the United States House of Representatives voted to veto the Sexual Assault Reform Act. H.R. Res. 208, 97th Cong., 1st sess. (1981). No action was taken by the Senate, and the resolution was not presented to the President.

On June 23, 1983, in INS v. Chadha, ___ U.S. ___, 103 S. Ct. 2764 (1983), the Supreme Court held unconstitutional a provision of the Immigration and Nationality Act which

decision to suspend deportation of certain aliens. The Court found that such action was legislative in nature and subject to the constitutional requirements of passage by both Houses of Congress and presentation to the President. Id. at ___, 103 S. Ct. at 2786-87.

In the instant case, defendant argues that the single-house veto of the Sexual Assault Reform Act was unconstitutional, and therefore the statutes under which he was indicted and convicted were effectively repealed by the City Council. This Court finds, however, that the Supreme Court's decision in INS v. Chadha does not apply to the District of Columbia Self-Government Act and that the one-house veto of the Sexual Assault Reform Act was constitutional.

The Supreme Court's decision in Chadha was based on the inconsistency between the legislative veto provision of the Immigration and Nationality Act and the principles of Separation of Powers which are reflected in Art. I and throughout the Constitution. Art. I provides:

> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." Art. I, § 1.
>
> "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; ..." Art. I, § 7, cl. 2.
>
> "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill." Art. I, § 7, cl. 3.

Lawmaking is a power to be shared by both Houses and the President, and as the Supreme Court noted in Chadha,

carefully and fully considered by the Nation's elected officials." Id. at ___, 103 S.Ct. at 2783.

While the bicameral requirement and the Presentment Clauses were intended to provide checks on each branch of government, not every action taken by either House is subject to the requirements of Art. I. In Chadha, the court specifically listed the four exceptions, provided for in the Constitution, where one House may act alone with the unreviewable force of law:

> (a) The House of Representatives alone was given the power to initiate impeachments. Art. I, § 2, cl. 6.
> (b) The Senate alone was given the power to conduct trial following impeachment on charges initiated by the House and to convict following trial. Art. I, § 3, cl. 5;
> (c) The Senate alone was given final unreviewable power to approve or to disapprove presidential apppointments. Art. II, § 2, cl. 2;
> (d) The Senate alone was given unreviewable power to ratify treaties negotiated by the President. Art. II, § 2, cl. 2.

Id. at ___, 103 S.Ct. at 2786. This list is not exhaustive; these are merely the exceptions specifically provided for in the Constitution. To read Chadha as invalidating every statute in which Congress has reserved a legislative veto would "sound the death knell for nearly 200 other statutory provisions." See id. at ___, 103 S.Ct. at 2792 (White, J., dissenting). The Supreme Court simply could not have intended to invalidate legislative veto provisions which do not conflict with the purposes of the bicameral requirement and Presentment Clauses of Art. I. The retained congressional power with respect to local District of Columbia legislation is such a provision.

It is beyond dispute that Congress, under Art. I, § 8, cl. 17, may legislate for and grant self-government to the District of Columbia. District of Columbia v. Thompson Co., 346 U.S. 100 (1953). The power of Congress over the District of Columbia is not limited to national power, but

its affairs. Id. at 108. Thus Congress may delegate full legislative power to the District of Columbia, subject to constitutional limitations and to the power of Congress to revise, alter, or revoke the authority granted. Id. at 109.

In Northern Pipeline Construction v. Marathon Pipe Line Co., the Supreme Court noted that the powers granted under Art. 1, § 8, cl. 17 are "obviously different in kind from the other broad powers conferred on Congress: Congress' power over the District of Columbia encompasses the full authority of government, and thus, necessarily, the executive and judicial powers as well as the legislative." 458 U.S. 50, 102 S.Ct. 2858, 2874 (1982) (emphasis in the original).

Congress is not required to establish a local government for the District of Columbia which embodies the separation of powers principles of the national government. In O'Donoghue v. United States, the Supreme Court held that the judges of the District of Columbia's Supreme Court and Court of Appeals were constitutionally protected from having their salaries reduced by an Act of Congress. 289 U.S. 516 (1933). Because those courts had authority not only in the District, but also over all controversies arising under the Constitution and the statutes of the United States and having nationwide application, the judges presiding over them had to be appointed to serve during their good behavior in accordance with the requirements of Art. III. Id. In O'Donoghue, the Court emphasized the principles of Separation of Powers, that the acts of each department shall never be controlled by, or subjected to, the coercive influence of either of the other departments. Id. at 530-34. The principles of Separation of Powers would be violated if "the legislature, though restrained from

compel a resignation by reducing salaries to a copper." Id. at 534 (citation omitted).

However, where the system of the courts is made up of strictly local courts, the Superior Court and the District of Columbia Court of Appeals, Congress has plenary Art. I power to provide for trying local criminal cases before judges who, in accordance with the District of Columbia Code, are not accorded life tenure. Palmore v. United States, 411 U.S. 387 (1973). Thus where the courts handle cases arising under the District of Columbia Code and relating to matters of strictly local concern, the principles of Separation of Powers have no application, and the citizens of the District are no more entitled to Art. III judges than the citizens of any of the fifty states who are tried for strictly local crimes. In Palmore, The Supreme Court made clear that Congress' power over the District of Columbia is plenary and that Congress "may exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes." Id. at 397. Congress may "legislate for the District of Columbia with respect to subjects that would exceed its power, or at least be very unusual, in the context of national legislation enacted under other powers delegated to it. Id. at 398. See also Gibbons v. District of Columbia, 116 U.S. 404, 408 (1886)(constitutional constraints on federal taxing power do not apply with respect to action concerning the District of Columbia; Employees' Liability Cases, 207 U.S. 463, 500 (1918) (constraints of Commerce Clause do not apply with respect to action concerning District of Columbia).

The rationale behind the Presentment Clause is to "check whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures." INS v. Chadha, ___U.S. at ___, 103 S.Ct. at 2782. The

provide a check on each House of Congress. Id. at ___, 103 S.Ct. at 2783. However, where a body is exercising its plenary power over purely local matters not affecting the relationship of the federal government to its citizens, nor any relationship between components of the federal government, the principles of Separation of Powers and checks on authority have no application.

It is clear that Congress, by legislation presented to the President, may constitutionally establish a system of local governance that does not involve the President in the same way that must be done with respect to national matters. Under the Self-government Act, local legislation is enacted by adoption by the City Council and presentation to the Mayor. D.C. Code § 1-227(e). It becomes effective after being submitted to the Congress for a period of thirty legislating days unless Congress disapproves. D.C. Code § 1-233(c). Thus legislation becomes effective by nonaction, and there is ordinarily no participation by the President in the enactment of local legislation either directly or through his appointees.[2] It follows that Congress may also establish a system where the President need not oversee congressional action preventing local legislation from becoming effective. Moreover, the fact that one House may disapprove is not significant since "it is as though a bill passed in one house and failed in another." See Buckley v. Valeo, 424 U.S. 1, 285 (1976)(White, J., concurring in part and dissenting in part).

Furthermore, the power of either House to disapprove local legislation is not "legislation or ... an order, resolution, or vote requiring the concurrence of both Houses." Id. at 285. In Chadha, the Court held that congressional action is subject to bicameral and presentment

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[2] However, legislation concerning the District's budget must be submitted to the President. D. C. Code § 1-233 (c)(1).

regarded as legislative in its character and effect." __ U.S. at ___, 103 S.Ct. at 2789 [citing S. Rep. No. 1335, 54th Cong., 2d Sess., 8 (1897)]. The court concluded that the legislative veto was an exercise of legislative power because it "had the purpose and effect of altering the legal rights, duties and relations of persons." Id. at ___, 103 S.Ct. at 2789. In Chadha, the one-house veto operated to overrule the Attorney General and mandate Chadha's deportation. The power of Congress over local legislation in the District, however, is merely a negative power and does not create new rights, duties, or relations.[3]

In Chadha, Justice White in his dissenting opinion quoted Justice Brandeis:

> "The Court has frequently called attention to the 'great gravity and delicacy' of its function in passing upon the validity of an act of Congress.... The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' Liverpool, N.Y. & P.S.S. Co. v. Emigration Commissioners, supra [113 U.S. 33, 5 S.Ct. 352, 28 L.Ed. 899]". Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936) (concurring opinion).

Id. at ___, 103 S.Ct. at 2796. (White, J., dissenting). This court cannot conclude that the Supreme Court's decision in Chadha is so broad as to invalidate the legislative veto provision of the Self-Government Act. The one-house veto of the Sexual Assault Reform Act was not unconstitutional, and therefore defendant was indicted and convicted under the proper statutes.

Accordingly, it is this 28th day of March, 1984,

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[3] In Process Gas Consumers Group v. Consumers Energy Council of America, ___ U.S. ___, 103 S.Ct. 3556 (1983), the Supreme Court affirmed the invalidation of legislative veto provisions which provided Congress with the power to merely disapprove agency rules. However, that case has no application here, where Congress has plenary power over local legislation which has no impact on any federal interest.

CHIEF JUDGE

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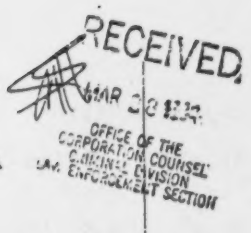

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

UNITED STATES OF AMERICA)

v.) Criminal No. F-4892-83

CALVIN MCINTOSH)

MEMORANDUM OPINION AND ORDER

While pending trial in this sexual assault case, defendant has moved to dismiss those counts of the indictment that charge him with rape and carnal knowledge, claiming that the statutory provision under which he is being prosecuted is invalid in light of the Supreme Court's recent decision in INS v. Chadha, 103 S. Ct. 2764 (1983).

I

The rape and carnal knowledge counts of the indictment are being prosecuted as violations of D.C. Code §22-2801. This section of the code was originally enacted on March 3, 1901. On July 21, 1981, the Mayor of the District of Columbia approved an act entitled the District of Columbia Sexual Assault Reform Act of 1981. This act, inter alia, renamed the offenses of rape and carnal knowledge and provided for the repeal of D.C. Code §22-2801. While the new act did not change the elements of rape or carnal knowledge, it did significantly reduce the penalties. Under D.C. Code §22-2801, the maximum penalty for either rape or carnal knowledge is life imprisonment; under the Sexual Assault Reform Act, the maximum penalty for either sexual assault in the first degree (rape) or an unlawful sexual act with a child (carnal knowledge) would be imprisonment for twenty years. Following the Mayor's approval of the Act on July 21, 1981, the Chairman of the Council of the District of Columbia transmitted the Sexual Assault Reform Act to the Speaker of the House of Representatives and the President of the Senate. As provided in §602(c)(2) of the District of Columbia Self-Government and Governmental Reorganization Act of 1973, D.C. Code §1-233(c)(2) (Home [illegible] to Congress by the Chairman that pertains

to Title 22 shall take effect at the end of a thirty-day period unless during that time either House of Congress adopts a resolution disapproving it.

On September 9, 1981, the House of Representatives adopted a resolution disapproving the Sexual Assault Reform Act.

On June 23, 1983, the Supreme Court, in INS v. Chadha, id., held unconstitutional a provision of the Immigration and Nationality Act which authorized either House of Congress, by resolution, to invalidate a decision of the Executive Branch. Specifically, the Court held unconstitutional §244(c)(2) of the Immigration and Nationality Act, which authorized either House of Congress to invalidate a decision of the Executive Branch (pursuant to authority delegated to the Attorney General by Congress) to allow an individual alien — otherwise ripe for deportation — to remain in the United States. The Court reasoned that the "one-House veto" provided by this statutory scheme was legislation, and concluded that, as such, it violated the Presentment Clauses, Art. I, §7, cls. 2, 3, and the bicameral requirement, Art. 1, §1 and §7, cl. 2, of the Constitution.

On August 24, 1983, a Superior Court grand jury returned an indictment charging defendant with rape and carnal knowledge in violation of D.C. Code §22-2801, taking indecent liberties with a minor child in violation of D.C. Code §22-3501(a), and enticing a minor child in violation of D.C. Code §22-3501(b). Defendant was arraigned on September 9, 1983, and is presently scheduled for trial on March 28, 1984.

II

In defendant's motion to dismiss those counts of the indictment charging him with rape and carnal knowledge, he asserts that the statutory provision under which he is being prosecuted, D.C. Code §22-2801, is invalid. He maintains that the relevant legislative

veto provision of the Home Rule Act is unconstitutional in light of the Supreme Court's ruling in Chadha, because the exercise of such legislative veto power by the House of Representatives in disapproving the Sexual Assault Reform Act of 1981 was unicameral legislation, violative of the presentment clauses and bicameral provision of the Constitution. Defendant further asserts that the legislative veto provisions of the Home Rule Act are severable from the remainder of the Act and that, therefore, the law now in effect is the Sexual Assault Reform Act of 1981. As a result, defendant claims, his post-Chadha indictment under D.C. Code §22-2801 cannot stand.

The United States concurs with defendant's assertion that the Home Rule Act's legislative veto provisions are unconstitutional and that they are severable from the Act. However, the United States maintains that Chadha should not be applied "retroactively" to invalidate defendant's prosecution. The United States also argues that there should be no prospective application of Chadha for a reasonable period of time to allow Congress the opportunity to correct its mistake. In short, it urges the Court to simply wait, in the hope that Congress will somehow -- sometime -- correct this alleged defect.

The District of Columbia, which was granted leave to intervene in this action, asserts that the legislative veto provisions of the Home Rule Act are constitutional. The District of Columbia maintains that the Chadha decision does not apply to the Home Rule Act, because of the unique status of the District. The District of Columbia further maintains that, even if the legislative veto provisions are found to be unconstitutional, then they should be severed from the Act. Moreover, the District of Columbia asserts that even if the veto provision is unconstitutional and severable, then this prosecution should still proceed, since the elements of the offenses are identical under either enactment, allowing this court to treat the statutory citation in the

indictment as, at most, a formal error in pleading.[1/]

The court has considered all of the pleadings submitted by the parties, as well as the oral arguments of the parties, and concludes that the Home Rule Act's unicameral veto provision, applicable solely to local legislation concerning the District of Columbia, does not infringe on any powers of the Executive Department, and is, therefore, well within the plenary powers granted to Congress by Art. I, §8, cl. 17, of the Constitution.

III

Defendant's assertion that the legislative veto provisions of the Home Rule Act are unconstitutional in light of Chadha must fail. Defendant's reliance on Chadha fails to comprehend that the Supreme Court is analyzing the federal scheme of enacting national laws, wherein the constitutional design for the separation of powers is of critical importance, whereas the Home Rule Act is rooted in Congress' exclusive and broad powers to legislate on local matters in the District of Columbia pursuant to Art. 1, §8, cl. 17, of the Constitution.

The court first looks at defendant's reliance on Chadha. The Supreme Court in Chadha held that §244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. §1254(c)(2), was unconstitutional. This provision authorized one House of Congress, by resolution, to invalidate a decision of the Executive Branch. The Supreme Court found that the action taken by the House of Representatives in vetoing the Attorney General's determination that a particular alien should remain in the United States was essentially legislative in purpose and effect, because it altered "the legal rights, duties and relations of persons . . . outside the legislative branch." Chadha, id. at 2784. The Supreme Court reasoned that because the House action was an exercise of legislative power, it was, therefore, subject to the standards

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1/ In light of the court's decision on the constitutionality of the legislative veto provision of the Home Rule Act the court need not consider the various positions taken by the parties on severability or on the retroactive or prospective application of Chadha.

prescribed in Article I of the Constitution. By analogy, defendant asserts that §602(c)(2) of the Home Rule Act, which authorizes one House of Congress, by resolution, to invalidate an act passed by the Council and signed by the Mayor, is unconstitutional. Defendant maintains that the disapproval by the House of Representatives of the Sexual Assault Reform Act of 1981 was legislative in purpose and effect, that the disapproval altered his legal rights, duties and relations, and that such an exercise of legislative power was subject to the standards prescribed in Article I. Defendant goes no further in analyzing the applicability of the Chadha decision to the Home Rule Act, but this court must.

In Chadha, in determining whether §244(c)(2) of the Immigration and Nationality Act violated the strictures of the Constitution, the Supreme Court stated that it was guided by the purposes underlying the Presentment Clauses, Art. I, §7, cls. 2, 3, and the bicameral requirement of Art. I, §1 and §7, cl. 2. The Court observed that "[t]hese provisions of Art. I are integral parts of the constitutional design for the separation of powers." Id. at 2781. In discussing the concept of separation of powers the Court explained:

> The Constitution sought to divide the delegated powers of the new federal government into three defined categories, legislative, executive and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted. Id. at 2784.

After discussing at length the Presentment Clauses and bicameralism, the Court summarized how these provisions were essential to the constitutional design for the separation of powers:

> The bicameral requirement, the Presentment Clauses, the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each branch must not be eroded. To accomplish what has been attempted by

> one House of Congress in this case requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President. Id. at 2787, (footnotes omitted).

The Court admitted that its inquiry into the constitutionality of §244(c)(2) was sharpened by the increasing use of Congressional veto provisions in statutes delegating authority to executive and independent agencies, and the Court stated that the need for the President's participation in the legislative process was, in part, "to protect the Executive Branch from Congress." Id. at 2784. Additionally, that Court noted that "the Presentment Clauses serve the important purpose of assuring that a 'national' perspective is grafted on the legislative process:

> 'The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some time, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the legislature whose constituencies are local and not countrywide . . .' Myers v. United States, supra, 272 U.S., at 123." Id. at 2782-83.

Clearly, the Court's decision in Chadha was based on the purposes underlying the Presentment Clauses and the bicameral requirements of Article I. [2/] The Court's rejection of §244(c)(2) was necessitated by the constitutional design for the separation of powers.

Defendant's analogy between §244(c)(2) of the Immigration and Nationality Act and §602(c)(2) of the Home Rule Act is inapposite. While §244(c)(2) was found to constitute an invasion of the Executive Branch by Congress, §602(c)(2) does not run afoul of the constitutional design for the separation of powers. Retained Congressional power over the Executive Branch does have an effect on the Executive Branch, but retained Congressional power over the District of Columbia clearly does not. In enacting §602(c)(2) of the Home Rule Act, Congress was

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2/ Moreover, the Chadha Court found that the bicameralism provision of Art. 1 was particularly important in the context of legislation as a device to protect the interests of the smaller states. Bicameralism, the Great Compromise, resulted in one house being viewed as representing the people, the other house representing the states. Id. at 2783-84.

legislating on purely local District of Columbia matters. This court, therefore, concludes that §602(c)(2) does not represent a usurpation by Congress of an Executive function; nor does it offend the constitutional design for the separation of powers; nor does it offend the constitutional mandate for bicameral agreement on national laws.

IV

Defendant's reliance on Chadha ignores Congress' unique and broad power over the District of Columbia. Article I, §8, cl. 17 of the Constitution provides that "[t]he Congress shall have power to . . . exercise exclusive legislation in all cases whatsoever, over such district . . . as may . . . become the seat of the government of the United States . . . ." That this clause vests Congress with plenary power over the District of Columbia is without dispute. Of Congress' power in this regard the Supreme Court in Palmore v. United States, 411 U.S. 389, 397-98 (1973), stated:

> Not only may statutes of Congress of otherwise nationwide application be applied to the District of Columbia, but Congress may also exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes . . . . It is apparent that the power of Congress under Clause 17 permits it to legislate for the District in a manner with respect to subjects that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it under Art. I, §8.

Similarly, in District of Columbia v. Thompson Co., 346 U. S. 100, 108-109 (1953), that Court stated:

> The power of Congress over the District of Columbia relates not only to "national power" but to "all the powers of legislation which may be exercised by a state in dealing with its affairs." . . . There is no reason why a state, if it so chooses, may not fashion its basic law so as to grant home rule or self-government to its municipal corporations . . . .
>
> This is the theory which underlies the constitutional provisions of some states allowing cities to have home rule. So it is that decision after

> decision has held that the delegated power of municipalities is as broad as the police power of the state, except as that power may be restricted by terms of the grant or by the state constitution . . . . It would seem then that on the analogy of the delegation of powers of self-government and home rule both to municipalities and to territories there is no constitutional barrier to the delegation by Congress to the District of Columbia of full legislative power, subject of course to constitutional limitations to which all lawmaking is subservient and subject also to the power of Congress at any time to revise, alter, or revoke the authority granted. (citations omitted) (footnote omitted).

In fact, the Court has repeatedly expressed the view that Congress' power over the District is plenary.[3/]

In O'Donoghue v. United States, 289 U.S. 516 (1933), the Supreme Court held that the Constitution permitted Congress to confer upon Article III courts of the District certain administrative functions that it could not constitutionally confer upon Article III courts elsewhere. The Court reasoned:

> Subject to the guaranties of personal liberty in the amendments and in the original Constitution, Congress has as much power to vest courts of the District with a variety of jurisdiction and powers as a state legislature has in conferring jurisdiction on its courts . . . .
>
> If, in creating and defining the jurisdiction of the courts of the District, Congress were limited to Art. III, as it is in dealing with the other federal courts, the administrative and other jurisdiction spoken of could not be conferred upon the former. But the clause giving plenary power of legislation over the District enables Congress to confer such jurisdiction in addition to the federal jurisdiction which the District courts exercise under Art. III, notwithstanding that they are recipients of the judicial power of the United States under, and are constituted in virtue of, that article.
> Id. at 545-46. (citations omitted).

Thus, in exercising its plenary power over the District, Congress is not limited by all of the constitutional restrictions that operate when it is legislating on a national basis. Defendant's assertion

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3/ O'Donoghue v. United States, 289 U.S. 516, 545 (1933); Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 435 (1932); Capital Traction Co. v. Hof, 174 U.S. 1, 5 (1899); Shoemaker v. United States, 147 U.S. 282, 300 (1893); Gibbons v. District of Columbia, 116 U.S. 404, 407 (1886); Mattingly v. District of Columbia, 97 U.S. 687, 690 (1878); Kendall v. United States, 37 U.S. (12 Pet.) 524, 619 (1838).

that the House's disapproval of the Sexual Assault Reform Act of 1981 was invalid fails to recognize Congress' plenary power over the District. Defendant's rigid interpretation of the Presentment Clauses and the bicameral requirement of Article I, if adopted by this court, would render meaningless the long-established tenet that Congress, in exercising its power over the District, has all the powers of legislation which may be exercised by a state in dealing with its affairs. There is nothing in the Constitution to hinder a state from enacting a statute which contains a unicameral legislative veto provision. Similarly, when exercising its plenary power over the District, there is nothing in the Constitution to hinder Congress from enacting a local statute which contains such a legislative veto provision.[4/]

Recently, the Supreme Court in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858, 2874 (1982), discussed Congress' plenary authority over the District of Columbia, noting that:

> ". . . the powers granted under [Article I, §8, cl. 17] are obviously different in kind from the other broad powers conferred on Congress: Congress' power over the District of Columbia encompasses the full authority of government, and thus, necessarily, the executive and judicial powers as well as the legislative." (emphasis in the original).

The appellants in Northern Pipeline had urged the Court to extend Congress' power to create Article I courts (see Palmore v. United States, supra) to permit it to create Article I bankruptcy courts. However, the Court refused to equate Congress' plenary power over the District, pursuant to Article I, §8, cl. 17, to its national power to establish bankruptcy laws pursuant to Article I, §8, cl. 4.[5/] The Court held that Congress' authority to create Article I courts, without violating the separation of powers principles of the Constitution,

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4/ Congress is, of course, prohibited from dispensing with any of the guarantees of personal liberty in the amendments and in the original Constitution when exercising its plenary power over the District.

5/ It is interesting to note that Congress' power to establish bankruptcy laws and Congress' power to establish a uniform rule of naturalization both flow from Article I, §8, cl. 4. In Northern Pipeline and in Chadha, the Supreme Court found that Congress' broad exercise of national power under clause 4 violated strictures of the Constitution.

was limited to certain geographical areas, where no state operated as sovereign, and therefore Congress was to exercise the general powers of government. The exceptions, the Court concluded, were the territories, courts martial, and the District of Columbia.[6/]

> But when properly understood, these precedents represent no broad departure from the constitutional command that the judicial power of the United States must be vested in Article III courts. Rather, they reduce to three narrow situations not subject to that command, each recognizing a circumstance in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers. Id. at 2867-68.

In the instant case, as in Northern Pipeline, the literal commands of Constitutional provisions "must be interpreted in light of the historical context in which the Constitution was written, and of the structural imperatives of the Constitution as a whole." Id. Thus, in Northern Pipeline, the Court clearly recognized that Congress' powers under Art. 1, §8, cl. 17 are different in kind from its other Art. 1, §8 powers and that Congress' exercise of those unique powers is not limited by all of the constitutional restrictions that operate when it is legislating on a national basis.

V

Indeed, an examination of an exceedingly relevant historical context buttresses this court's conclusion that Congress' utilization of a unicameral veto power over local laws promulgated by the District of Columbia's council and mayor does no violence to the Constitution. That historical context is the very first Congress' dealings with the Northwest Territories. That first Congress reenacted the Northwest Territories Ordinance of 1787, once the Constitution was enacted, to

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6/ The Court included one more exception: legislative courts and administrative agencies created to adjudicate cases involving "public rights."

conform to the requirements of that document. One of the provisions of the ordinance provided that a majority of a territory's judges and its governor should enact laws and report them to Congress, and that these laws should be in force in the territory unless disapproved by Congress. There was no provision in the ordinance for presentment to the President. Although the First Congress did change various provisions of the ordinance, to conform to the Constitution, they made no change in this provision regarding a Legislative veto over territorial laws. See Chadha, supra, at 2800-01, fn. 18 (dissent of Mr. Justice White).

This historical context is relevant for two reasons. First, Congress' power over the District of Columbia pursuant to Art. I, §8, cl. 17, is most nearly analogous to its power over the territories pursuant to Art. IV, §3, cl. 2. Indeed, the Supreme Court has found the analogy to be quite apt, noting that "the power of Congress over the District and its power over the Territories are phrased in very similar language in the Constitution." District of Columbia v. Thompson Co., supra, 105-106.

Second, the actions of the first Congress are of particular significance in interpreting the Constitution since that Congress was largely composed of the persons who had written Article I and secured the ratification of the Constitution:

> "In the first Congress sat many members of the Constitutional Convention of 1787. This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixed the construction to be given its provisions." Hampton v. United States, 276 U.S. 394, 412 (1928).

The first Congress is one "whose Constitutional decisons have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument." Myers v. United States, 272 U.S. 52,174-175 (1926). The actions of that first Congress, then, in providing a Legislative veto for proposed territorial

laws, very strongly indicates that the similar Legislative veto over proposed District of Columbia laws in the Home Rule Act does no violence to the provisions of the Constitution.

VI

The Presentment Clauses and the bicameral requirement of Article I must be complied with when national legislation is enacted. Chadha makes that conclusion abundantly clear. However, Congress, in exercising its plenary powers over the District of Columbia, may eschew these requirements, since both Congress and the Supreme Court have recognized that provisions of the Constitution:

> " . . . which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accomodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." Palmore v. United States, supra, 407-408.

VII

Accordingly, defendant's Motion to Dismiss Counts of the Indictment must be denied.

SO ORDERED.

JUDGE

3/27/84
Date

United States Department of Justice
Washington, D.C. 20530

ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

APR 11 1984

MEMORANDUM FOR MICHAEL J. HOROWITZ
COUNSEL TO THE DIRECTOR
OFFICE OF MANAGEMENT
AND BUDGET

Re: Constitutionality of Proposed Regulations of Joint Committee on Printing under Buckley v. Valeo and INS v. Chadha

This responds to your letter of December 7, 1983, in which you requested our opinion on the constitutionality, in light of the Supreme Court's decisions in Buckley v. Valeo, 424 U.S. 1 (1976), and INS v. Chadha, 103 S. Ct. 2764 (1983), of the proposed regulations published by the Joint Committee on Printing on November 11, 1983. For the reasons discussed below, we conclude that the regulations are statutorily unsupported and constitutionally impermissible.

The proposed regulations (copy attached) would effect a significant departure from the historical role of the Joint Committee on Printing (JCP). 1/ Specifically, they would redefine "printing" to encompass virtually all processes by which legible material is created or stored, thus increasing the number of activities purportedly subject to JCP oversight and control. These activities include, among others, planning and design of government publications (defined to mean any textual material reproduced for distribution to government departments or to the public), word processing, data storage and document retrieval, apparently subsuming the operation of every copying facility of a department. The proposed regulations would require executive departments to submit annual plans outlining their intended activities and to seek advance approval of all projected goals, policies, strategies, purchases, publications, and means of distribution. In addition, departments would be asked to submit plans for a second and third year, seeking JCP approval of all projections relating to the expanded concept of printing. These obligations would "provide the committee with a broader and better overview of all of the Federal Government's printing and publishing activities." 129 Cong. Rec. H9710 (daily ed. Nov. 11, 1983) (remarks of JCP Chairman Hawkins). The revised regulations, governing storage, duplication and distribution of information, "seek to replace JCP micro-management procedures with oversight and policymaking functions." Id.

The Joint Committee on Printing is composed, by statute, of the Chairman and two members of the Committee on Rules and Administration of the Senate and the Chairman and two members of the Committee on House Administration of the House of Representatives. 44 U.S.C. § 101. Vacancies are filled by the President of the Senate and the Speaker of the House of Representatives. 44 U.S.C. § 102. The authorized functions of the JCP are specified in various provisions of Title 44 of the United States Code.

This memorandum will address, in turn, the three major legal issues suggested by these regulations: (1) whether there is statutory authority for the proposed regulations, (2) whether the regulations would involve congressional performance of executive functions, and (3) whether a joint

(See footnotes at end of article.)

committee of Congress is seeking to exercise legislative power. We conclude that the proposed regulations fail on all three grounds. 2/

I. Statutory Authority

The first issue we address is the statutory basis for promulgation of these "legislative" rules. The Printing and Documents statute, Title 44 of the United States Code, contains three sections upon which the JCP relies for its "regulatory" authority. The first is 44 U.S.C. § 103, which allows the JCP to "use any measures it considers necessary to remedy neglect, delay, duplication, or waste in the public printing and binding and the distribution of Government publications." Second, § 501 provides that all government printing, binding, and blank-book work shall be done at the Government Printing Office (GPO), except: (1) work the JCP considers "to be urgent or necessary to have done elsewhere" and (2) printing in field plants operated by executive or independent departments, "if approved by the Joint Committee on Printing." Finally, § 502 provides that if the Public Printer is unable to do certain printing work at the GPO, he may enter into contracts to have the work produced elsewhere, "with the approval of the Joint Committee on Printing." As far as we are aware, these statutory provisions constitute the full extent to which the entire Congress might have been said to empower the JCP to participate in the decisionmaking process involving printing and distribution of materials published by the Executive Branch.

The proposed regulations were published in the Congressional Record on November 11, 1983, a gesture apparently not mandated by any existing statute. Nor are we aware of any other procedural requirements which might apply to promulgation of "regulations" such as these. Although Congress has enacted an elaborate scheme in the Administrative Procedure Act (APA) to control the issuance of regulations by executive agencies and to protect the persons subject to them by requiring broad opportunity for public notice and comment and availability of an administrative record reflecting these comments, we do not know of any analogous protections for those putatively subject to "legislative regulations." On the one hand, for the reasons stated in Part II of this memorandum, "legislative regulations" can apply only internally in Congress. Therefore one would not necessarily expect a scheme such as the APA to apply. On the other, it could also be assumed that had Congress contemplated or intended to authorize a committee's issuance of broad, binding regulations which could have an effect on the public and on the functioning of the Executive Branch, it might have enacted a procedure comparable to the APA to ensure that the practice comports with the principles of due process. Thus, it could be argued that it is doubtful that Congress intended to authorize this committee to assume a regulatory role with respect to persons outside the Legislative Branch. See Chadha, 103 S. Ct. at 2784.

At the very least, authority to regulate in a sweeping fashion cannot be presumed without an express indication that Congress has specifically delegated regulatory power. 3/ The three statutory provisions mentioned above fall far short of a clear delegation of regulating authority.

A. 44 U.S.C. § 103

The first, § 103, was originally enacted in 1852 in the following form:

> The Joint Committee on Printing shall have power to adopt such measures as may

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(See footnotes at end of article.)

> be deemed necessary to remedy any neglect or delay in the execution of the public printing, provided that no contract, agreement, or arrangement entered into by this committee shall take effect until the same shall have been approved by that house of Congress to which the printing belongs, and when the printing delayed relates to the business of both houses, until both houses shall have approved of such contract or arrangement.

Ch. 1, 10 Stat. 35 (1852) (emphasis added).

The language of that section, particularly the underlined portion, manifests its purpose: to allow the JCP to take remedial steps with regard to problems that may arise in having Congress's printing performed. The statute sought only to govern printing work for either or both Houses of Congress. The proviso, requiring one- or two-House approval for JCP remedial actions, was removed in 1894 when Congress passed an amendment which left the JCP alone in charge of curing delay in congressional printing. The reason for the amendment was that "[i]t seemed to the committee [JCP] that this approval of their action in each instance by Congress would produce delay and defeat rather than advance efforts to prevent neglect or delay." 27 Cong. Rec. 30 (1894) (Conf. Rep.). Congress gave no indication of any intention to change the scope of the JCP's remedial powers. Evidently, therefore, the committee's powers continued to extend only to the oversight of printing performed for either or both Houses of Congress.

By the time the JCP obtained this authority to remedy delay in the public printing without approval of either or both Houses, Congress had already passed a resolution requiring all public printing to be done at the newly-formed government printing establishment (the precursor to § 501). Res. 25, 12 Stat. 118 (1860). Consequently, at the time Congress granted the JCP power over the "public printing," that term applied, without exception, to the operations of the GPO alone. Bearing in mind this relation between the precursors to §§ 103 and 501, we believe the authority given the JCP to remedy delay "in the execution of the public printing" was intended to extend only to the operations of the GPO, itself an organization within the Legislative Branch. 4/ No subsequent legislative history of which we are aware has evinced a congressional intention to recast § 103 so that the JCP's remedial powers over the public printing would encompass operations outside the GPO. 5/ That section does not supply a foundation for the JCP's attempt to reach beyond the GPO to all related activities irrespective of where they are conducted.

B. 44 U.S.C. § 501

The second provision asserted as authority for the proposed regulations explicitly grants the JCP power to approve certain Executive Branch decisions regarding operation of field-plant printing facilities. 44 U.S.C. § 501(2). Section 501 also allows the JCP to approve the outside printing of other classes of work when "necessary" or "urgent." 44 U.S.C. § 501(1). Neither the statute nor its history gives any suggestion, however, that the power to approve printing work was intended to be expanded into an all-encompassing authority to regulate all aspects of operations in the Executive Branch unrelated to the common understanding of "printing."

The legislative history of § 501 reflects an evolution, first, from a rule promulgated in 1860, requiring all printing

(See footnotes at end of article.)

to be done at the GPO, 6/ to an enactment of 1895, allowing exceptions to be "provided by law." 7/ That provision was altered in 1919, when Congress permitted certain classes of work to be done elsewhere than in the District of Columbia if the JCP deemed it necessary 8/ based on an explanation that such flexibility would save money for the Government. 9/ Finally, the two exceptions now codified in § 501 were enacted in 1949 to save further time and expense by permitting printing to be accomplished in the area where it is needed. 10/ The explanations of the various amendments, although brief, indicate that the JCP's role was intended merely to ensure that the considerations of efficiency and economy were met in every case. 11/ Congress has never expressed, in connection with § 501, that it expected the JCP's approval power to be expanded into authority for overseeing, specifying and regulating internal operations of the Executive Branch.

C. 44 U.S.C. § 502

Nor does § 502, which authorizes the Public Printer to obtain certain contract work, expressly or impliedly endow the JCP with the power to regulate the activities of the Executive Branch. By its terms that section allocates powers between the JCP and the GPO, a division of responsibilities among units largely within the Legislative Branch, and does not directly affect any activities of Executive departments.

Not withstanding the absence of any express legislative authority for the JCP's assumption of the role of a regulatory commission over Executive Branch printing, word processing and information distribution systems, the JCP Chairman has characterized the Committee's efforts as a "regulatory scheme." 129 Cong. Rec. H9710 (daily ed. Nov. 11, 1983). By redefining the statutory term "printing," the JCP has, in effect, attempted to control all functions related to the creation of a written word or symbol, including "all systems, processes and equipment used to plan . . . the form and style of an original reproducible image." 129 Cong. Rec. H9710 (daily ed. Nov. 11, 1983) (Proposed Regulations, Title I, number 3). That attempt strays far from the JCP's statutory grant of authority under § 103, § 501, or § 502.

Because no legal foundation can be identified in support of either the "regulatory" expansion of the statutory term "printing" or the breadth of the entire proposed scheme over Executive Branch management decisions, established principles of administrative law would compel the conclusion that the JCP has exceeded its statutory authority in issuing the proposed rules. Cf. 5 U.S.C. § 706(2)(c) (agency rulemaking); City of Overton Park v. Volpe, 401 U.S. 402, 415 (1971); Schilling v. Rogers, 363 U.S. 666, 676-77 (1960); L. Jaffe, Judicial Control of Administrative Action 359 (1965).

Although we believe that the proposed regulatory scheme is without a valid statutory basis, we proceed to examine the implications of the regulations for the constitutional separation of powers.

II. Legislative and Executive Functions

In view of the purported binding effect of the JCP's proposed regulations on Executive Branch agencies, the question arises whether the JCP, a Legislative Branch entity, is seeking to exercise executive functions in a manner which violates constitutional principles of the separation of powers. In Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court, per curiam, struck down a provision of the Federal Election Campaign Act of 1971 which gave the Federal Election Commission, whose members were not all appointed by the President, the power to perform broad functions, including rulemaking, for

(See footnotes at end of article.)

enforcement of the Act. Id. at 141. The Court found that the Commission, so composed, was constitutionally precluded from performing executive tasks, because of the failure to comply with the Appointments Clause of the Constitution, Art. II § 2, cl. 2:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The pivotal term "Officers of the United States" was explained by the Court to mean "any appointee[s] exercising significant authority pursuant to the laws of the United States," 424 U.S. at 126, and again as "all appointed officials exercising responsibility under the public laws of the Nation." Id. at 131. Officials meeting these qualifications must be appointed in the manner prescribed in Article II of the Constitution. 424 U.S. at 126. This is because the Legislature "cannot ingraft executive duties upon a legislative office," 424 U.S. at 136, quoting from Springer v. Philippine Islands, 277 U.S. 189, 202 (1928); nor can it insulate persons performing executive tasks from the President's power to remove them. Id. In short, the Court held that Congress may not itself appoint persons to perform duties which can be performed only by an officer of the United States.

In analyzing the powers conferred on the Federal Election Commission, the Court in Buckley described three types of statutory functions: "functions relating to the flow of necessary information -- receipt, dissemination, and investigation; functions relating to the Commission's task of fleshing out the statute -- rulemaking and advisory opinions; and functions necessary to ensure compliance with the statute and rules -- informal procedures, administrative determinations and hearings, and civil suits." 424 U.S. at 137. The Court held that "insofar as the powers confided in the Commission are essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees," the Commission as then composed could constitutionally exercise them. However, "when we go beyond this type of authority to the more substantial powers exercised by the Commission, we reach a different result." 424 U.S. at 137-38. The Court held that each of the Commission's functions in connection with rulemaking and rendering advisory opinions "represents the performance of a significant governmental duty exercised pursuant to a public law," which could be performed only by persons appointed in accordance with the Appointments Clause. 424 U.S. at 141.

At the same time, the Supreme Court disavowed any intention to "deny to Congress 'all power to appoint its own inferior officers to carry out appropriate legislative functions.'" 424 U.S. at 128. Because it is clear that members of the JCP are not appointed in accord with Article II (see p. 2 supra), we must address whether, by issuing and implementing the proposed regulations, the JCP would be performing functions of officers of the United States or merely would be carrying out appropriate legislative functions.

Applying the rule of Buckley v. Valeo to the rulemaking powers arrogated to itself by the JCP, we conclude that those

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(See footnotes at end of article.)

powers are not "sufficiently removed from the administration and enforcement of public law to allow [them] to be performed by" persons not appointed in accordance with the Appointments Clause. 424 U.S at 141. We have described above the nature and extent of the JCP's proposed involvement in the printing operations of the Executive Branch, and the putatively binding nature of the JCP rules. Accordingly, like the rulemaking and advice-giving functions of the Federal Election Commission at issue in Buckley, the JCP's activities "represent the performance of a significant governmental duty exercised pursuant to a public law." Id.

Insofar as the Joint Committee enjoys investigative and informative powers of the type generally delegated to congressional committees, the Constitution is no bar to its exercise of those powers. Buckley v. Valeo, 424 U.S. at 137; McGrain v. Daugherty, 273 U.S. 135, 175 (1927). It could be asserted that the JCP's powers over the GPO are just such internal powers which allow it to control all operations of the GPO and that Congress may constitutionally require all Executive Branch agencies to use the GPO facilities for all their printing needs. 12/ Because certain standards and rules must necessarily be permissible in running the operations of the GPO, the JCP inevitably exerts some powers over Executive agencies, which might then arguably be expanded to other arenas to the extent printing outside the GPO is permitted. The flaw in this argument is that the proposed regulations bear no relation to the smooth operation of the GPO; rather, they focus primarily on outside activities involving management of information. Thus, the GPO foundation upon which to build the expanded and comprehensive JCP regulatory structure is absent from the proposed regulatory scheme. We do not believe the constitutional demarcation of executive and legislative functions can be so easily eroded.

The most egregious and illustrative provision in this regard is the requirement that each Executive department submit annually to the JCP a plan outlining its printing and distribution activities anticipated for the fiscal year and the following two years. Under the proposed regulations, the JCP would review each of these plans to determine its conformity with the objectives of the "Federal printing program," specifically evaluating the efficiency and cost effectiveness of the plan and the printing and distribution requirements of the Executive department. Only upon approval of the JCP could a department implement its plan. This "Federal printing program," a construct of the JCP, clearly involves the interpretation and implementation of policy directives that it is the job of the Legislature (acting as a legislature and not a committee) to identify and of the Executive to fulfill. Each step in this "micro-management" process constitutes a uniquely executive function, to execute faithfully the laws as constitutionally enacted by Congress.

In sum, administrative functions such as policymaking and rulemaking are quintessentially and traditionally executive duties; they are the duties of "Officers of the United States." See Springer v. Philippine Islands, 277 U.S. 189, 202 (1928). 13/ Yet the Joint Committee unequivocally acknowledges its intention "to replace JCP micro-management procedures with oversight and policymaking functions," 129 Cong. Rec. H9709 (daily ed. Nov. 11, 1983), and to establish a new "regulatory scheme," id. at H9710, all with respect to putative control of the Executive Branch. We cannot reconcile this endeavor with the Supreme Court's clear delineation of the functions defined in Articles I, II and III of the Constitution. 14/

This is not the first attempt at an express transformation of the JCP to a policymaking executive body. In 1919, Congress attempted explicitly to provide, by statute, for a broad

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(See footnotes at end of article.)

system of JCP regulatory authority not unlike the present scheme. Under the bill, passed by both Houses of Congress,

> no journal, magazine, periodical, or similar Government publication shall be printed, issued, or discontinued by any branch or officer of the Government service unless the same shall have been authorized under such regulations as shall be prescribed by the Joint Committee on Printing . . . . [T]he foregoing provisions of this section shall also apply to mimeographing, multigraphing, and other processes used for the duplication of typewritten and printed matter, other than official correspondence and office records.

H.R. 12610, 66th Cong., 2d Sess. (1919).

President Wilson vetoed the bill, voicing an adamant repudiation of any right Congress claimed to endow a committee "with power to prescribe 'regulations' under which executive departments may operate." 15/ This historical perspective highlights an important aspect of the separation of powers issue. Following Congress's failure to accomplish its objective once through a constitutional process, the JCP may not now attempt to effect the same end by "regulation," circumventing the possible intervention of a Presidential veto. This usurpation of executive power is the very evil that the Supreme Court recognized when it quoted from The Federalist in its opinion in INS v. Chadha:

> "If even no propensity had ever discovered itself in the legislative body to invade the rights of the Executive, the rules of just reasoning and theoretic propriety would of themselves teach us that the one ought not to be left to the mercy of the other, but ought to possess a constitutional and effectual power of self-defense." 16/

III. Legislative Action

We next consider whether the JCP's proposed regulations can be treated as an exercise of Congress's constitutional power to legislate and, if so, whether the JCP could by itself exercise that legislative power. In 1690, John Locke wrote that "the Legislative can have no power to transfer their Authority of making Laws, and place it in other hands." 17/ Nearly three hundred years later, the Supreme Court, in INS v. Chadha, 103 S. Ct. 2764 (1983), restated the same principle as firmly embodied in the United States Constitution. The Court forcefully rearticulated the broad constitutional principle that all exercises of legislative power must undergo bicameral passage and presentment to the President unless the Constitution specifically authorizes a departure from the standard procedure. 103 S. Ct. at 2782-84. Whether a particular action constitutes an exercise of legislative power requiring adherence to the rules of bicameral passage and presentment depends upon whether it is legislative in character. An action by Congress is "legislative" if it purports to have "the purpose and effect of altering the legal rights, duties and relations of persons, including . . . Executive Branch officials . . ., outside the legislative branch." Id. at 2784.

Of the three statutory bases relied upon by the JCP for authority to issue its proposed regulations, only one explicitly allows the committee to approve or disapprove decisions of persons outside the Legislative Branch. 44 U.S.C. § 501(2).

(See footnotes at end of article.)

Section 501(2), which purports to allow the JCP unilaterally to create exceptions to the general rule that all printing must be accomplished through the GPO, would have the effect of empowering a committee of Congress to forestall, regulate, revise or manage executive printing operations which have been authorized through the legislative process in the form of authorization and appropriations acts for the agencies involved. This action inevitably affects the rights, duties, and relations of members of the other branches of government, and appears to meet the test for legislative action. 18/

The Supreme Court has also indicated that, in determining whether an act is legislative in character, it is useful to examine the nature of the congressional action which the committee's power supplants. Chadha, 103 S. Ct. at 2785. Until the predecessor to § 501 was amended in 1919 to give some discretion to the JCP, 19/ all printing had been centralized in the GPO, "except in cases otherwise provided by law." 20/ This history suggests that the Committee's power to create exceptions to the statute originated as a substitute for plenary legislation -- an action indubitably legislative in character.

We conclude that § 501 improperly seeks to delegate legislative power to the JCP in abrogation of the constitutional requirements of bicameral passage and presentment. Consequently, even the bare statutory approval power -- unembellished by interpretative regulations -- must fall as a compromise of the constitutional requirements for legislative action. 21/

Under the other two sources of putative authority propounded by the JCP, the proposed regulations fare no better. Although neither § 103 nor § 502 explicitly authorizes the Joint Committee to affect the rights and relations of extra-legislative officials, the JCP proffers those sections as authority for placing constraints on the implementation of executive printing operations already sanctioned with budget authority and appropriated funds. Insofar as the two sections can reasonably support the issuance of regulations restricting the lawful operations of all agencies and departments of the Federal Government, they too authorize a committee's exercise of legislative power and therefore cannot survive the impact of Chadha. "[A] joint committee has not power to legislate, and legislative power cannot be delegated to it." 37 Op. A.G. 56, 58 (1933).

IV. Conclusion

The defects in the committee approval and regulatory mechanism discussed here could well have been the object of the views articulated twenty-five years ago by then Acting Attorney General William P. Rogers:

> Legislative proposals and enactments in recent years have reflected a growing trend whereby authority is sought to be vested in congressional committees to approve or disapprove actions of the executive branch. Of the several legislative devices employed, that which subjects executive department action to the prior approval or disapproval of congressional committees may well be the most inimical to responsible government. It not only permits organs of the legislative branch to take binding actions having the effect of law without the opportunity for the President to participate in the legislative process, but it also permits mere handfuls of members to speak for a Congress

(See footnotes at end of article.)

> which is given no opportunity to participate as a whole. An arrangement of this kind tends to undermine the President's position as the responsible Chief Executive. 22/

For the reasons expressed above, we have concluded that the regulations proposed by the Joint Committee on Printing are without foundation in law. First, no statute grants to the JCP, with adequate specificity, authority to issue regulations purporting to control operations within the Executive Branch for which budget authority and appropriated funds exist. Second, the JCP's attempted performance of executive functions in administering the laws transgresses the rule of separation of powers set forth in Buckley v. Valeo. Finally, a congressional committee's promulgation of rules binding on the other branches runs afoul of the constitutional requirement, affirmed in INS v. Chadha, that all legislative actions, with a few specifically stated exceptions not relevant here, undergo bicameral passage and presentment to the President.

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Office of Legal Counsel

FOOTNOTES

1/ This is not to say that the current role of the JCP necessarily enjoys statutory authority or constitutional sanction. We have not attempted to evaluate those issues in this memorandum.

2/ Because we conclude that the regulations as a whole cannot legally be enforced against the Executive Branch, we do not seek in this memorandum to discuss the legality of various provisions of the regulations individually. Consequently, we have not attempted to resolve the specific question raised in your letter regarding the regulations' apparent effect of transferring to the GPO revenues which ordinarily would be paid into the accounts of individual agencies or the United States Treasury.

3/ Cf. Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring in judgment) (delegation of regulatory authority to executive must provide "intelligible principle" to guide exercise of discretion).

4/ See Lewis v. Sawyer, 698 F.2d 1261, 1263 (D.C. Cir. 1983) (Wald, J., concurring) (citing § 103 as example of congressional control over GPO in support of conclusion that GPO is a legislative unit).

5/ The section was amended in 1919, when the words "duplication" and "waste" and the phrase "and the distribution of Government publications" were added. Ch. 86, § 11, 40 Stat. 1270 (1919). No discussion or explanation of the change appears in the legislative history. See 57 Cong. Rec. 3865 (1919); H.R. Rep. No. 1146, 65th Cong., 3d Sess. 7 (1919).

6/ Res. 25, § 5, 12 Stat. 118 (1860).

7/ Ch. 23, § 87, 28 Stat. 662 (1895).

(Footnotes--Continued)

8/ Ch. 86, § 11, 40 Stat. 1270 (1919).

9/ 57 Cong. Rec. 3865, amending H.R. 14078, 65th Cong., 3d Sess. (1919).

10/ Pub. L. No. 156, 63 Stat. 405 (1949).

11/ H.R. Rep. No. 841, 81st Cong., 1st Sess., reprinted in 1949 U.S. Code Cong. & Ad. News at 1515-16.

12/ The constitutionality of a statute requiring all agencies to use the GPO for their printing is not an issue necessary to evaluate the validity of the proposed regulations or the existing statutes. We therefore do not attempt to resolve this question.

13/ Cf. Lewis v. Sawyer, 698 F.2d 1261, 1263 (D.C. Cir. 1983) (Wald, J., concurring) (JCP's order that Public Printer halt furlough plans for GPO employees did not "encroach[] on another branch and thereby offend[] the constitutional separation of powers" only because GPO is a legislative, rather than an executive, unit). Each branch of the Federal Government can conduct the hiring and firing of employees within that branch, to carry out the respective mission of that branch, without treading upon the separation-of-powers doctrine. Of course, Congress can regulate hiring and firing of civil servants in the Executive Branch, but only by legislation, not by committee fiat.

14/ This conclusion would seem to apply equally to the "JCP micro-management procedures" currently in place as well as the establishment by the JCP of a new "regulatory scheme." It would seem irrefutable under Buckley and Chadha, discussed infra, that micro-management of Executive Branch agencies is an inherently executive function, and one which must therefore be performed by officers of the United States duly appointed pursuant to Article II of the Constitution.

15/ Veto Message on Legislative, Executive and Judicial Appropriation Bill, H.R. Doc. No. 764, 66th Cong., 2d Sess. 2-3 (1920). President Wilson's veto message was one basis upon which, in 1933, then Attorney General William D. Mitchell concluded that a statutory provision authorizing a joint committee of Congress to make final decisions regarding certain tax refunds was a trespass upon the constitutional separation of powers. He reasoned that the provision "attempts to entrust to members of the legislative branch, acting ex officio, executive functions in the execution of the law, and it attempts to give a committee of the legislative branch power to approve or disapprove executive acts." 37 Op. A.G. 56, 58 (1933).

16/ 103 S. Ct. at 2782, quoting The Federalist No. 73, at 457-58 (H. Lodge ed. 1888).

17/ J. Locke, Second Treatise of Government § 141, at 381 (P. Laslett ed. 1980).

18/ Similarly, § 501(1) purportedly enables the JCP, by itself, to create exemptions from the legislated rule that all printing be done at the GPO. Although it does not operate expressly upon the statutory functions of the Executive Branch, it does purport to delegate a legislative function to a committee of Congress, which is also impermissible under Chadha. 103 S. Ct. at 2784. Except insofar as the provision allows the JCP to control the internal printing affairs of Congress, id. at 2787, n.21, it inevitably alters the rights, duties and relations of persons outside that branch by permitting a committee to effect an exception to a legislated rule, and therefore is an unconstitutional exercise of legislative power.

(Footnotes--Continued)

19/ Ch. 86, § 11, 40 Stat. 1270 (1919) (printing to be done by GPO "except such classes of work as shall be deemed by the Joint Committee on Printing to be urgent or necessary to have done elsewhere than in the District of Columbia for the exclusive use of any field service outside of said District").

20/ Ch. 23, § 87, 28 Stat. 662 (1895).

21/ This Office recently provided an opinion devoted exclusively to the constitutionality of the statutory approval power granted the JCP in 44 U.S.C. § 501(2). The opinion concluded that this power is invalid under INS v. Chadha, and that the ability of Executive departments to conduct authorized field-plant printing remains effective. Memorandum from Theodore B. Olson, Assistant Attorney General, to William H. Taft, IV, Deputy Secretary of Defense, March 2, 1984 (copy attached).

22/ 41 Op. A.G. 300, 301 (1957).